

Search & Seizure

Law in Missouri

State & Federal Law

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Part One – Introduction

I. Constitutional Authority (Federal and Missouri)

All search & seizure cases are governed by the 4th Amendment, which reads:

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.

This 54-word Amendment was ratified and became law in 1791. Not one word has been added or deleted since it was enacted and tens of thousands of cases have interpreted it in specific fact situations. It first applied only to federal prosecutions, but in 1961 the Supreme Court held that the Fourth Amendment also applies to state prosecutions, making evidence obtained by improper searches or seizures inadmissible in state cases.

Mapp v. Ohio, 367 U.S. 643 (1961). The police, without a warrant or probable cause, knocked on defendant's door and demanded entrance. Defendant telephoned her lawyer and, after talking with him, refused to admit the police without a search warrant. The police broke down the door. Although they did not find what they were looking for (a suspect in a bombing), they did find obscene books, for which defendant was charged. **HELD:** The books should have been inadmissible since the Fourth Amendment was violated. The Fourth Amendment applies to state court prosecutions as well as federal ones.

The Missouri Constitution has a very similar provision at Article I, Section 15:

That the people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the person or thing to be seized, as nearly as may be; nor without probable cause, supported by written oath or affirmation.

The Missouri Supreme Court has consistently held that Missouri's Constitution provides identical protection to that of the Fourth Amendment. *State v. Jones*, 865 S.W.2d 658 (Mo. banc 1993); *State v. McCrary*, 621 S.W.2d 266 (Mo. banc 1981).

II. Checklist for the Busy Practitioner

1. Is the Fourth Amendment even applicable? Do not go to question 2 unless the answer to 1 is yes.
2. Was it an unreasonable search? Has the Fourth Amendment been satisfied?

Florida v. Jardines, 133 S.Ct. 1409, 1414 (2013). Police took a drug dog to defendant's front porch, where the dog gave a positive alert for drugs within two minutes. Based on the alert, the officers got a search warrant for the house and found growing marijuana plants. **HELD:** Even though an officer could have walked up to the door and knocked on it, the use of the drug dog within the curtilage of the home was a "search" within the meaning of the Fourth Amendment, thus requiring a warrant. "When it comes to the Fourth Amendment, the home is first among equals." Officers cannot search the area "immediately surrounding and associated with the home" without probable cause and a warrant, and the use of the dog as a forensic tool amounted to a search. **The Supreme Court announces that the Fourth Amendment can be violated in two ways: (1) by police physically intruding onto someone's property without license to do so to conduct a search; or (2) by police violating a person's reasonable expectation of privacy under the *Katz* analysis.** See Lane P. Thomasson, "Florida v. Jardines: Dogs, Katz, Trespass and the Fourth Amendment," 69 *J. Mo. Bar* 336 (2013).

Silverman v. United States, 365 U.S. 505, 511 (1961). Police officers eavesdropped on conversations in defendant's gambling headquarters by drilling into the wall of the building and using a "spike mike" to listen to the discussions going on inside. **HELD:** Any physical intrusion into a house, even one amounting to only "a fraction of an inch," violates the Fourth Amendment. "At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Jardines* cited this case because it was decided on the trespass approach, rather than the reasonable expectation of privacy approach.

III. Applicability of Fourth Amendment -- Examples

1. Non-Coverage of Place (Other Country)

Brulay v. United States, 383 F.2d 345 (9th Cir. 1967). Drug smuggling conspiracy. Defendant's home was searched in Mexico without probable cause or a warrant and drugs were found. Defense wanted to suppress evidence at trial in the United States. **HELD:** Fourth Amendment only applies to U.S. police. The purpose is not to police Mexican police on Mexican soil. Evidence admissible.

U.S. v. Verdugo Urquidez, 494 U.S. 259, 274-75 (1990). Warrantless search of Mexican drug suspect's home in Mexico by DEA and Mexican police. **HELD:** Fourth Amendment did not apply to search of property owned by a non-resident alien located in a foreign country. "At the time of the search, defendant was a citizen and resident of Mexico with no voluntary attachment to the United States, and the place searched was located in Mexico. Under these circumstances, the Fourth Amendment has no application."

2. Open Fields Versus Curtilage

Hester v. U.S., 265 U.S. 57, 59 (1924). Federal agents, trespassing on moonshiner's property, found his still and illegal booze. **HELD:** Fourth Amendment only applies to "persons, houses, papers, and effects," not to open fields.

Oliver v. United States, 466 U.S. 170 (1984). Kentucky State Police trespassing in field one mile from defendant's home find marijuana patch. **HELD:** Evidence admissible. Fourth Amendment only applies to home and curtilage. Same result: *State v. Simpson*, 639 S.W.2d 230 (Mo. App. S.D. 1982) (Missouri Highway Patrolmen trespassing in open field).

U.S. v. Dunn, 480 U.S. 294, 300-01 (1987). Peering, without warrant, into barn's front door held not to violate Fourth Amendment because: (1) barn was not within curtilage ("the area around the home to which the activity of the home extends") and (2) observation from open fields did not violate any other privacy expectation. The barn was on a 198-acre farm, completely encircled by a fence, 60 yards from another fence around the house. The DEA Agent did not go inside the barn, but saw the drug lab from outside, and later got a warrant. The Court provides a good discussion of curtilage: "[T]he extent of the curtilage is determined by factors that bear upon whether an individual reasonably may expect that the area in question would be treated as the home itself." The four factors are: (1) the proximity of the area claimed to be curtilage to the home; (2) whether the area is included within an enclosure surrounding the home; (3) the nature of the uses to which the area is put; and (4) the steps taken by the resident to protect the area from observation by people passing by. These factors all bear on the central question whether the "area in question is so intimately tied to the home itself that it should be placed under the home's umbrella of Fourth Amendment protection." In other words, a man's home is his castle, but his barn is fair game (for peering into).

State v. Schweitzer, 879 S.W.2d 594 (Mo. App. E.D. 1994). The trial court sustained a motion to suppress marijuana growing in a cornfield which had been seized after a warrantless search. **HELD:** Suppression was affirmed due to lack of a record made by the prosecution. The prosecutor evidently believed all he had to show was that the marijuana was found in a field. He put on no proof about buildings, outbuildings, fences or other things affecting the curtilage of the home. While the prosecution might have been able to show this marijuana was not within the curtilage, it failed to do so by the evidence offered.

State v. Kelly, 119 S.W.3d 587 (Mo. App. E.D. 2003). Sidewalks and steps leading to the door of a residence are generally open to the public, so items found in plain view in these areas are subject to seizure without a warrant, even if otherwise within the curtilage. Defendant had dropped a plastic bag of crack cocaine on the stairway leading to his front

door. Admissible.

State v. Cady, 425 S.W.3d 234 (Mo. App. S.D. 2014). A shop 100 yards from the house was not within the curtilage. Good discussion of curtilage.

State v. Pierce, ___ S.W.3d ___ (Mo. App. E.D. 9/6/2016). Police do warrantless search of a chicken coop. The defendant lives on a 3.9 acre property, completely fenced with barbed wire and adorned with No Trespassing signs. His buildings consist of a mobile home in which he lives, two uninhabited mobile homes, two garage buildings, and the chicken coop. The distance between the coop and the home is about 75 to 100 yards, and the defendant usually visits it every day to get eggs and tend to the chickens, but two or three weeks ago someone stole or killed the chickens. The officers climbed the barbed wire (presumably with gloves rather than a warrant) and caught the defendant in the coop with a meth lab. **HELD:** The recent chicken theft did not change the fact that the coop was being used recently for intimate domestic activities connected to the house.

3. Thermal Imaging Device (Heat Leaving Premises; Bodies Moving Inside Home)

Kyllo v. U.S., 533 U.S. 27, 40 (2001). Officers suspected the defendant of growing marijuana in his home. They used a thermal imaging device to scan the house. It operated like a video-camera, showing heat images inside the home. It revealed the roof over the garage and a side wall as being “hot,” suggesting indoor grow-lights. This information was used with other facts to get a search warrant, pursuant to which police found a marijuana growing operation. **HELD:** “Where, as here, the Government uses a device that is not in general public use to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a ‘search’ and is presumptively unreasonable without a warrant.” Remanded for determination whether the remaining facts in affidavit amounted to probable cause. NOTE: This case reversed prior law. *United States v. Pinson*, 24 F. 3d 1056 (8th Cir. 1994).

4. Abandoned Property

California v. Greenwood, 486 U.S. 35 (1988). Defendant’s garbage put out in bags at curb was searched without a warrant. **HELD:** No reasonable expectation of privacy. The property was abandoned by defendant. *See also: U.S. v. Williams*, 669 F.3d 903 (8th Cir. 2012) (“The constitutionality of a trash pull depends upon whether the garbage was readily accessible to the public so as to render any expectation of privacy objectively unreasonable.”); *State v. Bordner*, 53 S.W.3d 179 (Mo. App. W.D. 2001) (meth manufacturing items such as empty pseudoephedrine bottles, “Heet” cans, acetone cans, mason jars and tubing found in trash provided probable cause for search warrant).

State v. Simmons, 955 S.W.2d 729 (Mo. banc. 1997). Police who arrested defendant for murder inventoried his wallet and found pawn tickets and photo receipts. They went to the photo developer and collected the photographs and negatives. They went to the pawn shop and collected the stolen jewelry that defendant had pawned. **HELD:** The seizure of the pawn tickets and photo receipts was part of a legitimate inventory search of an arrested person. The seizure of the items from the pawn shop and photo shop does not violate the Fourth Amendment because the defendant had no legitimate expectation of privacy in the photographs left at the developer or in the stolen jewelry left at the pawn shop. He relinquished any privacy right in these items by leaving them with the businesses, and assumed the risk they might be shown to others, including police.

California v. Hodari D., 499 U.S. 621 (1991). Two police officers wearing jackets bearing the word "POLICE" were on patrol in a car in a high crime area. A group of youths, including defendant, huddled around a car parked at a curb. At the sight of the police car, they ran. One officer left the car and ran around the block to intercept defendant. Defendant was looking behind him as he ran and when he turned his head and saw the officer he tossed away a small rock of crack cocaine. Defendant claims the evidence should be suppressed, arguing that he was seized the moment the officer got out of the car and started chasing him without probable cause. **HELD:** It is not a seizure to yell, "Stop in the name of the law!" at a fleeing person. The cocaine abandoned while defendant was running was not the fruit of a seizure and the motion to exclude it was properly denied. *See also: State v. Morgan*, 406 S.W.3d 490 (Mo. App. E.D. 2013) (backpack tossed as defendant ran); *State v. Primm*, 62 S.W.3d 463 (Mo. App. E.D. 2001); *State v. Johnson*, 863 S.W.2d 361 (Mo. App. E.D. 1993) for same results in Missouri cases.

State v. Solt, 48 S.W.3d 677, 682 (Mo. App. S.D. 2001). Defendant was a passenger on a Greyhound bus. A narcotics officer boarded the bus and spoke with each passenger. He woke defendant and asked if the backpack at defendant's feet was his. He said it was not. The officer checked his ticket stub, which confirmed that defendant was telling the truth about his destination. With no reasonable suspicion, the officer "told defendant to exit the bus." The officer picked up the backpack and carried it off. The officer searched the backpack and found marijuana, then arrested defendant and found marijuana cigarettes in his pockets. **HELD:** The evidence was properly suppressed. Forcing the defendant to get off the bus was an investigative detention, requiring reasonable suspicion, which the officer did not have. The abandonment of the backpack was a result of this improper detention. "Ordinarily, a defendant who voluntarily abandons property has no standing to contest its search and seizure, but this is not true if the abandonment results from a Fourth Amendment violation, as such abandonment cannot be voluntary. Abandonment will not be realized when it is the result of illegal police conduct." **NOTE:** This result might have been different had the officer merely collected the backpack as abandoned property once defendant disclaimed ownership. Once drugs were found inside it, the defendant could have been arrested.

State v. Looney, 911 S.W.2d 642 (Mo. App. S.D. 1995). Defendant did not voluntarily abandon his items when his canoe tipped over and an officer retrieved a floating container and opened it without probable cause.

5. Information in Law Enforcement Database

State v. Loyd, 338 S.W.3d 863 (Mo. App. W.D. 2011). A police officer ran a check on a license plate for no specific reason and learned that a warrant was outstanding for the owner of the van. He pulled it over. **HELD:** It did not constitute a search for Fourth Amendment purposes to run a computer check on a license plate seen in plain view. No reasonable suspicion was needed to run the license check.

6. Government Versus Private Action

United States v. Jacobsen, 466 U.S. 109 (1984). Federal Express employees examined a damaged package and found a tube containing plastic bags of white powder. They called DEA agents, who did a field test on a trace of the white powder and identified it as cocaine. The package was re-wrapped and delivered to the addressee, and then recovered by a search warrant. **HELD:** The search by Federal Express employees was not government action, so it was not prohibited by the Fourth Amendment. The seizure of the trace amount by DEA was not unreasonable because a chemical test that merely discloses whether or not a substance is cocaine does not compromise any legitimate expectation of privacy. The DEA did not infringe upon any privacy interests that had not already been frustrated by the private conduct.

United States v. Mullenbruch, 634 F.3d 987, 998 (8th Cir. 2011). Defendant's live-in girlfriend found child pornography on his computer. While she went on a shopping trip with him, she had a friend go to their house and enter it and download the child porn onto discs and take them to the police. **HELD:** "A search by a private citizen is not subject to the strictures of the Fourth Amendment unless that private citizen is acting as a government agent. To determine whether a private citizen is acting as a 'government agent' we consider: (1) whether the government had knowledge of and acquiesced in the search; and (2) whether the citizen intended to assist law enforcement agents or to further his own purposes; and (3) whether the citizen acted at the government's request."

State v. Collett, 542 S.W.2d 783 (Mo. banc 1976). Motel manager found keys and buttons in defendant's motel room and gave them to police. This evidence connected defendant to a robbery. **HELD:** No governmental action; thus defendant's Fourth Amendment rights were not violated.

State v. Allen, 599 S.W.2d 782 (Mo. App. E.D. 1980). Defendant robbed a jewelry store in St. Louis. Security guards from Stix Baer & Fuller caught her as she was in a restroom washing blood from her face and neck. They did not know a robbery had occurred but they took her to their security office and then learned of the robbery. They made her empty her pockets and found a wristwatch stolen in the robbery. **HELD:** The search was conducted by a private citizen, so Fourth Amendment is not applicable.

United States v. Hall, 142 F.3d 988 (7th Cir. 1998). A computer repair employee noticed child pornography on defendant's computer when it was in the store for repairs. He notified the police, who used his information to get a search warrant. **HELD:** This was a search by a private person, not the government, so the Fourth Amendment is inapplicable.

Commonwealth v. Leons, 386 Mass. 329, 435 N.E.2d 1036 (1992). What if an off-duty police officer is working a second job as a security officer for a store? In the search and seizure context, an off-duty policeman is not automatically acting in concert with or at the direction of government officials simply because he discovers contraband. Official involvement is not measured by the primary occupation of the actor, but by the capacity in which he acts at the time in question. An investigation by a police officer privately employed as a security guard does not violate the Fourth Amendment when it is conducted on behalf of the private employer in a manner that is reasonable and necessary for protection of the employer's property. If, on the other hand, the officer steps out of this sphere of legitimate private action, the exclusionary rule applies as it would to any police officer.

State v. Woods, 790 S.W.2d 253 (Mo. App. S.D. 1990). Off-duty officer was hired by defendant who owned several acres of property with a building to patrol the property during deer hunting season to deter poachers. Officer was given keys to the building and permission to enter in event of emergency. One day when the burglar alarm went off, he went in the building to shut it off. He noticed the odor of burned marijuana at the time, but did nothing. Later, he entered to leave a lamp for defendant, and snooped in the kitchen and seized what he believed were marijuana cigarettes from an ashtray. He also went into a bedroom and opened drawers and closets, finding marijuana seeds and rolling papers. He went to the Sheriff and this information was used for the issuance of a search warrant. **HELD:** Although the original odor of marijuana was noticed when officer was performing his private duties and could have been used, the later searches were not done in his job as security guard but in his criminal investigative capacity. Thus, the evidence was properly suppressed.

People v. Pilkington, 156 P.3d 477 (Colo. 2007). Insurance investigators searched a fire scene at a liquor store after the fire department put it out. They found evidence that the fire was intentionally set, and the insured was charged with arson based on that

evidence. **HELD:** It did not matter whether the insured had given consent to the investigators to do their search, the Fourth Amendment did not apply since they were not acting as agents for the police, but rather in their capacity as private actors for the insurance company.

7. No Expectation of Privacy (Key in Lock)

State v. Weaver, 912 S.W.2d 499 (Mo. banc 1995). It is not a search to check to see if a key fits the lock of a car parked outside. NOTE: This result might no longer be the same after *United States v. Jones*, 132 S.C. 945 (2012) (the trespass of putting a beeper on the undercarriage of defendant's car violates Fourth Amendment).

8. Information From Utility and Phone Companies

Information About Electricity Use from Utility Company

People v. Dunkin, 888 P.2d 305 (Colo. App. 1994). Officers compiled information to get probable cause for a search warrant for a marijuana grow operation at defendant's home. Part of the investigation included getting the electricity records for the home from the utility company to show an abnormally high amount of electricity being used. **HELD:** A person does not have a reasonable expectation of privacy in his utility company's records about the electricity used by his home. No violation of Fourth Amendment.

Information from Phone Company About Cell Tower Cite Location of Phone

In re Application of United States for Historical Cell Site Data, 724 F.3d 600, 611 (5th Cir. 2013). "Cell site information is clearly a business record" and thus no warrant is required to obtain such records from service providers. *But see Commonwealth v. Agustine*, 4 N.E.3d 846, 862-63 (Mass. 2014) (historical cell cite location information "is substantially different" from other records to which a person has no expectation of privacy).

State v. Earls, 70 A.3d 630 (N.J. 2013). Users of a cell phone have a reasonable expectation of privacy in information revealing the location of the phone user under the state constitution. The court emphasizes that under the state constitution, privacy interests are not deemed diminished by the fact that the person is required to disclose information to a third-party provider.

State v. Hosier, 454 S.W.3d 187 (Mo. banc 2015). Notes issue is undecided in Missouri whether information from cell phone company concerning location of a phone requires a search warrant.

9. Grand Jury Subpoenas or Prosecutor's Investigative Subpoenas

Grand Jury Subpoenas

United States v. Dionisio, 410 U.S. 1, 15 (1973). A grand jury subpoena is not a seizure and the giving of a voice exemplar is not a search so the Fourth Amendment is not applicable. The Court upheld grand jury subpoenas directing 20 people to go to the U.S. Attorney's office to read a specified transcript for a voice recording so the samples could be compared to recordings of unknown voices obtained by court-approved wiretaps. The Court of Appeals had refused to enforce the subpoenas on the ground that there had been no showing of reasonableness of the seizures as required by the Fourth Amendment. It viewed the grand jury as "seeking to obtain the voice exemplars of the witnesses by the use of its subpoena powers because probable cause did not exist for their arrest" or for a search warrant. The U.S. Supreme Court reversed because "neither the summons to appear before the grand jury nor its directive to make a voice recording infringed upon any interest protected by the Fourth Amendment" and accordingly "there was no justification for requiring the grand jury to satisfy even the minimal requirement of 'reasonableness' imposed by the Court of Appeals. It is clear that the subpoena to appear before a grand jury is not a seizure in the Fourth Amendment sense, even though that summons may be inconvenient or burdensome." *Id.* at 9.

As to the compelled giving of a voice exemplar, "in *Katz v. U.S.*, 389 U.S. 347 (1967) we said that the Fourth Amendment provides no protection for what 'a person knowingly exposes to the public, even in his own home or office.' The physical characteristics of a person's voice, its tone and manner, as opposed to the content of a specific conversation, are constantly exposed to the public. Like a man's facial characteristics, or handwriting, his voice is repeatedly produced for others to hear. No person can have a reasonable expectation that others will not know the sound of his voice, any more than he can reasonably expect that his face will remain a mystery to the world." Likewise, a grand jury subpoena (or an investigatory subpoena) for the presence of a person to provide other evidence to which there is no reasonable expectation of privacy, would not be covered by the Fourth Amendment. This includes: (1) handwriting samples; (2) fingerprints; (3) shoe and footprints; (4) photographs; (5) holding a lineup; and (6) head or facial hair.

In re Shabazz, 200 F. Supp. 2d 578 (D. S.C. 2002). Investigative grand jury subpoena allowed for saliva sample to test the DNA of a female prison guard who was suspected of committing the crime of having sex with inmates. Probable cause was not required, only a general standard of reasonableness.

NOTE: The subpoena process is considered inherently unlike a stop or seizure by the police. "A subpoena is served in the same manner as other legal process; it involves no

stigma whatever; if the time for appearance is inconvenient, this can generally be altered; and it remains at all times under the control and supervision of a court.” The procedure to follow to attack a subpoena is to make a motion to quash, making a non-constitutional objection to the subpoena, such as it exceeded the permissible scope of grand jury activity. *In re Grand Jury Proceedings (Schofield)*, 486 F.2d 85 (3rd Cir. 1973). The trial court required the prosecution to make “some preliminary showing by affidavit that each item (handwriting samples, photographs, and fingerprints) was at least relevant to an investigation being conducted by the grand jury, and was not being sought primarily for another purpose.”

Prosecutor’s Investigative Subpoenas

These subpoenas serve the same purpose as grand jury subpoenas and are treated the same way. See H. M. Swingle, “Criminal Investigative Subpoenas: How to Get Them, How to Fight Them,” 54 *J. Mo. Bar* 15 (1998).

Johnson v. Missouri, 925 S.W.2d 835 (Mo. banc. 1996). Court holds prosecutor’s investigative subpoenas constitutional and says they do not require probable cause to issue. The prosecutor requested the issuance of a subpoena duces tecum under 56.085 as a part of a criminal investigation. The statute reads: **“In the course of a criminal investigation, the prosecuting attorney or circuit attorney may request the circuit or associate circuit judge to issue a subpoena to any witness who may have information for the purpose of oral examination under oath to require the production of books, papers, records, or other material of any evidentiary nature at the office of the prosecuting or circuit attorney requesting the subpoena.”** The subpoena was issued, and the person subpoenaed moved to quash it, attacking the constitutionality of the statute. The trial court overruled the motion. The witness still failed to comply. The State moved for an order to show cause why the witness was not in contempt. The court ultimately found the witness in contempt and jailed him. On appeal, the witness claimed the issuance of a subpoena should be analyzed under the Fourth Amendment with the same criteria as a search warrant, which would require that it be issued by a neutral and detached magistrate after a sworn showing of probable cause. **HELD:** Wrong! “The search and seizure clause of the Fourth Amendment was not intended to interfere with the power of the courts to compel, through a subpoena duces tecum, the production, upon a trial in court, of documentary evidence. In regard to pretrial subpoenas duces tecum, the Fourth Amendment, if applicable, at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be particularly described. The gist of the protection is in the requirement that the disclosure sought shall not be unreasonable. The U.S. Supreme Court has specifically required only that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.” *Id.* at 836.

State v. Eisenhower, 40 S.W.3d 916, 919-20 (Mo. banc 2001). Prosecutor sought investigatory subpoena to require a minister to come to prosecutor's office and to bring all relevant materials "including personal knowledge" to testify under oath. **HELD:** The Missouri investigative subpoenas are limited by statute to "books, papers, records or other material" and do not include "personal knowledge." Subpoena properly quashed.

State v. Clampitt, 364 S.W.3d 605 (Mo. App. W.D. 2012). The defendant, a lawyer, was a suspect in a fatal traffic accident, where he left the road and struck a riding lawn mower. The prosecutor subpoenaed the suspect's cell phone records for not just the day of the accident (which might have shown whether he was talking on the phone at the time he left the road) but also for all of his calls and text messages made in the weeks since the accident. The prosecutor candidly admitted she was hoping to find admissions the defendant may have made about being the driver. **HELD:** Cell phone users have an expectation of privacy in their text messages. When seeking the content of text messages, the prosecutor must make sure he or she has spelled out the relevant purpose for the information to the criminal investigation and must limit the scope of the subpoena so that it meets that limited purpose.

United States v. Warshak, 631 F.3d 266 (6th Cir. 2010). The prosecution used subpoenas to obtain 27,000 pages of the suspect's e-mails, instead of trying to get them by search warrant. The content was useful in proving defendant's intent to defraud in his mail fraud scheme. **HELD:** A search warrant must be used to obtain the content of a suspect's e-mails. A person has a reasonable expectation of privacy in e-mails, exactly the same as in letters put into the regular mail, and they cannot be searched by law enforcement without a search warrant. In making this ruling, the court found a portion of the federal Stored Communications Act (18 U.S.C. 2703) unconstitutional.

State v. Plunkett, 473 S.W.3d 166 (Mo. App. W.D. 2015). Investigative subpoenas for insurance policy information and bank records in case where wife killed husband. The company responded by simply giving the information to the police investigators instead of delivering it to the prosecutor's office. **HELD:** A person has no reasonable and legitimate expectation of privacy in bank records and insurance records in possession of those companies. Also, the investigative subpoena statute does not require notice to the defense, even if a charge is already filed.

State v. Hosier, 454 S.W.3d 882 (Mo. banc 2015). Police looking for a murder suspect got an order directing a cell phone company to "ping" the location of the suspect's phone, and learned he was in Oklahoma. Evidence was found in his car when he was arrested. Defense claims officers needed probable cause to get the ping order. **HELD:** Missouri officers obtained the ping order pursuant to 19 U.S.C. Section 2703(d), which requires "specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information

sought, are relevant and material to an ongoing criminal investigation.” This is a lesser standard than probable cause. The court notes that different jurisdictions are split as to whether or not probable cause is needed for a search for real-time cell phone locations. *See United States v. Skinner*, 690 F.3d 772 (6th Cir. 2012) (ping orders do not require probable cause); *United States v. Barajas*, 710 F.3d 1102 (10th Cir. 2013) (ping orders may be a search that requires a warrant, but an exception applied); *In re Order Authorizing Prospective and Continuous Release of Cell Site Location Records*, 31 F. Supp. 3d 889 (S.D. Tex. 2014) (probable cause required, so evidence inadmissible). The court ducks the issue by finding that the seizure of the evidence in Oklahoma was attenuated from any ping order violation because of a high- speed chase in Oklahoma and other factors.

In re Fingerprinting of M.B., 309 A.2d 3, 7 (N.J. Super. Ct. App. Div. 1973). Comment, 32 *Rutgers L. Rev.* 118 (1979). A class ring of an 8th grade class of a particular school was found next to the body of a homicide victim, and fingerprints other than victim’s were found on the inside and outside of victim’s car. That particular 8th grade class had 22 male members. The prosecutor sought and obtained an order (similar to an investigative subpoena) to have all 22 fingerprinted. The order permitted each pupil to be accompanied by an adult parent, guardian or attorney; directed that the fingerprints only be used in the investigation of the homicide; and specified that upon completion of the investigation the prints should be destroyed. The appellate court affirmed, holding: “There is substantial basis to suspect that a member of the school class in question may have had some implication in or material knowledge of the homicide such that fingerprinting all male members of the class was reasonable, having in mind the protective provision of the order for destruction of the prints after completion of the investigation. Under all circumstances . . . we find the existence of such narrowly circumscribed procedures as render the order reasonable within the view of the Fourth Amendment.”

HIPPA (Medical Record Privacy Law) Does Not Apply to Drunk Driver’s BAC Result

State v. Eichhorst, 879 N.E.2d 1144, 1154-55 (Ind. App. 2008). Investigative subpoena used to get hospital blood test results of drunk driver treated after his car crash killed his passenger. **HELD:** Investigative subpoena was proper and not blocked by HIPAA. “We conclude that HIPAA was passed to ensure an individual’s right to privacy over medical records; it was not intended to be a means for evading prosecution in criminal proceedings. The investigation was reasonable and the subpoena relevant in purpose.”

Issuing Search Warrant or Court Order for Records in Another State

Hubbard v. MySpace, Inc., 788 F. Supp. 2d 319 (S.D. N.Y. 2011). A state judge in one state (where the crime occurred) may issue a search warrant for the electronic records kept by the cell phone company in another state. Here, a Georgia state judge properly issued a

search warrant for the MySpace electronic records kept in California. The court said that Congress clearly intended to allow judges in this instance to authorize searches beyond their normal territorial jurisdictions. This would apply to investigative subpoenas as well.

10. Non-Coverage of Person of Defendant (Standing)

A defendant must have standing to challenge a search and seizure. Unless the defendant satisfies the court that his own, personal Fourth Amendment rights were involved, the search or seizure is none of his business!

Standing is sometimes the last refuge argument by a prosecutor when a search was improper. The evidence would still be admissible even if the police did something wrong because it was not the rights being violated were not those of this defendant.

The main question of standing is whether the defendant is asserting his own legal rights and interests rather than raising his claim for relief upon the rights of some third party. A person has Fourth Amendment protection from searches of places only where he has a legitimate expectation of privacy. His expectation of privacy is legitimate only if it is "one that society is prepared to recognize as reasonable."

A. Two-Part Test for Standing Used by U.S. and Missouri Supreme Courts

- Part 1. Subjective expectation of privacy in the place or thing searched; and
- Part 2. The expectation of privacy must be reasonable or legitimate.

B. Applying the Test:

1) Seizure of Defendant's Person

All individuals have a protected privacy interest to be free from unreasonable searches and seizures of their person. Thus, a defendant always can challenge the validity of his own arrest, investigatory stop, or temporary detention. See *State v. Gabbert*, 213 S.W.3d 713 (Mo. App. W.D. 2007).

BUT: A defendant has no standing to contest the allegedly unconstitutional search of a companion who was walking across a parking lot with him when stopped and improperly searched. *United States v. Baucom*, 611 F.2d 253 (8th Cir. 1979).

2) Search of Defendant's Person

For the same reason, a defendant can always challenge the legality of a search

of his person.

3) Defendant's Own House (or Tent)

Obviously, a person has a legitimate expectation of privacy in the search of his own house and would have standing to challenge the legality of the search in court.

People v. Schafer, 946 P.2d 938 (Colo. 1997). A defendant who had pitched his tent on private but unfenced, unimproved, and unused land has a legitimate expectation of privacy in his closed and zippered-shut tent and thus has standing to object to a warrantless search of it.

4) Defendant's Own Car.

Obviously, a person has a legitimate expectation of privacy in a search of his own car and would have standing to challenge the legality of the search.

5) Passenger in Car – Standing or NOT?

Passengers in cars who do not own the car generally do not have standing to object to a search of the car. However, a passenger in a car during an illegal traffic stop has been seized for purposes of the Fourth Amendment and may contest the illegality of the stop.

Rakas v. Illinois, 439 U.S. 128 (1978). Armed robbery. Radio broadcast of a robbery described the getaway car occupied by two males (later defendants) and two females. Police pulled over and searched a car because it matched the description of the robbery vehicle. They found a sawed-off rifle found under front passenger seat and a box of rifle shells in the glove compartment. The two male defendants were passengers. The owner was the female driver. The defendants did not claim ownership of the gun or shells. **HELD:** These defendants did not have standing to object to a search of the glove compartment or under seat of the car, since those are not areas where a mere passenger would have a legitimate expectation of privacy in someone else's car. Thus, it was not necessary to consider whether the search of the car may have violated the driver's Fourth Amendment rights. Conviction of robbery affirmed. *See also: State v. Rellihan*, 662 S.W.2d 535 (Mo. App. 1983) (passenger has no expectation of privacy in trunk of companion's car).

United States v. Crippen, 627 F.3d 1056 (8th Cir. 2010). A mere passenger in a vehicle has no legitimate expectation of privacy under the seats where the evidence was found.

State v. Hindman, 446 S.W.3d 683 (Mo. App. W.D. 2014). A passenger in a car generally does not have standing to object when consent has been given for a search of the car.

A passenger in a car during an illegal traffic stop has been seized for purposes of the Fourth Amendment and may contest the illegality of the stop.

Brendlin v. California, 551 U.S. 249 (2007). Defendant was a passenger in a car that was illegally pulled over on a traffic stop. The State concedes the illegality. The officer pulled over the car because he wanted to “verify” that a temporary permit was affixed to the car, even though he had already confirmed by computer check that the car had a temporary permit and he could see it from his vehicle and tell that “nothing was unusual” about it. Once he pulled the car over, he recognized the passenger (defendant) and learned that an outstanding warrant existed for him. He arrested him on the warrant and found a syringe cap on his person. A search of the car revealed items used to produce meth. **HELD:** The California Supreme Court had ruled that a passenger is not seized by a traffic stop. A unanimous U. S. Supreme Court reversed, holding that a passenger is seized by a traffic stop, so the passenger may contest the illegality of the stop. The proper test is the *Mendenhall* objective test, where one looks at whether a reasonable person would have believed that he was not free to leave and whether a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter. *U.S. v. Mendenhall*, 446 U.S. 544 (1980); *Florida v. Bostick*, 501 U.S. 429 (1991). A person in a car during a traffic stop would not feel free to leave. In fact he would reasonably feel that “his attempt to leave the scene would be so obviously likely to prompt an objection from the officer that no passenger would feel free to leave.” This comports with previous cases holding that for officer safety, even the passengers in a traffic stop may be ordered out of the car. *Pennsylvania v. Mimms*, 434 U.S. 106 (1977). It was error to deny the suppression motion on the ground that the defendant had not been seized, so the case is remanded to see whether the suppression turns on any other issue.

A passenger may also challenge a seizure of his person based upon an improper investigatory stop of the driver.

State v. Martin, 79 S.W.3d 912 (Mo. App. E.D. 2002). Defendant was a passenger in a car pulled over for failing to have a proper license plate. By the time the officer reached the car window, he realized that the car did have a proper tag and that there had been no reason to pull the car over. Ultimately, he asked this passenger to get out of the car and spotted a smoking pipe behind his ear. **HELD:** The passenger had standing to contest the improper stop. “A passenger may challenge the validity of the stop.” Thus, the finding of the pipe was the fruit of an unlawful search.

6) Driver of Someone Else’s Car With Permission – Has Standing to Contest Search of Most of Car, But No Standing as to Locked Glove Compartment.

State v. Williams, 485 S.W.3d 797 (Mo. App. W.D. 2016). A driver of a car who has the permission of the owner to drive it has standing to object to a search of the car.

State v. Martin, 892 S.W.2d 348 (Mo. App. W.D. 1995). Defendant was convicted of possession of cocaine found in the locked glove compartment of the car he was driving. The key to the glove compartment was hidden in the headliner of the car. Defendant claimed it was his girlfriend’s car, which he was driving with her consent, but that he had no access to the glove compartment and did not know where the key was located. **HELD:** Defendant lacks standing to contest the search. The U.S. and Missouri Supreme Courts have rejected the automatic standing rule. Thus, “persons charged with crimes, an element of which is possession, can only avail themselves of a Fourth Amendment protection if the illegal search and seizure is personal to them. Stated in another way, an accused cannot invoke the Fourth Amendment where the illegal search and seizure is of another’s person or property.” In this case, defendant does not have a “legitimate expectation of privacy” in the area searched or the items seized. Defendant denied owning the car and the drugs and claimed he had no knowledge or access to the locked glove compartment. “The mere status of being a passenger in a vehicle does not accord the passenger a legitimate expectation of privacy in the vehicle entitling him to assert a Fourth Amendment challenge to the search of the vehicle.” *See also: State v. Sullivan*, 935 S.W.2d 747 (Mo. App. S.D. 1996).

7) Driver of Stolen Car or RV - No Standing.

U.S. v. Hargrove, 647 F.2d 411 (4th Cir. 1981). Defendant who was driving a stolen car when stopped by police had no standing to object to the search of the car. Paper bag found behind seat contained drugs. No legitimate expectation of privacy. A wrongful possessor of an article has no right to complain, on Fourth Amendment grounds, of its search and seizure. *See also: State v. Luleff*, 729 S.W.2d 530 (Mo. App. 1987) (stolen tractor in plain view on defendant's property - no expectation of privacy); *State v. Woodrome*, 407 S.W.3d 702 (Mo. App. W.D. 2013) (no expectation of privacy in stolen RV).

8) Driver of Vehicle with Owner as Passenger Has No Standing.

State v. Sullivan, 735 S.W.2d 747 (Mo. App. S.D. 1996). Defendant was the driver of a vehicle (boat) in which the owner was a passenger. Defendant does not have standing to object to the search of the vehicle over the consent of the owner.

9) Driver of Rental Car, Rented by Someone Else Has Standing in Eighth Circuit, but Not in Missouri Courts.

United States v. Best, 135 F.3d 1223 (8th Cir. 1998). Defendant was driving a rental car that he claims was rented for him by his best friend and wants to contest its search. **HELD:** Remanded for more proof on this issue because if the defendant was driving the car with the permission of the renter, he would have a privacy interest giving rise to standing.

State v. Toolen, 945 S.W.2d 629 (Mo. App. E.D. 1997). Police responding to a call about a suspicious car in the neighborhood found an unoccupied rental car with Illinois plates. Defendant was located in a nearby house and said he had driven the car but that it was not his – it had been rented in Chicago by someone else. Police searched the car and found drugs. **HELD:** A defendant who claims the protection of the Fourth Amendment must have a legitimate expectation of privacy in the place or thing searched, *i.e.* he must have an actual subjective expectation of privacy in the place or thing searched and this expectation must be reasonable or legitimate. This car was owned by Hertz and was rented to someone else. There was no evidence that defendant was an authorized driver of the car by consent of the owner, Hertz. “A person does not have a legitimate expectation of privacy in a car where it is shown only that he is in possession of the car by being the driver of the car.” He must also show a legitimate basis for being in it - such as permission of the owner.

State v. Brown, 382 S.W.3d 147 (Mo. App. W.D. 2012). Defendant borrowed a rental car to use in the commission of a shooting. This car had been rented by his girlfriend's mother. The girlfriend loaned it to him for the evening. Defendant left the car at the scene of the shooting and give its keys back to the girlfriend, saying there had been a shooting and he had left the car there so the police would not suspect him. The police searched the car and found a gun, ammo, and the ID of the defendant. **HELD:** Defendant did not have standing. A split of authority exists as to whether a borrower of a car rented by someone else has standing. Some circuits draw a bright line and say no. *United States v. Thomas*, 447 F.3d 1191 (9th Cir. 2006). The Eighth Circuit says the person would have standing if he was driving it with the consent of the renter. *See Best* above. Under either theory, this defendant did not have standing because he had returned the keys and gave up any expectation of privacy in the car.

11. Overnight Guest in House.

Minnesota v. Olson, 495 U.S. 91 (1990). A lone gunman robbed a gas station and shot the manager. An officer suspected Joseph Eaker and went to his house just as a car pulled up and took evasive action. The two occupants of the car fled on foot. The murder weapon and a sack of money and papers of suspect Robert Olson were found in the car. The next day, the police got a phone call from a woman saying "Rob" drove the car in the gas station killing and told Louanne and Julie that he had done the robbery. The caller said the women lived at 2046 Filmore, Minneapolis, MN. Police called Louanne. She confirmed that Rob Olson had been living there, but claimed he was not home. Police issued bulletin to pick up defendant but officers were instructed to stay away from 2046 Filmore. Police telephoned 2046 Filmore at 2:45 p.m. and said Rob should come out. Police heard a male voice say, "Tell 'em I left." Julie said Rob had left. Police entered the home without consent and without a warrant, with weapons drawn, and found Defendant hiding in a closet. Defendant confessed. The confession was admitted at trial. **HELD:** Reversed for retrial without the confession. An overnight guest has a Fourth Amendment expectation of privacy and has standing to object to a police officer's warrantless, non-consensual entry into a friend's house to search for and arrest defendant. Defendant's friend, the owner of house, had not consented to the entry.

State v. Williams, 577 S.W.2d 59 (Mo. App. 1978). Defendant, who lived with his aunt and who slept in his aunt's son's bedroom, had standing to claim that police made an illegal search of the room since he had a legitimate expectation of privacy in the room.

12. Guest in House for Drug Deal.

Minnesota v. Carter, 525 U.S. 83 (1998). Defendant and the lessee of an apartment were sitting in one of its rooms, bagging cocaine. While so engaged, they were seen by a police officer, who looked through a gap in a drawn window blind. The information was used as the basis for a car stop when defendant left the building and got into his car. The car search revealed 47 grams of cocaine and a loaded gun. **HELD:** Defendant had no standing to object to the allegedly illegal search done by peeking into the apartment through the blind. Although an overnight guest in a house may claim the protection of the Fourth Amendment, “one who is merely present with the consent of the householder may not. Respondents here were obviously not overnight guests, but were essentially present for a business transaction and were only in the home a matter of hours. There is no suggestion that they had a previous relationship with [the homeowner], or that there was any other purpose to their visit. Nor was there anything similar to the overnight guest relationship in *Olson* to suggest a degree of acceptance into the household.”

13. Trespasser in House.

State v. Thomas, 595 S.W.2d 325 (Mo. App. S.D. 1980). Defendant entered an unoccupied house without the owner’s permission through an unlocked window, where police caught him. **HELD:** Defendant lacked standing to challenge the warrantless search of the house; thus the robbery loot defendant had in house is admissible as evidence.

14. Motel Guest Past Check-Out Time.

State v. Mitchell, 20 S.W. 3d 546 (Mo. App. W.D. 2000). Defendant was staying at a motel, whose staff had called police because of meth lab items they spotted. Defendant was late checking out of the motel, but had not been given permission to stay beyond check-out time. As defendant was leaving the room, he was detained upon reasonable suspicion. He refused to give consent for a search of the room. Motel employees later entered the room to clean it and found dishes with residue and other items of evidentiary value. They called the police, who looked at the items and got a search warrant. **HELD:** Defendant did not have standing to object to the search because he did not have a legitimate expectation of privacy in the motel room beyond the check-out time. At that point, the motel has the right to reenter the room to prepare it for the next guest and thus has the right to grant permission to the police to enter it, too. *See also State v. Ballard*, 457 S.W.3d

899 (Mo. App. E.D. 2014) (renter of motel room lost expectation of privacy once he stayed in room past the time he had paid for it).

United States v. Summe, 182 Fed. Appx 612 (8th Cir. 2006). Motel guest who was ejected from his room no longer has standing to object to its search.

15. Laundry Room in Common Area of Apartment Complex

Hairston v. State, 314 S.W.3d 356 (Mo. App. S.D. 2010). Defendant has no standing to challenge search of laundry room in common area of his apartment complex. “Tenants of multifamily dwellings have no legitimate expectation of privacy in common, shared areas of the apartment complex.”

16. Abandoned Property in Public Place

State v. McCrary, 621 S.W.2d 266 (Mo. banc 1981). Defendant lived with Lydia and had two children by her, but she left him and moved in with Rufus. In November, Rufus was shot outside their home, and wounded. On March 8, someone threw a bomb in their window. On March 12, a police officer responding to an anonymous call about a suspicious person in that neighborhood carrying a long cardboard box saw defendant carrying a long cardboard box. Defendant dropped the box and ran. The box contained a .22 rifle, live shells, and a silencer. **HELD:** The *Rakas* two-part test of standing is adopted in MO: (1) The defendant must have an actual, subjective expectation of privacy in the place or thing searched; and (2) The expectation of privacy must be reasonable or legitimate. In this case, the defendant had no legitimate expectation of privacy in a dropped box and thus defendant had no standing to object to the seizure of this box and its contents.

17. Someone Else’s Purse.

Rawlings v. Kentucky, 448 U.S. 98 (1980). Defendant was charged with possession of drugs (LSD and meth) with intent to sell. He had been in someone else’s home when the police entered to make an arrest of that other person pursuant to a warrant. Police searched the other occupants of the house, including this defendant and a woman companion. The police found a large amount of drugs (1,800 tablets of LSD and vials of methamphetamine) in the woman’s purse. Defendant later admitted the drugs were his. He claims he put them in her purse moments before the police entered the house. A legal issue exists whether the woman consented to the search of the purse. **HELD:** It doesn’t matter whether she consented or not, as to the prosecution of this defendant. He has no standing to complain about the search of her

purse. He did not make a sufficient showing that his legitimate or reasonable expectation of privacy was violated. At the time he “dumped thousands of dollars of illegal drugs into her purse,” he had known the woman only a few days, had never been in her purse before, and had no right to exclude others from her purse.

IV. In situations where the Fourth Amendment applies, the question that needs to be answered is -- has the Fourth Amendment been violated or satisfied?

1. Initial Intrusion

A warrantless search can violate the Fourth Amendment in two different ways.

- (1) It can violate the Fourth Amendment because the Defendant manifested a subjective expectation of privacy in the place searched and it is one that society accepts as objectively reasonable. *Katz v. United States*, 389 U.S. 347 (1976) (warrantless wiretapping of defendant’s telephone conversation in public telephone booth).
- (2) It can violate the Fourth Amendment because the police have trespassed or otherwise violated the property interests of the Defendant to an unreasonable extent:
 - (a) *Florida v. Jardines*, 133 S. Ct. 1409 (2013). Police took a drug-sniffing dog to defendant’s front door (within curtilage of his home) without a warrant.
 - (b) *United States v. Jones*, 132 S. Ct. 945 (2012). Police put GPS tracking device on defendant’s car without a warrant.
 - (c) *Silverman v. United States*, 365 U.S. 505 (1961). Police drilled hole through wall of defendant’s apartment to eavesdrop on conversations with a “spike mike.”

Remember:

“A man’s home is his castle”—*U.S. v. Tobin*, 923 F.2d 1506 (11th Cir. 1991).

“The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It maybe frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement.”—William Pitt the Elder

Warrant Requirement

“[T]he most basic Constitutional Rule in this area is that searches conducted

outside the judicial process, without prior approval by a judge or magistrate, are *per se* UNREASONABLE under the Fourth Amendment SUBJECT ONLY TO A FEW SPECIFICALLY ESTABLISHED AND WELL-DELINEATED EXCEPTIONS.”

Coolidge v. New Hampshire, 403 U.S. 443, 445-55 (1971).

2. Scope of Search

Even if the initial intrusion is good, the SCOPE of search is limited. A general rummaging around, fishing expedition is prohibited. Constitutional law says MINIMIZE. Get in and find what you are looking for and get out. Look only where it could be. You can't look for an elephant in a bread box! The Fourth Amendment's "particularly described" wording requires some specification as to what officers are looking for. If looking for a TV set, look everywhere it could possibly be found, but nowhere smaller.

V. Two Types of Searches – Those With Warrants and Those Without Warrants.

1. Searches with Warrants

In general, a search without a warrant is unreasonable and the evidence will not be admissible; always get a warrant, unless you cannot.

Why Get a Warrant in the First Place?

The idea is as American as the game of baseball. You can't call the balls and strikes if you are a player; the umpire does it. In the real world, the judge is the umpire. The defendant's home is his castle. The decision of when police have probable cause to look into a person's home is left to the judge, a neutral and detached magistrate, who will be fair to both sides.

Coolidge v. New Hampshire, 403 U.S. 443 (1971). The New Hampshire spring thaw revealed the body of 13-year-old Pamela Mason in a snow bank. She had been murdered and probably raped. The Attorney General did a massive investigation that pointed the finger of guilt at Edward Coolidge, who had hired her as a babysitter. They put together a detailed search warrant with affidavits showing probable cause to search his house and two cars for evidence of the girl's death. One of the finest warrant applications ever prepared! But instead of taking it to a judge at 2:00 a.m. the attorney general himself signed it, under a state provision saying the attorney general in New Hampshire doubled as a justice of the peace. Imagine him proclaiming: "We don't need to wake up the judge! Who knows better than I how well it shows probable cause? I wrote it myself! Give me the pen!" The Supreme Court held that the wrong person signed it. This goes to the core of the Fourth Amendment's purpose: the warrant requirement

is not an exposition in police writing skills, but rather intends to put a neutral and detached magistrate between the policeman and his quarry.

Burden of Proof

As a practical matter, when a warrant has been issued the burden of proof is on the defendant to show the warrant bad; if no warrant was involved, the burden of proof is on the State to show probable cause. The burden of proof is the tie-breaker; the person who has it loses the tie. A warrant is presumptively good.

U.S. v. Ventresca, 380 U.S. 102 (1965). The Court said that even though a search warrant might be flawed, the court should bend over backwards to find it good and not be hyper-technical in construing it, because the larger purpose of having a neutral magistrate decide probable cause was served. This encourages police to follow the preferred procedure of getting a warrant.

For a more detailed discussion of the burden of proof at suppression hearings, see the SUPPRESSION HEARINGS section at the end of this OUTLINE.

2. Searches Without Warrants— Exceptions to the Need to Obtain a Search Warrant

There are several exceptions to the search warrant requirement. These exceptions include at least ten categories, and are often described as “jealously and carefully drawn, well-recognized exceptions to the search warrant requirement.”

1. Search Incident to Lawful (Constitutionally Permissible) Arrest
2. Automobile Searches Upon Probable Cause
3. Suitcase Exception /Container Exception
4. Exigent Circumstances/ Emergency/Hot Pursuit
5. Stop and Frisk
6. Plain View Doctrine
7. Consent
8. Inventory Searches
9. Inevitable Discovery
10. Certain Administrative Searches in Matters Involving a Reduced Expectation of Privacy

Part Two – Searches With Warrants

I. Searches Without Warrants are Presumed Unreasonable

A search without a warrant is presumed unreasonable and the evidence will be excluded unless it falls into one of the exceptions to the warrant requirement.

General Rule For Officers – Always Get a Warrant, Unless You Cannot.

More Than 95 percent of the time, if law enforcement takes the time to get a warrant, the evidence will be admissible in court.

II. Statutory Mechanics of Obtaining a Search Warrant

This section assumes the officer has already made the decision to get a search warrant and covers the nuts and bolts of how to do it.

Obtaining a Warrant Under Missouri Law -- Chapter 542, RSMo.

1. **May ONLY be issued by a Judge - Appellate, Circuit, Associate Circuit. HAVE SOME TYPE OF "ON CALL" PROCEDURE.**
2. **May be issued to search for and seize an item, photograph it, copy or record it. 542.271, RSMo.**
3. **By statute, may be issued to search for and seize, or photograph, copy or record any of the following:**
 - a. Property, article, material or substance that constitutes evidence of the commission of crime;
 - b. Stolen property;
 - c. Property owned by public communications services if the person has failed to remove it after written notice that it is being used in the commission of an offense;
 - d. Property that is illegal to possess;
 - e. Property for which seizure is authorized or directed by any statute of this state;

EXAMPLE: Section 578.018 authorizes a search warrant to issue for a public health official or law enforcement officer to enter private property to inspect,

care for or impound neglected or abused animals.

- f. Property that has been used by the owner or with his consent as a raw material or as an instrument to manufacture or produce anything for which possession is an offense under MO law;
- g. For a kidnapped person;
- h. To search for or seize any human fetus or corpse or part thereof;
- i. To search for any person for whom a valid felony arrest warrant is outstanding;

NOTE: Under the “*Payton-Steagald Rule*” an arrest warrant carries with it the authority to search that person’s home for him or her, but not to enter or search a third party’s home.

Payton v. New York, 445 U.S. 573 (1980). For Fourth Amendment purposes, an arrest warrant carries with it the limited authority to enter a dwelling where the suspect lives when there is reason to believe the suspect is inside. Absent exigent circumstances, though, officers may not enter a suspect’s home to make an arrest without an arrest warrant.

Steagald v. United States, 451 U.S. 204 (1981). Police may not enter a 3rd person’s home without consent when looking for someone else for whom they have a valid arrest warrant.

The *Payton-Steagald* warrant requirement is not applicable in all circumstances. For one thing, if the entry of the premises was obtained on some other lawful basis, then the *Payton-Steagald* warrant requirement is inapplicable to an arrest thereafter made within – provided it is accomplished without exceeding the permissible scope of that entry. Wayne R. Lafave, *Search and Seizure: A Treatise on the Fourth Amendment*, Vol. 3, p. 382 (Fifth Ed. 2012).

U.S. v. Ruiz-Altschiller, 694 F.2d 1104, 1107 (8th Cir. 1982). No arrest warrant was needed for arrest inside home where the undercover officer had been invited inside while pretending to be participating in criminal activity. Defendants “by extending such an invitation, voluntarily exposed themselves to a warrantless arrest.”

Mahlberg v. Mentzer, 968 F.2d 772 (8th Cir. 1992). A warrantless arrest within the premises is permissible when the prior entry was gained by executing a search warrant for physical evidence.

U.S. v. Garcia, 997 F.2d 1273 (9th Cir. 1993). A warrantless arrest within the premises is permissible when the suspect or some other person with a significant interest in the premises to admit visitors, voluntarily consented to entry by a known police officer.

4. The Application

A warrant application shall:

- a. Be in writing;
- b. State the time and date of making application;
- c. Identify the property, article, material, substance or person to be searched for and seized in sufficient detail and particularity that the officer executing the warrant can readily ascertain it;
- d. Identify the person, place or thing to be searched in sufficient detail and particularity that the officer executing the warrant can readily ascertain whom or what is to be searched;
- e. State facts sufficient to show probable cause for the issuance of a search warrant;
- f. Be verified by the oath or affirmation of the applicant;
- g. Be filed in the proper court;
- h. Be signed by the Prosecuting Attorney (or one of his or her assistants) of the County where the search will take place.

The application can be supplemented by a written sworn affidavit from witnesses for the judge to consider in determining whether there is probable cause. The judge is NOT to consider oral testimony.

The judge shall determine whether sufficient facts have been stated to justify the issuance of a search warrant. The warrant shall be issued in the form of an original and two copies. Have the judge sign all three.

The application and any supporting affidavit and a copy of the warrant shall be retained in the records of the court from which the warrant was issued.

5. The search warrant shall:

- a. Be in writing;
- b. Be directed to any peace officer in the state;
- c. State the time and date the warrant is issued;
- d. Identify the property, article, material, substance or person to be searched for and seized in sufficient detail and particularity that the officers executing it can readily ascertain what they are searching for.

- e. Identify the person, place or thing to be searched, in sufficient detail and particularity that the officer executing it can readily ascertain whom or what he is to search;
- f. Command that the described person, place or thing be searched and that any of the described property, article, material, substance or person found thereon or therein be seized and photographed or copied and that photographs or copies be filed with the court within 10 days after the filing of the application;
- g. Be signed by the judge with his title of office indicated.

6. A search warrant shall be deemed invalid:

- a. If it was not issued by a judge;
- b. If it was issued without a written application having been filed and verified;
- c. If it was issued without probable cause;
- d. If it was not issued in the proper county;
- e. If it does not describe the person, place or thing to be searched for or the property, article, material, substance or person to be seized with sufficient certainty;
- f. If it is not signed by the judge who issued it;
- g. If it was not executed within the time prescribed by law. (10 days)

III. Obtaining a Warrant Under Federal Law -- Rule 41(b) and 18 U.S.C. 3103(a).

- 1. May be issued by a federal magistrate judge, or if none is reasonably available, a judge of a state court of record in the district. 41(b)(1).
- 2. May be issued for any of the following:
 - (a) Evidence of a crime;
 - (b) Contraband, fruits of a crime, or other items illegally possessed;
 - (c) Property designed for use, intended for use, or used in committed a crime;
 - (d) A person to be arrested or a person who is unlawfully restrained;
 - (e) The installation of a tracking device to track the movement of a person or property.
- 3. Federal search warrant must be served within a specified time no longer than 14 days. 41(e)(2)(i).
- 4. Telephonic and electronic search warrants are specifically allowed in the federal system. 41 (d)(2)&(3) and Rule 4.1.

IV. Particular Issues

1. Probable Cause

In determining probable cause, the Court is to look to the “totality of the circumstances and make a common sense practical decision whether there is a fair probability that

contraband or evidence of crime will be found in a particular place.” *Illinois v. Gates*, 462 U.S. 213, 238 (1983); *State v. Roggenbuck*, 387 S.W.3d 376 (Mo. banc 2012).

Illinois v. Gates, 462 U.S. 213, 238 (1983). The police received an anonymous letter: “This letter is to inform you that you have a couple in your town who strictly make their living on selling drugs. They are Sue and Lance Gates, they live on Greenway, off Bloomingdale Rd. in the condominiums. Most of their buys are done in Florida. Sue his wife drives their car to Florida, where she leaves it to be loaded up with drugs, then Lance flies down and drives it back. Sue flies back after she drops the car off in Florida. May 3 she is driving down there again and Lance will be flying down in a few days to drive it back. At the time Lance drives the car back he has the trunk loaded with over \$100,000 in drugs. Presently they have over \$100,000 worth of drugs in their basement. They brag about the fact they never have to work, and make their entire living on pushers. I guarantee if you watch them carefully you will make a big catch. They are friends with some big drug dealers who visit their house often. Lance & Susan Gates, Greenway in Condominiums.” *Id.* at 225. After getting the letter, the police corroborated it by: (1) Revenue records showed driver’s license to Lance Gates giving his street address on Bloomingdale Rd; (2) Confidential Informant with access to financial records confirmed that Lance Gates had made a reservation on an airplane from his home here in Bloomingdale, Illinois, to West Palm Beach, Florida, for May 5 at 4:15 p.m.; (3) An Illinois officer watched Gates board the flight; (4) Florida officers saw him arrive and take a taxi to a Holiday Inn and take a room registered to Susan Gates; (5) Florida officers saw him leave at 7:00 the next morning with an unidentified female in a Mercury bearing Illinois plates checking to Gates. A search warrant was issued for their house and automobile. The old *Aguilar* and *Spinelli* two-prong test was rejected and the totality of circumstances test replaced it. (The old two-prong test was that an informant’s veracity and basis of knowledge both had to be specifically shown and separately satisfied, usually by the informant having been used successfully in the past and by his opportunity to see or get the reliable information now being supplied.) **HELD:** This was sufficient probable cause even though the letter was completely anonymous. “[T]he **quanta of proof appropriate in ordinary judicial proceedings are inapplicable to the decision to issue a warrant . . . Finely-tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate’s decision. While an effort to fix some general numerically precise degree of certainty corresponding to ‘probable cause’ may not be helpful, it is clear that only the probability and not a *prima facie* showing, of criminal activity is the standard of probable cause.**” *Id.* at 235.

State v. Gardner, 741 S.W.2d 1 (Mo. banc. 1987). Defendant claims a search warrant was issued without probable cause. The test of *Illinois v. Gates* is used. Probable cause was found, but the court adds that even if no probable cause had been found the *Leon* good faith test was met for this search by warrant of a “chop shop” where stolen cars were being cut up.

State v. Neher, 213 S.W.3d 44 (Mo. banc 2007). A confidential informant provided a tip that the defendant had been cooking meth the night before and had all the chemicals necessary to make meth in the house. The affidavit did not say the informant had specifically seen the things in the house. **HELD:** Under the totality of circumstances, it could be inferred that the informant had seen the items and that the information was based upon personal observation. There was a fair probability that the search would uncover evidence of criminal activity.

State v. Loggins, 445 S.W.3d 105 (Mo. App. E.D. 2014). Probable cause existed for search warrant for iPhone where it was found on the ground at the feet of a murder suspect as he was being arrested. A reasonable probability existed that it might contain evidence relating to the murder. It did. The defendant had done searches for how to dispose of a dead body, where to buy lime locally, and where to buy a footlocker.

2. Anonymous Calls - Try to Corroborate as Much as Possible.

When a warrant will be based on an anonymous tip, as much information as possible should be corroborated.

State v. Berry, 801 S.W.2d 64 (Mo. banc 1990). A deputy received an anonymous phone call that the caller had been in Melissa Berry's mobile home the day before as Berry transferred marijuana from four or five large freezer bags into smaller plastic baggies. The caller described the exterior of the mobile home and its location in detail. The deputy verified the details of the exterior in detail (including small deck, above-ground swimming pool, single-wide trailer, tan in color, located at intersection of Highway D and County Road 463, large model two-tone GMC or Chevrolet pickup parked in front of trailer). All in all, there was not much corroboration, but the caller had proclaimed personal knowledge. The judge issuing the warrant found probable cause and issued it. **HELD:** Although the call was anonymous, the caller gave details indicating personal knowledge. The exterior details were corroborated so there was a fair probability that the details about the marijuana being inside were also true. It was error to grant the motion to suppress. *See also: State v. Meyers*, 992 S.W.2d 246 (Mo. App. E.D. 1999); *State v. Cornelius*, S.W.3d 603 (Mo. App. S.D. 1999).

United States v. Jackson, 898 F.2d 79 (8th Cir. 1990). An anonymous tip where the caller claimed to have personally seen four-foot-tall growing marijuana plants and bags of marijuana in the suspect's home. **HELD:** Even though the caller was anonymous, the description of the house and the name on the utilities could be verified. The call had the "richness in detail of first hand observation." Corroboration sufficient.

State v. Beatty, 770 S.W.2d 387 (Mo. App. S.D. 1989). An anonymous call came into a crime stopper hotline concerning the robbery of a gas station. The caller suggested going

to a restaurant and inquiring about a female who used to work there as being the person who did the robbery. The officer checked the description of the robber from reports and talked to the restaurant owner, who said it sounded like Sharon Beatty, a former employee. The MULES computer gave a similar description for her. A search warrant was obtained. **HELD:** This was sufficient corroboration for the anonymous tip. (It later turned out that the tip was from her psychiatrist.)

State v. Bordner, 53 S.W.3d 179 (Mo. App. W.D. 2001). After getting tips in September and November that defendant was cooking meth at his home, the police pulled his trash bags the following May and discovered empty cans of acetone, empty cans of charcoal fluid, empty cans of "Heet," empty bottles of pseudoephedrine pills, coffee filters with red phosphorous, empty cans of lye, numerous used syringes, glass Mason jars with white residue, and rubber tubing. **HELD:** The search warrant was properly issued. Even though the police did not see the defendant carry out the trash, the bags in front of the house combined with the tips established a "fair probability" that evidence of a crime would be found.

State v. Williams, 9 S.W.3d 3 (Mo. App. W.D. 1999). Police apply for search warrant based on an anonymous Crime-stopper call saying defendant was selling cocaine and had just received a large shipment. The corroboration for the hearsay tip was that a person of that name did live at that address and police records show he had been arrested one year ago for sale of cocaine and four months ago for possession of cocaine. **HELD:** The hearsay tip was sufficiently corroborated. "An affidavit which relies on hearsay is sufficient as long as there is a substantial basis for crediting the hearsay . . . The concepts of veracity and reliability and basis of knowledge are relevant considerations but they are not entirely separate and independent requirements to be rigidly applied in every case . . . Corroboration from other witnesses and from independent observations of police officers creates a substantial basis for crediting the hearsay statements in an affidavit . . . The fact the informant may not have actually observed criminal activity or contraband is not fatal to establishing probable cause . . . A suspect's past criminal behavior can be considered in determining whether probable cause exists to justify a search." *Same result: State v. Ford*, 21 S.W.3d 31 (Mo. App. E.D. 2000).

3. Drug Cases

In drug cases, be sure to show the time the drugs were seen. Search warrants are held invalid, and sometimes not even saved by good faith, when they say drugs were seen, but don't say when. If the source was anonymous, corroborate as much as possible. Maybe the suspect has a prior. Maybe his name has come up in other investigations. Keep a drug file. Get as many details as possible from the caller and check them out as much as possible.

State v. Wilbers, 347 S.W.3d 552 (Mo. App. W.D. 2011). The search warrant affidavit for drugs did not say when the illegal drugs had been seen on the premises, thus no probable cause for warrant; but the good faith exception saved the warrant. *Dixon v. State*, 511 So. 2d 1094 (Fla. 1987) (same facts, but not saved by good faith).

4. Staleness

If the probable cause is not recent, it may be no probable cause at all.

- a. Informant's seeing stolen items in Defendant's hotel room 16 days earlier is not too stale. *United States v. Golay*, 502 F.2d 182 (8th Cir. 1974).
- b. Month-old information about meth manufacture going on at defendant's home was too stale. *People v. Miller*, 75 P.3d 1108 (Colo. 2003).
- c. 48 hour delay for marijuana where no indication of smoking going on, not too stale. *United States v. Schauble*, 647 F.2d 113 (10th Cir. 1981). A 5-day delay for marijuana ("over 40 grams") was not too stale. *State v. Hodges*, 705 S.W.2d 585 (Mo. App. 1986). A 17-day delay for drugs was not too stale where the defendant had been actively dealing drugs on a regular basis during the 30 days prior to police receiving the information 17 days earlier, and he was known to keep his drugs in a safe at his house. *State v. Valentine*, 430 S.W.3d 339 (Mo. App. E.D. 2014).
- d. Offer to sell drugs 3 days earlier revitalized probable cause information from 90 days earlier. *State v. Abbott*, 499 A.2d 437 (Conn. App. 1985).
- e. 30 day delay OK with respect to warrant for hand grenades. *U.S. v. Dauphinee*, 538 F.2d 1 (1st Cir. 1976).

5. Search of Suspect's Home, Not Because Contraband Seen There, but Because of Probable Cause He Committed the Crime and this is His Home.

U.S. v. Dresser, 542 F.2d 737 (8th Cir. 1976). The only reason to search defendant's residence for evidence of robbery (gun and stolen property) is the fact he was identified as the robber and this is where he lives. No one saw any of the stolen items in his house. Nevertheless, this is sufficient probable cause. *Same result: United States v. Jones*, 994 F.2d 1051 (3rd Cir. 1993).

State v. Miller, 14 S.W.3d 135 (Mo. App. E.D. 2000). Defendant is being prosecuted for possession of methamphetamine with intent to manufacture. The search warrant for his house was issued upon an affidavit showing he had very recently purchased a large quantity of lithium batteries and lots of ephedrine pills (27 bottles at 50 pills each) under a fake name. Defendant claims the affidavit did not show probable cause because it did not expressly state that anyone had ever seen the items at his residence. **HELD:** Sufficient probable cause. The state need not prove by its affidavit that drug activity was

seen at Defendant's residence. "Only the probability of criminal activity, not a prima facie showing is the standard of probable cause." The issuing judge may draw reasonable inferences, and it is reasonable to assume that evidence of drug-dealing is likely to be found where the dealer lives. "Observations of illegal activity occurring away from the suspect's residence can support a finding of probable cause to issue a search warrant for the residence if there is a reasonable basis to infer from the nature of the illegal activity observed that relevant evidence will be found in the residence." *Same result: State v. Hawkins*, 58 S.W.3d 12 (Mo. App. E.D. 2001) (search of suspected murderer's house for change of clothing, etc.).

6. Anticipatory Search Warrants and Prospective Probable Cause

United States v. Grubbs, 547 U.S. 90 (2006). The defendant ordered child pornography. Postal inspectors intercepted the order and prepared an anticipatory search warrant to search defendant's house as soon as the package would be delivered. The warrant affidavit said: "Execution of this search warrant will not occur unless and until the parcel has been received by a person and has been physically taken into the residence." *Id.* at 92. Two days after the warrant was issued, the package was delivered and the officers executed the warrant and caught the defendant in possession of the child pornography. The 9th Circuit ruled the anticipatory search warrant invalid because the warrant itself did not mention the triggering mechanism of the delivery of the package. **HELD:** The Supreme Court ruled anticipatory search warrants valid. "An anticipatory search warrant is a warrant based upon an affidavit showing probable cause that at some future time (but not presently) certain evidence of crime will be located at a specified place. Most anticipatory warrants subject their execution to some condition precedent other than the mere passage of time -- a so-called triggering condition." *Id.* at 94. Typically, it is the delivery of a package of drugs, child pornography or stolen property. The Court points out that all search warrants are anticipatory in the sense that they require the issuing judge to determine (1) probable that (2) contraband, evidence of a crime, or a fugitive will be on the described premises (3) when the warrant is executed. The Court says it is adequate for the affidavit to set out the triggering condition -- the search warrant itself does not need to do so. *See also: State v. Sweeney*, 701 S.W.2d 420 (Mo. banc. 1986) (search warrant for stolen watch not actually stolen but in possession of undercover police officer who was going to sell it to defendant); *U.S. v. Tagbering*, 985 F.2d 946 (8th Cir. 1993) (search warrant for drugs to be delivered to defendant's home).

7. Confidentiality of Informant Or Surveillance Location

Probable cause for search warrant may be established by information provided by an informant and it is not necessary to name the informant. *State v. Rohrer*, 589 S.W.2d 121 (Mo. App. S.D. 1979).

Rule 25.10 of the Missouri Rules of Criminal Procedure provides that an informant's identity may remain a prosecution secret.

United States v. Green, 670 F.2d 1148 (D.C. Cir. 1981). Where officer testified he observed an on-the-street drug transaction using binoculars, the court upheld his refusal to disclose his location. "We believe the policy justifications analogous to the well-established informer's privilege also protect police surveillance locations from disclosure."

8. Oath or Affirmation

See H. Morley Swingle & Lane P. Thomasson, "Beam Me Up: Upgrading Search Warrants With Technology," 69 *J. Mo. Bar* 16 (2013). Discusses getting search warrants by fax, phone or e-mail, while still satisfying the oath requirement.

See also H. Morley Swingle, "Electronic Search Warrants in Colorado," 44 *Colo. Law* 45 (June 2015).

United States v. Brooks, 285 F.3d 1102 (8th Cir. 2002). Officer signed affidavit for search warrant in front of a notary, but at the suppression hearing could not remember whether the notary actually had him raise his hand and swear. The affidavit itself, however, said that he was "duly sworn" and "under oath." **HELD:** Even if he had not raised his hand and sworn to the notary, the wording of the affidavit showed that he intended to be under oath so it satisfied the oath or affirmation requirement.

People v. Snyder, 449 N.W.2d 703, 706 (Mich. App. 1989). A drunk driver refused a breath test so the prosecutor got a search warrant for a blood test. The oath was okay even though it was taken over the telephone using a fax machine to transmit the affidavit to the judge and the warrant back to the officer. **HELD:** "The telephone link by which the judge and the officer communicated creates enough of a presence to satisfy a reasonable construction of the search warrant statute."

State v. Bicknell, 91 P.3d 1105 (Idaho 2004). Sufficient as to oath when affidavit was signed before a notary public and not a judge. The Fourth Amendment does not require that an affidavit submitted in connection with an application for a search warrant be signed in the presence of the judge issuing the warrant, only that it be under oath.

People v. Sullivan, 437 N.E.2d 1130, 1134 (1982). Oath requirement met where form contained notice to effect that false statements are punishable as a crime. **HELD:** "Although perhaps less formal in nature than the more traditional methods of verification, a statement containing such a warning is, practically as well as theoretically, no different than a statement under oath." **NOTE:** Similarly, Rule 22.03 of the Missouri

Rules of Criminal Procedure provides that the oath requirement for an arrest warrant is satisfied by having the officer make the statement “on a form bearing notice that false statements therein are punishable by law.”

State v. Gannaway, 786 S.W.2d 617 (Mo. App. S.D. 1990). The officer signed the affidavit in front of the judge who issued the warrant, but the judge did not fill in the part saying that the officer had been sworn. The affidavit itself said the officer was under oath and the officer considered himself under oath. Even if an application for a search warrant was not properly verified, the seized evidence was admissible under the good faith exception to the exclusionary rule.

People v. Fournier, 793 P.2d 1176 (Colo. 1990). When judge was not in town, the officer swore to the affidavit in front of a court clerk, faxed the affidavit to the judge, and the judge issued a warrant by fax. **HELD:** Even though this technically violated the Colorado rule requiring an affidavit for a search warrant to be signed in front of a judge, the evidence would not be suppressed since it was not a constitutional violation as the affidavit had been under oath or affirmation

State v. Gutierrez-Perez, 337 P.3d 205 (Ut. 2014). In vehicular homicide case, the investigating officer used e-mail to send his affidavit to the judge. It was sworn using an affirmation that he was swearing under criminal penalty for false statements. An “eWarrant” was issued. **HELD:** “Affirmation” on form acknowledging that officer was under oath and subject to a misdemeanor penalty if he lied is sufficient.

NOTE: Federal rules allow the oath to be taken either in person or over the telephone or electronically. Rule 41(d)(2) & (3) and Rule 4.1.

9. Warrants For Blood Draws or Hospital Records of BAC Level

The blood inside a person’s body can constitute evidence of a crime and can be obtained through the issuance of a search warrant. The blood draw might be evidence of intoxication in a DWI or vehicular homicide case. It might be evidence used to match the defendant’s DNA to a crime scene.

Although a Missouri statute allows an officer to order the taking of a blood sample without consent in a DWI case that involves a fatality or serious physical injury, the safest practice for law enforcement is to get a search warrant or consent.

Under the wording of Section 577.020, RSMo, an officer is allowed to order the taking of a blood sample even without a warrant or consent when a driver is under arrest for a traffic violation involving in a vehicle crash resulting in a fatality or “readily apparent serious physical injury.”

State v. Stottlemire, 752 S.W.2d 840, (Mo. App. W.D. 1988). Defendant was racing a motorcycle back and forth across a dam at high speed, lost control and his passenger went over rail was impaled on a support post. The victim's head ended up 30 feet from his body. Defendant had alcohol on his breath and refused consent for a blood test. The trooper got a search warrant for his blood. **HELD:** The search warrant was proper as being for evidence of a crime. *See also: State v. Willis*, 97 S.W.3d 548 (Mo. App. W.D. 2003); *State v. Trice*, 747 S.W.2d 243, (Mo. App. W.D. 1988).

State v. Smith, 134 S.W.3d 35 (Mo. App. E.D. 2004). Defendant was arrested for DWI, but refused a breath test. The police obtained a search warrant for a blood sample. The defense argued that the wording of the implied consent law barred the issuance of a search warrant. Section 577.041 says that after a refusal to consent to a chemical test, "none shall be given." On the other hand, the search warrant statute says that a search warrant may issue for evidence of a crime. 542.271, RSMo. **HELD:** "The Missouri Implied Consent Law was enacted to codify the procedures under which a law enforcement officer could obtain bodily fluids for testing by consent without a search warrant. It provides administrative and procedural remedies for refusal to comply. Because it is directed only to warrantless tests authorized by law enforcement officers, it does not restrict the state's ability to apply for a search warrant to obtain evidence in criminal cases pursuant to Section 542.276 or a court's power to issue a search warrant under Section 542.266." Thus, police may seek and obtain a search warrant after a DWI suspect refuses to voluntarily consent to a breath or blood test.

For the applicable cases regarding warrantless blood draws see "Blood Draws Under Exigent Circumstances" in this book.

NOTE: HOSPITAL RECORDS MAY BE OBTAINED TO SHOW INTOXICATION IN DWI CASES.

State v. Todd, 935 S.W.2d 55 (Mo. App. 1996). Defendant was convicted of two counts of involuntary manslaughter in connection with a DWI-fatality. Defendant was taken to the hospital immediately after the crash. His blood was drawn for testing by the hospital. The hospital's test showing a blood alcohol of .11 was introduced via a business records affidavit accompanying the lab report. The medical examiner, a doctor, testified as an expert witness as to the meaning of a .11 blood alcohol reading. Defendant claimed the blood test results were inadmissible since the implied consent procedures set out in 577.020 to 577.041 were not followed. **HELD:** "The requirements and protection provided by the implied consent law do not apply to all blood tests offered as evidence but only to those offered pursuant to Chapter 577." This was not a prosecution under

Chapter 577 (DWI), but 565 (offenses against person). Thus, the laboratory test results from the hospital are admissible as business records. *Same result: State v. Yarbrough*, 332 S.W.3d 882 (Mo. App. S.D. 2011).

State v. Moore, 128 S.W.3d 115 (Mo. App. E.D. 2003). Defendant was driving while intoxicated and caused a crash that killed someone. At his manslaughter trial, the state offered the blood test results from the sample drawn at the hospital for treatment purposes. Defendant claimed it was privileged, but the court said that by statute, the doctor patient privilege does not apply. See 491.060(5), RSMo.

State v. Waring, 779 S.W.2d 736 (Mo. App. S.D. 1989). A prosecutor may obtain by search warrant the hospital's medical records pertaining to a drunk driver's blood alcohol level.

State v. Eichhorst, 89 N.E.2d 1144 (Ind. App. 2008). Investigative subpoena may be used to obtain the blood alcohol medical records of a drunk driver involved in a fatal crash. "We conclude that HIPAA [The Health Portability and Accountability Act, 45 C.F.R. 164.512(f)(1)(ii)(A)] was passed to insure an individual's right to privacy over medical records; it was not intended to be a means for evading prosecution in criminal proceedings." It does not apply to prohibit law enforcement from getting medical records in compliance with "a court ordered warrant, or a subpoena or summons issued by a judicial officer . . . or a grand jury subpoena."

State v. Fortner, 451 S.W.3d 746 (Mo. App. E.D. 2014). Defendant at hospital for crash injuring another had blood taken for medical reasons. After giving consent for a blood draw, a nurse tells the officer that the defendant's veins will not allow another draw, so the hospital gives the officer one of the vials previously drawn for medical purposes. **HELD:** Despite defendant's claim that the consent was only for a "future" draw, this consent applied to the blood already taken.

10. Search Warrants For Surgical Invasions

Search warrants generally cannot issue to allow surgical invasions of a suspect's body, nor will exigent circumstances generally allow surgical invasions; these will generally be allowed only after a contested hearing where the Fourth Amendment interests have been weighed by a court.

Winston v. Lee, 470 U.S. 753 (1985). Defendant was a suspect in an attempted armed robbery. The shop owner and the robber exchanged gunfire. The robber was hit. Defendant was found 20 minutes later, suffering a gunshot wound to his left chest. He

was identified by victim and was charged. Prosecutor moved for a court order directing defendant to undergo surgery to remove the bullet, which was lodged under his collarbone. Medical testimony first indicated the surgery would last 45 minutes, with 4% chance of temporary nerve damage and 1% chance of permanent nerve damage. Later medical testimony indicated that the bullet had moved and now was believed to be just under the skin, with no danger of nerve damage. The trial court issued the order, but then X-rays showed that the bullet was deeper than thought (one inch), and there would be risk of muscle, nerve, and tissue damage, as well as risk of infection. **HELD:** A compelled surgical intrusion into a suspect's body for evidence involves expectations of privacy of such a magnitude that the intrusion may be "unreasonable" under the Fourth Amendment, even if very likely to produce evidence of a crime. The Fourth Amendment test balances the individual's interest in privacy versus society's interest in obtaining the evidence. Factors include the magnitude of the intrusion, the risk to the suspect's safety, the extent of the intrusion upon the individual's dignity and privacy, the strength of the probable cause, and whether the state's need for the evidence is compelling. **CONCLUSION:** The operation would be unreasonable in that the medical risks are not insignificant, the privacy invasion is severe, and the need for the bullet is not compelling since the other evidence against the defendant is so strong.

United States v. Crowder, 543 F.2d 312 (D.C. Cir. 1976). A dentist was killed in his office with his own gun. Police arrested Sandra Toomer for the murder. She implicated the defendant, saying she and defendant had gone to the office to rob the dentist, a fight ensued, and she fled, hearing several shots as she ran off. When defendant rejoined her, he said he'd been shot in his arm and leg, but had killed the dentist. The defendant was arrested and had bandages in both places. X-rays showed bullets in both locations. The prosecutor got an affidavit from a doctor saying the operation on the arm (but not the leg) would merely be "minor surgery." The prosecutor sought a court order for removal of the bullet from the arm. The court approved it after an adversarial hearing at which the competing interests were balanced.

State v. Overstreet, 551 S.W.2d 621 (Mo. 1977). Defendant was a suspect in a robbery murder. The victim managed to shoot the robber. Defendant was shortly afterward treated at a hospital for a gunshot wound to the left buttock. When defendant was questioned by police, he first claimed he had been shot by a stray bullet in a drive-by shooting at a particular location. The police checked the location and found the snow undisturbed. After defendant was charged, the prosecutor filed a motion for defendant to be examined concerning the risks of surgery to remove the bullet. The motion was granted. Later, without any additional hearing, the judge issued an order for the surgery after an affidavit was filed from a doctor saying that the bullet could be removed by a simple surgical procedure, but that there was no compelling medical reason to remove it. **HELD:** Proper constitutional procedures were not followed because there was no judicial adversarial hearing at which all factors could be weighed by the court prior to the

intrusion. The four requirements to determine whether surgery in search of evidence is reasonable are: (1) A judicial adversarial hearing in which defendant is represented by counsel and is given the opportunity to cross-examine and offer witnesses; (2) An opportunity for appellate review prior to surgical removal; (3) The evidence sought to be surgically removed must be relevant; and (4) Surgical procedure should be a minor intrusion without risk of harm or injury to defendant. Reversed for new trial without the bullet.

State v. Richards, 585 S.W. 2d 505, (Mo. App. E.D. 1979). Defendant is a suspect in the murder of the City Marshall of Silex. The Marshall had been in gunfight with his murderer, producing another butt-shot defendant. This bullet lodged 4 inches under the skin of the right hip. The *Overstreet* test was applied at an adversarial hearing. The trial court's order requiring the surgery was upheld on appeal.

11. X-Rays, Pumping Stomach, Inducing Vomiting, or Giving Laxatives

Procedures such as x-rays, pumping stomach, inducing vomiting, or giving laxatives fall between drawing blood and surgery. Obtaining a search warrant is probably the best procedure to use if time permits, although the exigent circumstances exception can apply.

Rochin v. California, 342 U.S. 165, 173 (1952). Police made forcible entry into defendant's room, saw him put two capsules into his mouth, tried unsuccessfully to extract them by force, and then took him to the hospital where a doctor forced him to vomit by putting a drug through a tube into his stomach. **HELD:** This warrantless conduct shocks the conscience. Illegally breaking into the privacy of defendant's home, struggling to forcibly open his mouth, forcibly extracting his stomach contents – this method offends “a sense of justice.”

People v. Thompson, 820 P.2d 1160, 1164 (Colo. App. 1991). Officers doing surveillance of a drug buy approached the defendant and saw him put something in his mouth and swallow it. They got a search warrant for an x-ray. It revealed a drug-filled balloon in his gastrointestinal area. **HELD:** There was a “clear indication” that defendant had swallowed a foreign object, most likely a controlled substance. Any safety risk presented by an x-ray was minimally intrusive. The search warrant was reasonable.

State v. Strong, 493 N.W.2d 834 (Iowa 1992). Upheld pumping the stomach of a defendant who had swallowed crack cocaine. Police had approached defendant, who was a suspect in a shooting, in a public place. He put small objects in his mouth and fled. Officers chased and caught him and saw what appeared to be rocks of crack cocaine in his mouth before he swallowed them. After gulping them down, he admitted they were crack cocaine. Officers took him to a hospital and had his stomach pumped. Citing

Winston v. Lee, the Court emphasized: (1) Clear probable cause existed to arrest defendant; (2) Method used was reasonable; (3) No health safety risk to defendant, no lasting pain, and procedure was done in hospital; (4) Virtual certainty the procedure would yield the evidence; and (5) Exigent circumstances. *Rochin* was distinguished since this was not an invasion of the person's home.

State v. Payano-Roman, 714 N.W.2d 548, 561 (Wis. 2006). Defendant swallowed a plastic bag filled with heroin. Police warrantlessly had doctor administer a laxative. HELD: Giving the laxative was lawful as it "was medically indicated and likely reduced the health risks" to the defendant, it was "medically appropriate," and the "officers had a clear indication that the defendant's stool would contain evidence of a crime."

12. Removing Baggie of Drugs From Rectum (The "Crack in Crack" Cases)

Removing a baggie of drugs from a person's rectum will usually require a search warrant. *People v. More*, 738 N.Y.S.2d 667 (2002). Police obtained consent to enter an apartment where defendant and others were believed to be "cutting up cocaine." Defendant was sitting on a couch with a crack pipe and a rock of crack cocaine on a nearby table. They arrested defendant and patted him down for weapons, finding none. They removed him to a bedroom (away from the other people) to conduct a strip search. When they examined his butt, they saw an outer portion of a plastic baggie protruding from his rectum. A police officer (presumably the low man on the totem pole) removed the baggie, which contained several pieces of crack cocaine. **HELD:** Even when there is a "clear indication" that incriminating evidence will be retrieved from a bodily intrusion, search warrants are normally required. In order for this search to be justified, the State would need to show exigent circumstances "in which the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of the evidence." The police made no showing that the evidence would have been destroyed during the time it would have taken to get a search warrant. "Notably, no police officer testified that, despite the available means of incapacitating defendant and keeping him under full surveillance, an immediate body cavity search was necessary to prevent access to a weapon or prevent his disposing of the drugs. Nor was there any evidence the police were concerned that the drugs – which were wrapped in plastic – could have been absorbed into defendant's body. The absence of exigent circumstances dictates the conclusion that the body cavity search here was unreasonable."

United States v. Booker, 728 F.3d 535 (6th Cir. 2013). After a valid arrest, a suspect was strip searched at the station and a string was seen protruding from his anus. He tried to push it further in. Officers transported him to the hospital where he resisted a rectal exam. Medical personnel administered a sedative and paralytic agent to him intravenously and intubated him to control his breathing. He was unconscious for 20 to 30 minutes and paralyzed for 7 to 8 minutes. A doctor removed five grams of crack

cocaine from his rectum. **HELD:** This was state action and went too far without a warrant.

United States v. Cameron, 538 F.2d 254 (9th Cir. 1976). Police suspected defendant of smuggling drugs inside his body because of a tip, his nervousness, fact he was under influence of drugs, and lubricant around anus. Defendant was taken to hospital where doctor did an anal probe, but could not get the item out. Defendant was given a water enema, but it did not work. He tried to resist taking an oral laxative, but officers forced it down. Later, he defecated a condom filled with heroin. **HELD:** Although a search warrant is not always required, under these facts the officers should have gotten one.

But see: *People v. Allman*, 2001 Cal. App. Unpub. LEXIS 2283 (10/25/2001). Defendant had been arrested and the jail had a policy requiring a strip search of all persons arrested for being under the influence of drugs. Defendant was walking stiffly and his buttocks were tightly clenched. Defendant first consented to a search but objected when the officers focused upon his clenched buttocks. Police summoned paramedics, who transported him to a hospital. On the way he admitted he had a gram of meth in his butt cheeks, but still objected to the search. At the hospital, he was placed on a table and his feet and hands were restrained so he could not destroy the evidence. His buttocks were clenched so tightly the officers still could not retrieve the item. Finally, they told the defendant that they would remove the item by force if he did not cooperate. He relented and an officer used his index finger to “swipe” the baggie away. It had been between his buttocks, but not inside his rectal cavity. The court holds that this was not a body-cavity search, but a strip search, and was reasonable under the totality of the circumstances. “Generally, post-arrest searches of the body to discover controlled substances are permitted. . . Retrieval of concealed contraband preserves evidence, prevents the import of illegal substances into a penal facility, and also guards against accidental overdosing by the individual ingesting or secreting the drugs. Here, the search was not conducted in an unreasonable manner, and the visible contraband was retrieved without invading a body cavity.”

13. Removing Item From Mouth

Removing a bag of drugs from a person’s mouth may usually be done without a warrant.

People v. Fulkman, 286 Cal. Rptr. 728 (Cal. App. 4th Dist. 1991). Defendant’s home was being searched for drugs pursuant to a search warrant. Defendant was seen putting a “two-inch wad” of masking tape into his mouth. Police kept him from swallowing it by applying pressure to his chin and throat by placing two fingers on each side of his throat. When he did not spit it out on command, an officer put the capped end of his Bic pen into defendant’s mouth and used a sweeping motion to pry the object out, which proved to be filled with sixteen balloons of heroin. **HELD:** “The Fourth Amendment neither

forbids nor permits all involuntary intrusions into the human body.” The test is whether the search was reasonable under the circumstances. “In order to prevent the destruction of evidence, police may reach into a person’s mouth to recover evidence if there is sufficient probable cause to believe a crime is being, or has been committed. The mouth is not a sacred orifice and there is no constitutional right to destroy or dispose of evidence.” At the same time, the officers must use only that degree of force necessary to overcome defendant’s resistance. Factors include: (1) Whether there was probable cause for the search; (2) Whether the procedure used threatened the person’s safety; (3) Whether the search would damage the individual’s sense of personal privacy and bodily integrity; (4) The community’s interest in fairly and accurately determining guilt or innocence. Search upheld.

14. Knock & Announce Requirement and Exceptions.

Before entering a premises to execute a search warrant, officers are generally required to knock and announce their identity and purpose. Exceptions to this requirement exist, allowing no knock and announce, and allowing forced entry.

Wilson v. Arkansas, 514 U.S. 917 (1995). While executing a drug search warrant, officers found the door to defendant’s home open. They entered before knocking or identifying themselves as police officers. Defendant claimed the Fourth Amendment requires officers to knock and announce in order for a search warrant to be reasonable. The trial court disagreed and denied the motion to suppress. The Supreme Court REVERSES, holding that the Fourth Amendment protects against unreasonable searches and seizures. A search not preceded by a knock and announce may under some circumstances be unreasonable, and that factor should be considered in determining whether a search was reasonable. Certainly, law enforcement interests in cases where the defendant is dangerous, or where a high risk of escape exists, or where a high risk of destruction of evidence exists should be considered.

Richards v. Wisconsin, 520 U.S. 385 (1997). In *Wilson v. Arkansas*, the U.S. Supreme Court held that the Fourth Amendment incorporates the common law requirement that police officers entering a dwelling must knock on the door and announce their identity and purpose before attempting forcible entry. It said this would not be a “rigid” rule but could have exceptions based upon reasonableness. In this case, Wisconsin had concluded that police officers are never required to knock and announce when executing a search warrant in a felony drug investigation. “We disagree that the Fourth Amendment permits a blanket exception” for the knock and announce rule for this “entire category of criminal activity.” *Id.* at 388. However, in this particular case, the decision not to knock and announce was reasonable in that when the police officers knocked on defendant’s door at 3:40 a.m., he opened it a crack, with the chain still on, saw at least one officer in uniform, and quickly slammed the door. The officers waited 2

or 3 seconds before kicking and ramming the door to gain entry, catching the defendant going out a window. They found cocaine hidden above the bathroom ceiling tiles. The test: “In order to justify a no-knock entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence.” *Id.* at 394.

State v. Hamilton, 8 S.W.3d 132 (Mo. App. S.D. 1999). Police executing search warrant in drug case knew that defendant reportedly had a gun (though perhaps it was a BB gun), plus 25 prior arrests (which included armed robbery and carrying a concealed weapon), and the items being looked for were small pieces of crack cocaine, which could “easily be discarded through bathroom or kitchen fixtures.” **HELD:** It was reasonable for the officers to enter without knocking and announcing. The police did have a reasonable suspicion that knocking and announcing their presence would have been dangerous or futile or would have allowed the destruction of evidence. *See also: State v. Baker*, 103 S.W.3d 711 (Mo. banc 2003) (reasonable suspicion that defendant was violent justified a no knock execution of a search warrant).

NOTE: Most jurisdictions have some type of statute requiring law enforcement officers executing a search warrant to expressly announce their presence before entering to search a premise.

FEDERAL LAW: The federal Knock and Announce statute is at 18 U.S.C. 3109.

MISSOURI LAW: Section 105.240, RSMo, states: “Every officer may break open doors and enclosures to execute a warrant or other process for the arrest of any person, or to levy an execution, or execute an order for the delivery of personal property, if, upon public demand and an announcement of his official character, they be not opened.”

State v. Williams, 539 S.W.2d 530 (Mo. App. 1976). Held that this section imposes no such requirement of public demand and announcement where no break-in is necessary to execute the warrant. In this case, a policeman who claimed to be a drug customer was let into the house by the wife of the drug dealer who believed he was one of her husband’s customers. Ruse, deception or subterfuge may be used by officers to gain entry with a search warrant without knocking, as long as force is not used in the entry.

State v. Erwin, 789 S.W.2d 509 (Mo. App. 1990). Police were not required to announce who they were because no force was necessary to break down any door. They had knocked on the door and it swung open as they knocked. They went in without announcing their authority. **HELD:** No problem with the execution of this search warrant; evidence admitted.

A. How Long to Wait After Knocking Before Breaking?

Once the police knock and announce, how long must they wait before kicking down the door? In general, delays of 30 seconds or more seem to be uniformly upheld; but delays of less than 30 seconds are often held not sufficient, absent exigent circumstances. John M. Burkoff, *Search Warrant Law Deskbook*, Chap. 12.

United States v. Banks, 540 U.S. 31 (2003). Police, armed with a search warrant for cocaine in the apartment of a suspected drug dealer went to his apartment in the afternoon. They knocked on the door, announcing, "Police! Search warrant!" The apartment was small. The officer at the back door could hear the knock and announce at the front door. After waiting 15 to 20 seconds with no response they used a battering ram to force open the door. They entered and found defendant, dripping wet and clad in a towel. He had just gotten out of the shower. They also found cocaine. Defendant was convicted of possession of cocaine with intent to distribute. **HELD:** The 9th Circuit ruled this to be an unreasonable search under the Fourth Amendment. The Supreme Court reversed, holding that the standard of reasonableness as to the length of time police with a search warrant must wait before entering without permission after knocking depends upon the totality of the circumstances. Because cocaine is quickly disposed of and because this house was small, it was reasonable for the officers to wait no longer than 15 to 20 seconds before knocking down the door. Otherwise the cocaine could have been flushed.

B. Exigent Circumstances For Not Knocking

Executing officers are entitled to ignore the knock and announce requirement in exigent circumstances. Typical examples are where there is a reasonable likelihood that notice to the occupants of the premises would result in violent resistance or the removal or destruction of evidence.

State v. Hamilton, 8 S.W.3d 132 (Mo. App. S.D. 1999). Police executing a search warrant in a drug case know that defendant reportedly has a gun (though perhaps only a BB gun), plus 25 prior arrests (including armed robbery and carrying a concealed weapon) and the items being looked for are small pieces of crack cocaine which could "easily be discarded through bathroom or kitchen fixtures." **HELD:** Reasonable for officers to enter without knocking and announcing.

State v. Parrish, 852 S.W.3d 426 (Mo. App. W.D. 1993). Exigent circumstances excuse noncompliance with statute requiring police officers to announce their authority and purpose prior to forcing their way into residence.

U.S. v. Garcia, 741 F.2d 363 (11th Cir. 1984). Failure to announce purpose held OK where officers heard shuffling noises inside that sounded like occupant trying to hide and where they could reasonably believe that he might try to wash cocaine down the sink.

U.S. v. Kane, 637 F.2d 974 (3rd Cir. 1981). Failure to make any announcement at all held okay where officers knew occupants were armed and were engaged in large-scale drug activity.

C. Exclusionary Rule Inapplicable IF Officers Have Warrant

Hudson v. Michigan, 547 U.S. 586 (2006). Police got a warrant to search defendant's home for drugs and firearms. They knocked but only waited three to five seconds before entering through the unlocked door. The defendant was sitting in an easy chair with a gun under its cushion and crack cocaine in his pocket. **HELD:** The exclusionary rule does not apply to violations of the "knock and announce" rule because a search warrant has already been issued, so the search itself is reasonable in that it was already approved by a judge. The remedy for the defendant is not the suppression of the evidence, but instead a civil suit for any damages to the door or for the momentary invasion of privacy.

D. Exclusionary Rule Still Applies IF Officers Do Not Have Warrant

State v. Gibbs, 224 S.W.3d 126 (Mo. App. W.D. 2007). Defendant had committed a robbery, where he had passed a note saying he had a gun. He got away with lots of cash. Motel employees said a person matching his description was in a motel room. They provided a key to police. Instead of waiting to get a warrant, the officers opened the door. Defendant saw them and bolted for the window. The officers grabbed him as he was going out the window, but he made it out, only to be nabbed outside. After he was handcuffed, officers found cash, a knife and a crack pipe on his person. **HELD:** In *Payton v. New York*, 445 U.S. 573 (1979) the Supreme Court held that the Fourth Amendment prohibits police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest. This is a different matter than the case of *Hudson v. Michigan*, 547 U.S. 586 (2006), which held that the exclusionary rule did not apply to a violation of a knock and announce when a search warrant had already been issued by a judge. "*Payton* still governs . . . a failure of knock and announce without a search warrant." Exigent circumstances did not justify this entry, since even though the crime was a robbery, there was no showing that a gun was really involved, there was no indication that the suspect would escape if police backed off and got a warrant, nor was there any indication that lives were endangered by holding off and getting a warrant. Thus, the evidence seized incident to defendant's unlawful arrest must be suppressed.

15. Significance of Prior Refusal to Issue Warrant.

In order to avoid the undesirable practice of “magistrate shopping” by the prosecution, when one magistrate has refused to issue a search warrant based upon a ruling of insufficient probable cause, some cases hold that the same information cannot serve - standing alone - as the basis for issuance of a search warrant by a second magistrate. *U.S. v. Davis*, 346 F.Supp. 435 (S.D. Ill. 1972).

Where, however, the information tendered to the second magistrate to support probable cause is not identical to that presented to the first judge (i.e. some additional information has been added in the affidavit) there is no constitutional defect in the warrant issued by the second magistrate. *State v. Caldwell*, 279 S.E.2d 852 (N.C. Ct. App. 1981).

Thus, a prosecutor should NEVER resubmit the same affidavit to a second judge if the first has found no probable cause, without making some change in the affidavit, however innocuous the additional information might appear by itself.

16. Particularity Requirement - Places to be Searched.

The places to be searched pursuant to a search warrant must be described with particularity in the warrant or an attached affidavit in order for the warrant to be constitutional. “Particularity” in this setting means that the description must be detailed enough to ensure that the executing officers can reasonably ascertain and identify the place to be searched.

- A. Street numbers, geographic indicators, apartment numbers, city, county, and state locations; legal property descriptions, plat map references, directions on a map; descriptions of house color, style, size; description of the neighborhood – all of these details may be useful.
- B. If search warrant is for a car, the make, model, year, color, license plate number, presence of bumper or dealer stickers, VIN #, owner’s name, and location, are all useful.
- C. A person may be searched by search warrant, too. Not a bad idea to describe him in detail and include him in the warrant in drug cases, particularly. Often the person would be arrested, anyway, and could be searched incident to the arrest.
- D. Some prosecutors have tried to include in the search warrants “all persons on premises.” The U.S. Supreme Court has reserved ruling on this issue, but the majority of lower courts say it is unconstitutional. *See Beeler v. State*, 677 P.2d 653 (Okla. Crim. App. 1984).
- E. In drafting the search warrant, the prosecutor should use language saying that the “premises” at the particular address is to be searched, assuming there is probable

cause for the whole house to be searched. Cases hold that the language “premises” includes all buildings on the property, all appurtenances thereto, and any vehicles owned or controlled by the owner of, and found upon, the premises. *Commonwealth v. Signorine*, 535 N.E. 2d 601 (Mass. 1989) (collecting cases); *United States v. Pennington*, 287 F.3d 789 (8th Cir. 2002) (vehicles on premises may be searched, except those of obvious guests).

But see: State v. Varvil, 686 S.W.2d 507 (Mo. App. E.D. 1985), where “premises” held not to include a second building on the property, completely unmentioned in the search warrant or affidavit. Issue became whether this was saved by good faith exception.

State v. Waller, ___ S.W.3d ___ (Mo. App. W.D. 10/7/2014). The scope of a search of a residence pursuant to a warrant includes places within the curtilage of that residence, including a two-car garage and an outdoor furnace. NOTE: The Missouri Supreme Court has accepted transfer of this case.

- F. A search warrant to search defendant’s residence for marijuana allowed the officers to search the entire house, not just the living room where the marijuana had been seen by the informant who gave the affidavit. *State v. Hodges*, 705 S.W.2d 585 (Mo. App. S.D. 1986).
- G. *State v. Hardy*, 497 S.W.3d 836 (Mo. App. S.D. 2016). The search warrant described the house to be searched as the first house on the left of the road, when it was really the third building. HELD: This description was okay since it was clear which house was meant. (One of the other buildings was a barn and the other was not visible from the road.) “Practical accuracy rather than technical precision governs in determining whether a search warrant accurately describes the premises to be searched . . . Where one part of the description of the premises to be searched is inaccurate, but the description has other parts which identify the place to be searched with particularity, searches pursuant to such warrants have been routinely upheld. A technically wrong address does not invalidate a warrant if it otherwise describes the premises with sufficient particularity so that the police can ascertain and identify the place to be searched.”

17. Particularity Requirement - Things to be Seized.

The things to be seized pursuant to the execution of a search warrant must be described with particularity in the warrant or an attached affidavit in order for the warrant to be constitutional. The particularity requirement in this setting is satisfied when the description is as specific as the circumstances and the nature of the activity under investigation permit.

A. Contraband & Evidence Examples

State v. Tolen, 304 S.W.3d 229, 232-33 (Mo. App. E.D. 2009). “Controlled substances”

is sufficient. “Marijuana and paraphernalia related to marijuana” is sufficient. “Instrumentalities of sodomy” is insufficient. “Pornography” is insufficient.

People v. Lindholm, 591 P.2d 1032, 1034 (Colo. 1979). In a murder investigation where officers hoped to link red wool-like fibers from the scene of crime to defendant, a warrant was issued for “articles of clothing, floor covering, upholstery fabric and blankets made of red wool-like fibers and traces of such fibers.” **HELD:** “The search warrant must specify the objects to be seized with sufficient particularity so that nothing is left to the discretion of the officer executing the warrant.” *Id.* at 1035. This description was sufficiently specific.

B. Fruits of Crime

Unlike contraband, fruits of crime cannot ordinarily be readily identified by their nature or physical character, and thus their description must be more specific. A bare reference to stolen property, for example, is not sufficient.

State v. Bussard, 760 P.2d 1197, 1203 (Idaho Ct. App. 1988). “Miscellaneous gold and silver jewelry” is not specific enough.

People v. Murray, 143 Cal. Rptr. 502, 503 (Cal. Ct. App. 1978). “Television sets, power tools, appliances, hand tools, home furniture, clothing, power drill press” not specific enough.

C. But a Search Warrant Description will Always be Valid as Sufficiently Particular When it is as Specific as the Circumstances and the Nature of the Activity Under Investigation Permit.

U.S. v. Shoffner, 826 F.2d 619, 631 (7th Cir. 1987). Search warrant listed “stolen motor vehicles, parts of stolen motor vehicles, materials used to retag, dismantle and rebuild stolen automobiles” and executing officers “had every reason to believe that some of the vehicles named in the affidavit would no longer be on the premises . . . and that others would have been added.”

State v. Strickland, 609 S.W.2d 392 (Mo. 1980). Not mentioning shotgun shells in search warrant did not require their suppression where warrant authorized police to search defendant’s residence for shotgun, diamond rings, and a revolver. Green shotgun shell casings had been found at the scene of the shooting but police did not know of existence of “green” shells at defendant’s residence when they applied for the search warrant. It was apparent to the police when they saw them, though, that they constituted evidence.

18. Timeliness of Execution.

MISSOURI: A search warrant “shall be executed as soon as practicable” and shall expire if not executed and the return made within ten days after the date of making the application. Section 542.276.8, RSMo.

State v. Miller, 46 S.W.2d 541 (Mo. 1932). A search made 12 days after issuance was unauthorized and illegal, therefore unreasonable. Evidence should have been suppressed.

A search warrant must be executed **both** within the jurisdiction’s maximum time period (in MO, 10 days) and also prior to the time the probable cause which supports the warrant grows stale.

As seen, Missouri statute says search is to be conducted “as soon as practicable.”

WARNING: DON’T DELAY TOO LONG.

State v. Jackson, 821 S.W.2d 908 (Mo. App. W.D. 1992). Police got a search warrant for drugs based on informant’s affidavit that he had seen methamphetamine in defendant’s house “within the last 48 hours.” Police waited 6 days to execute the warrant. The defendant claims it had become stale. **HELD:** Search valid. Test as to staleness is resolved by looking at all factors, including the nature of the wrongful activity alleged, the length of the activity, and the nature of the property sought to be seized, to evaluate whether probable cause still existed. It is relevant, but not dispositive, that the execution of the search warrant occurred within the 10-day time frame prescribed by law.

Cave v. Superior Court, 73 Cal. Rptr. 167,169 (Cal. App. Ct. 1969). A 7-day delay was held unreasonable even though the statute provided a 10 day maximum, because there was no continuing probable cause demonstrated and the “primary if not the sole reason for the delay was the expectation of finding additional property.”

United States v. Shegog, 787 F.2d 420 (8th Cir. 1986). A search warrant was issued for PCP based upon probable cause that it was in the house, but the officers waited 8 days to serve it because the informant said another shipment was coming and called after it arrived. **HELD:** Search warrants should be executed promptly, and the Fourth Amendment requires that they be executed while probable cause still exists that the evidence searched for is present. The records shows probable cause still existed even after the 8-day delay.

NOTE: In 2008, Section 542.276.8 was amended to clarify that an item seized and

removed from the searched premises pursuant to the execution of a search warrant may be searched later at the station even after the 10 days without the necessity of getting a new search warrant.

FEDERAL: The search is to be conducted “within a specified time no longer than 14 days.” 41(e)(A)(i).

19. Receipt, Return & Inventory Requirements.

The officer shall fill out an itemized inventory and receipt for property taken, and leave a copy of the receipt and a copy of the warrant with the person from whom the property was taken, or leave the copies at the site searched if no person is present. **MISSOURI:** 542.291; **FEDERAL:** 41(f). It is a good idea to use a standard form for the Return & Inventory, and use duplicate copies when filling it out at the scene, so a copy can be left. NOTE: Copies of the Application and Affidavits do not need to be left with suspect. It is only mandatory to leave a copy of the warrant and a copy of the receipt/return & inventory.

A copy of the receipt (Return & Inventory) shall be delivered to the Prosecuting Attorney within 2 working days of the search. 542.291.5

After the search, the warrant and a return, signed by the officer making the search, shall be delivered to the judge who issued the warrant. The return shall show the date and manner of execution, what was seized, and the name of the possessor and owner, if known. The return shall be accompanied by a copy of the itemized receipt given the suspects under 542.291, if they are separate documents. The judge or clerk shall, upon request, deliver a copy of such receipt to the person from whose possession the property was taken and to the applicant for the warrant.

State v. Hunt, 454 S.W.2d 555 (Mo. 1970). Total failure to file return did not invalidate the search warrant, where the defendant could not show he was prejudiced by its absence, and the court ordered remedied the situation by ordering the prosecution to file a return within 10 days of the hearing.

State v. Buchli, 152 S.W.3d 289, 306 (Mo. App. W.D. 2004). One lawyer beat another lawyer to death at their law office. A search warrant was issued for the suspect lawyer’s home. No inventory was left at the premises as required by statute, nor was a proper return ever filed. **HELD:** “A return to a search warrant is a ministerial act, and even the total failure to file a return does not affect a warrant’s validity.”

NOTE: Effective 8/28/2004, officers in Missouri were required to also provide the court with photographs or copies of the items seized. Section 542.276.6(6), RSMo. This short-

lived requirement was repealed, effective 8/28/2005.

FEDERAL: This return to the judge must be made “promptly.”

20. Nighttime Searches.

Most jurisdictions require search warrants to be executed during daytime hours unless a special showing of need to search at night is made to the issuing judge and noted on the warrant.

FEDERAL: The search warrant must command the officer to execute the warrant during the daytime, unless the judge for good cause expressly authorizes otherwise. Daytime per Rule 41 is between 6:00 a.m. and 10:00 p.m.

MISSOURI statute says: “The search may be made at night if making it during the daytime is not practicable.” 542.291.

One would assume “nighttime” means between sunrise and sunset, but that is not always the case. Jurisdictions have variously pegged nighttime as beginning somewhere between 7:00 to 10:00 p.m. and ending 6:00 to 7:00 a.m. Execution of a search warrant only a few minutes after the beginning of nighttime may sometimes be treated as *de minimis* and, hence, lawful. This is also true if it began before nightfall and continued into the night.

James v. State, 658 S.W.2d 382 (Ark. 1983). Search after 8:00 p.m. nighttime rule held to be okay where it began at 7:00 p.m., paused, began again at 9:15 p.m. and was finished by 10:40 p.m.

If there is a reasonable probability that the evidence sought will be removed or destroyed before a warrant could be executed in daylight, a nighttime search will always be okay.

People v. Siripongs, 247 Cal. Rptr. 729 (Cal. 1988). Evidence existed that the stolen property was to be quickly disposed of.

State v. Salley, 514 A.2d 465 (Me. 1986). Evidence that defendant was selling the drugs and they would be at least partly sold that night.

State v. Paul, 405 N.W.2d 608 (Neb. 1987). Evidence that marijuana was being smoked that night and might be burned up by morning.

NOTE: A violation of the nighttime search prohibition is not necessarily considered a

constitutional violation. Only half of the jurisdictions ever applied the exclusionary rule in this situation; others did not. Almost certainly, the Supreme Court would rule that under *Hudson v. Michigan*, 547 U.S. 586 (2006) (declined to apply exclusionary rule to violation of knock and announce requirement since a search warrant had been issued) the exclusionary rule would not apply.

Pianzano v. State, 423 So.2d 258 (Ala. Crim. App. 1981) (exclusionary rule applied); *United States v. Anderson*, 851 F.2d 384 (D.C. Cir.), *cert den.* 488 U.S. 932 (1988) (declined to apply exclusionary rule on ground that nighttime search prohibitions are NOT constitutionally required.)

21. Persons on Premises - Detention, Search or Arrest. “Detention” of Persons On or Near Search Premises.

A. Detention

Occupants of search premises may be detained during the execution of a search warrant for contraband but may not be searched or arrested in the absence of additional information establishing probable cause. Persons found leaving the search premises may also be detained (but not arrested or searched) during the execution of a search warrant for contraband if the executing officers reasonably believe they are occupants of the premises.

Michigan v. Summers, 452 U.S. 692, 705 (1981). Defendant was coming down exterior front steps when police arrived and detained him. Drugs were found in his pocket. **HELD:** Evidence admissible. “A warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted.”

State v. Rios, 840 S.W.2d 284 (Mo. App. W.D. 1992). A search warrant for a house carries with it the right to detain occupants of the house while officers conduct search.

The detention is lawful even in the absence of probable cause or reasonable suspicion that any specific occupant has committed a crime. This is because by issuing the warrant the judge has determined “that police have probable cause to believe that someone in the home is committing a crime.” Also, the risk of harm to everyone is minimized if the occupants’ self-interest induces them to open locked containers so they don’t get damaged.

In *Summers*, one person was barely outside the home, having just come down the steps when the police got there. He was also lawfully required to reenter and remain

there while they conducted the search. They found out he was owner and after drugs were found in the house they arrested him. They found more heroin in his pocket.

Bailey v. United States, 133 S.Ct. 1031 (2013). Police had a search warrant to search a basement apartment for a gun. The informant had seen the gun when he was in the apartment to buy drugs from a heavysset black male with short hair known as "Polo." As police did surveillance, getting ready to do the search, two black males fitting Polo's description left the basement apartment, got into a car, and drove off. Some officers went into the apartment to do the search; others followed the two potential Polos for five minutes and pulled over the car about a mile away. In a pat down, they found keys in defendant's pocket that went to the apartment, where a gun was found. **HELD:** A detention incident to the execution of a search warrant is only reasonable if the person being detained is in the "immediate vicinity" of the place being searched, so this was not a valid detention under that ground. Remanded to consider whether this was a valid *Terry* stop.

B. Occupants v. Visitors

The *Summers* decision legitimized detention of the "occupant" of search premises, without explicitly stating what was meant by that term. Lower courts have interpreted "occupant" broadly enough to not require ownership of the search premises before detention is permissible, but narrowly enough so as to preclude the detention of known non-occupants.

United States v. Cowan, 674 F.3d 947 (8th Cir. 2012). Defendant was one of eight people present in house where drug sales had taken place at time search warrant executed. **HELD:** He was properly handcuffed and detained. The officers were outnumbered and it was reasonable to briefly detain the people present and pat them down.

Lippert v. State, 664 S.W.2d 712 (Tex. Crim. App. 1984). Known visitor arrived after search began and said, "Hey, what's going on?" Police said, "Search warrant. Assume the position." With no specific reason to think he was armed, an officer frisked him and had him take a place on the floor next to the others. Drugs were found in a vial in his pocket. **HELD:** Absent reasonable belief he was armed or probable cause to believe he possessed drugs or contraband, it was unlawful to search defendant merely because he arrived at scene of search.

C. Handcuffs

The detention should employ the least intrusive means reasonably necessary, but can include use of handcuffs if reasonably necessary for safety of officers.

Muehler v. Mena, 544 U.S. 93, 100 (2005). Police detained Mena and others in handcuffs for three hours during a search of the premises they occupied. The warrant authorized a search for weapons and evidence of gang membership, relating to a gang-related shooting. The use of handcuffs was reasonable since a search for weapons in a gang-related crime is “inherently dangerous” and the use of handcuffs “minimizes the risk of harm to both officers and occupants.” The “need to detain multiple occupants” made the use of handcuffs “all the more reasonable.”

United States v. Miller, 974 F.2d 953 (8th Cir. 1992). An investigative detention of a suspect at an airport included handcuffing her before probable cause was developed, but while reasonable suspicion existed. Since there were six suspects and only three officers, the Court held that the record supported the officers’ concerns that the suspects should be handcuffed “for safety concerns” in order to “maintain the status quo in order to achieve the purposes of the investigative detention, i.e., determine if there was probable cause to arrest any of the suspects for a drug offense.”

D. Preventing Property Owner from Entry

A defendant whom the police have probable cause to believe has drugs in his home may be prevented from entering the home unsupervised while the police are awaiting the issuance of the warrant.

Illinois v. McArthur, 531 U.S. 326 (2001). Police officers with probable cause to believe that defendant had hidden marijuana in his home prevented him from entering the home unaccompanied by an officer for about two hours while they were obtaining a search warrant. Once they had the warrant, they went inside and found marijuana and drug paraphernalia. **HELD:** The officers acted reasonably. The temporary intrusion of preventing defendant from entering his home was reasonable in light of the possibility that he would destroy the evidence if he got inside. **NOTE:** The same procedure was followed in *State v. Edwards*, 36 S.W.3d 22 (Mo. App. W.D. 2000).

E. Full Searches of Persons On or Near Search Premises.

An individual may be searched if he or she is specifically identified as a search target in the search warrant. Although people on the premises may be detained, a warrant to search a place does not normally authorize a full search of each individual in that place.

Ybarra v. Illinois, 444 U.S. 85, 92 n. 4 (1979). “A warrant to search a place cannot normally be construed to authorize a search of each individual in that place.” The search of a bar patron simply because of his presence at the scene of search is held improper. A search warrant had been issued to search the bar and the bartender for heroin and controlled substances. Defendant was simply one of many patrons at the bar.

Doe v. City of Chicago, 580 F.Supp. 146 (1983). A search warrant was issued to search an apartment and a specifically-described white male. The police strip searched a mother and her two teenage daughters just because they were on the premises. **HELD:** “A person’s mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. *Id.* at 150-51. “The prohibition against ‘open ended’ or ‘general’ warrants means that a warrant to search a place cannot be construed to authorize a search of each individual in that place.” *Id.* at 149.

PRACTICE TIP: In drafting a search warrant, the police and prosecutor should word it to cover the specific defendant and any other known individuals expected to be present, as well as the place. In such cases, those people may be thoroughly searched as well as the premises.

NOTE: An individual who is lawfully detained on a search premises pursuant to the execution of a search warrant may thereafter be lawfully arrested if probable cause develops from things found to establish probable cause for the arrest. Once lawfully arrested, the arrestee may then be searched incident to that arrest. John M. Burkoff, *Search Warrant Law Deskbook*, 13.3 & 3.4.

F. Searches of Purses or Bags of Visitors on Search Premises.

United States v. Johnson, 475 F.2d 977 (D. C. 1973). A search warrant was being executed on the apartment of James Stewart for drugs. Officers entered the apartment while Stewart was climbing out a window, and defendant, a woman, was sitting on a couch. A purse was on the coffee table in front of the couch. The officers searched the purse and found narcotics and arrested her. Before entering Stewart’s apartment, police had been advised that defendant was a visitor on the premises. **HELD:** The search of the purse was within the scope of the warrant to search the premises. The purse was not being worn by defendant and was thus not a search of her person. The dissent felt the search was not permissible because the purse was clearly the visitor’s, not James Stewart’s, and it would have been valid only if incident to her arrest.

United States v. Teller, 397 F.2d 494 (7th Cir. 1968). A search warrant was being

executed on the premises of Sheldon Teller's house, plus an arrest warrant for Teller. The object of the search was money, the fruit of a crime. While the search was going on, the defendant (Teller's wife) arrived in her car, parked it in the driveway, and walked in, carrying a purse. She put the purse on a bed in the bedroom and left it there, leaving the room. The officer searching the bedroom searched the purse 20 minutes later and found heroin. **HELD:** Defendant's purse, lying on the bed, was merely another household item subject to lawful execution of the search warrant of the premises. This was not a search of the person of the defendant.

State v. Hodges, 705 S.W.2d 585 (Mo. App. S.D. 1986). Police were searching a house pursuant to a search warrant and looked through the purse of a visitor, finding a gun used in a robbery. The gun actually belonged to the occupant of the house, even though it was found in the purse of the visitor. **HELD:** The owner of the house did not have standing to object to the search of the visitor's purse.

United States v. Giwa, 831 F.2d 538, 544-45 (5th Cir. 1987). Officers were executing a search warrant on the apartment of Aurya for credit card fraud. The only person in the apartment when they arrived was defendant, Giwa, clad in a bathrobe. He claimed to be a visitor. When asked for ID he said it was in his flight bag in the closet. Giwa asked to get it himself but the officers refused, saying they would get it. He said it was in the side pocket. Officers found it, as well as credit cards in other names, which were evidence of the credit card fraud they were investigating. Defendant claims the search was improper since he was just Aurya's visitor. **HELD:** Search was proper. "We begin with the proposition that any container situated within residential premises which is the subject of a validly-issued warrant may be searched if it is reasonable to believe that the container could conceal items of the kind portrayed in the warrant." If a person claims merely to be a visitor, the court should look at the "relationship between the person and the place." A "mere passerby" like the customer in the bar would have a higher expectation of privacy and could not have his bag searched. Giwa's bag could be searched on these facts.

State v. Andrews, 549 N.W.2d 210, 218 (Wisc. 1996). Police executing a search warrant for an apartment found drugs in a duffel bag lying in the master bedroom. The bag belonged to a visitor. The Wisconsin Supreme Court approved the search, pointing out that "the touchstone of the 4th Amendment is reasonableness" and it was reasonable for the officers to search any container on the premises that could contain the object of the search, unless it was actually worn by or in the physical possession of a person whose search was not authorized by the warrant. The Court rejects the suggestion of *Giwa* that some special relationship between the person and the place must be shown.

BUT COMPARE:

State v. Lambert, 710 P.2d 693 (Kan. 1985). Police were executing a search warrant for the apartment of Randy for cocaine. Three women were in the apartment at time of the search – one sick in bed, the others sitting at the kitchen table with a serving tray of marijuana between them. All three women were arrested. The defendant was one of the women at the table. A purse on the kitchen table was searched. Marijuana and amphetamine were found in it. **HELD:** Defendant’s person and purse could not be searched just because she was on the premises of Randy when there was no reason to believe this was Randy’s purse. **NOTE:** The issue of whether this was a valid search incident to an arrest was not even discussed. Somebody goofed!

Hummel-Jones v. Strobe, 25 F.3d 647 (8th Cir. 1994). Plaintiffs were present at a birthing clinic as overnight guests when a search warrant was executed for evidence that the clinic operators were practicing medicine without a license. The overnight bag of the guest was searched. **HELD:** The couple was merely patronizing the clinic and the officers had no reason to suspect they were involved in the criminal activity of practicing medicine without a license or that the incriminating medical records would be in their bag. The search was unreasonable.

22. Extent of Search: Scope.

The scope of a search undertaken pursuant to a warrant is strictly limited by the explicit area or item limitations set out in the warrant itself.

Use of terms like “premises” is a good idea, because “premises” has been interpreted as including all land, all buildings, all appurtenances, carport, garage, doghouse, chicken coop, storage sheds, and all vehicles of owners on the land. **But see:** *State v. Varvil*, 686 S.W.2d 507 (Mo. App. E.D. 1985).

State v. Waller, ___ S.W.3d ___ (Mo. App. W.D. 10/7/2014). The scope of a search of a residence pursuant to a warrant includes places within the curtilage of that residence, including a two-car garage within 10 feet of the house and an outdoor furnace that is “fairly close” and connected by wiring and ducts. **NOTE:** The Missouri Supreme Court has accepted transfer of this case.

United States v. Gottschalk, 915 F.2d 1459 (10th Cir. 1990). The scope of a search warrant authorizing a search of a “premises” includes automobiles on the premises either actually owned or under the control and dominion of the premises owner, or, alternately, those vehicles which appear, based on objectively reasonable indicia present at the time of the search, to be so

controlled. Thus, the defendant's Cadillac in the driveway of the premises searched was fair game even though he did not live there.

NOTE: Vehicles **not** on premises may not be searched unless specifically described in warrant.

State v. Pourtes, 744 P.2d 644 (Wash Ct. App. 1987). A warrant for a search of the premises did not justify a search of a car parked along the curb of the street.

General Rule: "Any container situated within residential premises which is the subject of a validly-issued warrant may be searched if it is reasonable to believe that the container could conceal items of the kind portrayed in the warrant." *United States v. Gray*, 814 F.2d 49 (1st Cir. 1987); *United States v. Giwa*, 831 F.2d 538 (5th Cir. 1987). As stated by the U.S. Supreme Court: "A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search. Thus, a warrant that authorizes an officer to search a home for illegal weapons also provides authority to open closets, chests, drawers, and containers in which the weapon might be found . . . When a legitimate search is under way, and when its purpose and its limits have been precisely defined, nice distinctions between closets, drawers, and containers, in the case of a home . . . must give way to the interest in the prompt and efficient completion of the task at hand." *United States v. Ross*, 456 U.S. 798, 820-21 (1982).

The wording used in the warrant can be very important.

State v. Franklin, 144 S.W.3d 355 (Mo. App. S.D. 2004). The police were executing a search warrant for a meth lab, specifically for "chemicals, precursors, methamphetamine, paraphernalia, scales, substances and equipment used in the production of illegal drugs, computers, written records or documents used in the manufacture or distribution of illegal drugs." The officers noticed 25 to 30 unmarked videotapes in a television room. Knowing that people who manufacture meth sometimes have homemade training videos showing how to make meth, they briefly watched each tape. One contained children having sex with an adult male. **HELD:** Since the officers knew tapes were used to teach people how to make meth, these videotapes, even though not specifically listed in the warrant, could constitute drug paraphernalia as "all equipment or material . . . of any kind . . . used in manufacturing a controlled substance." Thus, it was not beyond the scope of the warrant to check the contents of each videotape.

23. Extent of Search: Intensity.

The intensity of the search undertaken pursuant to a warrant is strictly limited by the nature of the items sought under the warrant.

A. Closed Containers

All items, including closed containers, in which the object searched for could be hidden, may be searched.

United States v. Ross, 456 U.S. 798, 821 (1982). “A warrant that authorized an officer to search a home for illegal weapons also provides authority to open closets, chests, drawers, and containers in which the weapon might be found. A warrant to open a footlocker to search for marijuana would also authorize the opening of packages found inside. A warrant to search a vehicle would support a search of every part of the vehicle that might contain the object of the search.”

United States v. Evans, 92 F.3d 540, 543 (7th Cir. 1996). “A warrant to search a house or other building authorizes the police to search any closet, container or other closed compartment in the building that is large enough to contain the contraband or evidence they are looking for . . . If they are looking for a canary’s corpse, they can search a cupboard, but not a locket. If they are looking for an adolescent hippopotamus, they can search the living room or garage, but not the microwave oven. If they are searching for cocaine, they can search a container large enough to hold a gram, or perhaps less.”

State v. Shaon, 145 S.W.3d 499 (Mo. App. W.D. 2004). Police executing a search warrant authorizing them to look for methamphetamine opened a small closed metal “Altoids” can in a kitchen cabinet and found marijuana inside it. The defense claims that opening the can exceeded the scope of the search, particularly since the search warrant said nothing about marijuana. **HELD:** “Under the search warrant, Trooper Ahern was authorized to open and search the kitchen cabinet. He was also authorized by the search warrant to search any containers inside the kitchen cabinet where methamphetamine could reasonably be hidden, such as an Altoids can, because methamphetamine may be hidden in a small container.” It didn’t matter that the officer actually suspected he might find marijuana in the tin can since he’d found marijuana in Altoids cans in the past. The important rule is that “a lawful search extends to all areas and containers in which the object of the search may be found.”

B. Search After Object Described in Warrant is Found.

After the objects sought under a warrant have been located, the applicable intensity rules change.

United States v. Gagnon, 6354 F.2d 766, 769 (10th Cir. 1980). “Once a search warrant has been fully executed and the fruits of the search secured, the authority under the warrant expires and further governmental intrusion must cease.”

Where, however, the executing officers have found some, but not necessarily all, of the items described in the warrant, the search may lawfully continue.

State v. Tolen, 304 S.W.3d 229 (Mo. App. E.D. 2009). Officers were executing a search warrant for defendant’s laptop computer. They spotted one laptop on the kitchen counter as soon as they entered, but they could keep searching since it wasn’t clear they had found the particular laptop they were seeking.

C. Damage or Destruction of Property.

Where damage is reasonably necessary to effect a search pursuant to a warrant, the Fourth Amendment is not violated.

Dalia v. United States, 441 U.S. 238, 247 (1979). “Officers executing search warrants on occasion must damage property in order to perform their duty.”

State v. Sierra, 338 So.2d 609 (La. 1976). But in executing a search warrant, to the extent possible, due respect should be given to the property of the occupants of the premises searched.

United States v. Ramirez, 523 U.S. 65 (1998). Police got a no-knock warrant to look for a dangerous fugitive, believed to be at defendant’s home. The police broke a window and stuck a gun through it while executing the search warrant. Defendant claimed the evidence should be suppressed since his property was damaged (broken window) in the course of the search by an excessive use of force. **HELD:** Damage to the property is no reason for suppression of evidence.

24. Seizure of Evidence.

Evidentiary items, including papers and documents, specified in a search warrant or discovered in plain view during the execution of a search warrant may be seized, provided it is immediately apparent to the seizing officers that the items are those

described in the warrant or that they otherwise possess a nexus with criminal activity.

Horton v. California, 496 U.S. 128 (1990). Police may seize without a warrant any evidence in plain view during a legal search, even if they had expected in advance that the evidence would turn up at the scene but had not listed that evidence in the search warrant. “Inadvertent” discovery is not a requirement of admissibility.

State v. Strickland, 609 S.W.2d 392 (Mo. 1980). Not mentioning shotgun shells in the search warrant did not require their suppression where the warrant authorized police to search defendant’s residence for shotgun, diamond rings, and revolver. Green shotgun shell casings were found at scene of the shooting but police did not know of existence of “green” shells at Defendant’s residence prior to discovering them during the authorized search, and it was apparent to the police that they constituted evidence so it was lawful to seize them.

25. Strip or Body Cavity Searches.

Missouri has a specific statute dealing with strip and body cavity searches. 544.193, RSMo. It reads as follows:

A. As used in sections 544.193 to 544.197:

(1) Body cavity search means the inspection of a person’s anus or genitalia, including but not limited to inspections conducted visually, manually or by means of any physical instrument.

(2) Strip search means the removal or rearrangement of some or all of the clothing of a person so as to permit an inspection of the genitals, buttocks, anus, breasts, or undergarments of such person, including but not limited to inspections conducted visually, manually or by means of any physical instrument.

B. No person arrested or detained for a traffic offense or an offense which does not constitute a felony may be subject to a strip search or a body cavity search by any law enforcement officer or employee unless there is probable cause to believe that such person is concealing a weapon, evidence of the commission of a crime or contraband.

Lucero v. Bush, 737 F. Supp. 2d 992 (D. S.D. 2010). Chery Lucero was a passenger in a pickup driven by her husband, who was pulled over for violating the open container law. Officers found cocaine on her husband. A female officer searched Chery in several increasingly-invasive ways: (1) a pat-down outside the clothes; (2) a visual inspection of her genitals and anus in a restroom; and (3) inserting a gloved finger in her vagina and anus. Nothing found. **HELD:** All three searches violated the Fourth Amendment. To do a pat-down, the officer must have “particularized” suspicion as to that individual. A person’s “mere propinquity” to

others suspected of crime does not, without more, give rise to probable cause to search that person. The Eighth Circuit has not adopted the “automatic companion search” rule, but rather uses a totality of circumstances analysis. Likewise, the strip search was an extreme intrusion on her privacy. Even worse, the body cavity search would only have been justified by probable cause with “reasonable certainty” that the evidence would be destroyed unless it was found without delay, and even then, with exigent circumstances, it should have been performed by a medical professional in an appropriate medical environment.

Doe v. City of Chicago, 580 F.Supp. 146 (1983). Police officer got search warrant to search apartment and the man who lived there for marijuana. Officers executing warrant found the man present with his wife and two teenage daughters and a young male friend of the family. Marijuana was found in pots on the back porch. A female jail matron was summoned, and she had each female lift her nightgown and lower her underpants and squat for inspection for hidden drugs. The adults were arrested but the teenagers were never charged with anything. **HELD:** The strip searches violated the Fourth Amendment and subjected the city to liability. They were unreasonable. No probable cause existed to believe they could have hidden anything on their persons in so short a time.

Kathriner v. City of Overland, Missouri, 602 F.Supp. 124 (1984). The District Court held the city liable for violating detainee’s constitutional rights when a strip search was conducted without belief that detainee possessed contraband or weapons and without circumstances warranting such search.

C. All strip searches and body cavity searches conducted by law enforcement officers or employees in this state shall be performed by persons of the same sex as the person being searched, and shall be conducted on premises where the search cannot be observed by any person other than the person physically conducting the search, except that nothing herein shall be interpreted to prohibit a readily available person from being present at the request and consent of the person being searched.

D. A body cavity search of any person detained or arrested for a traffic offense or an offense which does not constitute a felony may only be conducted pursuant to a duly executed search warrant, under sanitary conditions and by a physician, registered nurse or practical nurse, licensed to practice in this state.

E. Every law enforcement officer or employee conducting a strip search or body cavity search shall:

(1) Obtain the written permission of the person in command of the law enforcement agency in which the strip search or body cavity search is to be

conducted authorizing the strip search or body cavity search; and
(2) Prepare a written report regarding the strip search or body cavity search. The report shall include:

- (a) The written permission required in sub. 1 above;
- (b) The name of the person searched;
- (c) The name of the persons conducting the search; and
- (d) The time, date and place of the search.

A copy of the report shall be furnished to the person searched.

D.F. v. Florida, 682 So.2d 149 (1996). A Florida strip search statute, much like Missouri's, required that a street officer obtain approval from a supervisor before conducting a strip search. An officer arrested defendant on outstanding traffic warrants. At the station he felt a plastic baggie during a pat-down search of the buttocks. Without the approval of a supervisor, he ordered the defendant to drop his trousers and saw the tip of a baggie sticking out from his butt cheeks. He ordered the defendant to spread his legs, but the defendant would not. The officer spread defendant's legs and the baggie of five rocks of cocaine fell to the floor. **HELD:** The Court held this was a strip search that by statute required a supervisor's permission in advance. Thus, the evidence was suppressed.

F. The statute prohibiting strip searches does not apply to "persons committed to a correctional institution or jail by judgment of a court of competent jurisdiction." Section 544.197, RSMo. See the "Searches of Prisoners" section of this outline under Administrative Inspections and Searches.

NOTE: Federal Fourth Amendment law is less restrictive when the person has been arrested and is being booked into the jail.

Florence v. Board of Chosen Freeholders of County of Burlington, 132 S.Ct. 1510 (2012). Defendant brought civil suit for being strip searched at the jail after an arrest on an outstanding warrant for not paying a fine. **HELD:** No violation of Fourth Amendment to have a jail policy of non-touching strip searches for inmates being admitted into the general population, even pretrial inmates on non-serious offenses. No reasonable suspicion of contraband is needed.

26. Search Warrant for Records Outside Jurisdiction

Hubbard v. MySpace, 788 F. Supp. 319 (S.D.N.Y. 2011). A state judge in one state (where the crime occurred) may issue a search warrant for the electronic records kept by the cell phone company in another state. Here, a Georgia state judge properly issued a search warrant for the MySpace electronic records kept in California. The court said that Congress clearly intended to allow judges in this instance to authorize searches beyond

their normal territorial jurisdictions.

27. Exclusionary Rule and Good Faith Exception.

GENERAL RULE –

If an officer executing a search warrant collects evidence based upon that warrant, the evidence will still be admissible in court even if it turns out later that there was a problem with the warrant, as long as the officer believed the warrant was constitutional at the time he did the search.

STATED ANOTHER WAY—

Evidence seized pursuant to an unconstitutional search warrant or unconstitutional execution of a constitutional search warrant may be suppressed from admission in the prosecution's case-in-chief in a criminal trial (but only if) the law enforcement officers involved did not have an objectively reasonable belief in the warrant's constitutionality.

IN OTHER WORDS—

In *United States v. Leon*, 468 U.S. 897, 921 (1984), the Court held that the exclusionary rule would be loosened so as not to bar the use in the prosecution's case-in-chief evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause. "Penalizing the officer for the [judge's] error, rather than his own, cannot logically contribute to the deterrence of 4th Amendment violations." *Leon*.

"Those who drafted the Fourth Amendment may not have specifically contemplated the exclusionary rule, but surely they expected the commands of the Amendment to be adhered to." Wayne R. Lafave, *Search and Seizure: A Treatise on the Fourth Amendment*, Vol. 1, p. 32-33 (Fifth Ed. 2012). "The cost argument was rejected when the Fourth Amendment was adopted." *LaFave* at 33, quoting Justice Traynor in *People v. Cahan*, 282 P.2d 905, 914 (Cal. 1955).

Good Faith Exception When Warrant was Obtained, but was Later Found to be Invalid.

United States v. Leon, 468 U.S. 897 (1984). In August 1981, Burbank police got a search warrant to search Alberto Leon's home for drugs. The warrant was later found to have been issued without enough probable cause. The U.S. Supreme Court created a good faith exception to the exclusionary rule. Now evidence

seized by officers relying in good faith on the validity of a warrant issued by a judge will not necessarily be excluded. The court reasoned that the exclusionary rule serves to deter police misconduct, so it does not apply to good faith actions by policemen relying upon a warrant.

28. The Court Noted Four Exceptions:

A. False Information in Affidavit

- (1) If the judge was misled by information in the affidavit, the officer either knowing it was false or recklessly disregarding its falsity;

Test for Knowledge of Falsity or Reckless Disregard:

Franks v. Delaware, 438 U.S. 154 (1978). A rape defendant claimed that the officer's affidavit for a search warrant contained false information. The Court says a search warrant affidavit that is knowingly false or recklessly disregards the truth may cause the entire search to be unconstitutional, but:

- (1) If probable cause can still be established by other parts of the affidavit the evidence is still admissible;
- (2) Burden of proof is on the defendant by preponderance of evidence to prove his allegations of perjury or reckless disregard;
- (3) Every fact in affidavit does not necessarily need to be correct – the test is whether the affiant believed the facts were true or recklessly disregarded the truth.

See also *State v. Sherman*, 927 S.W.2d 350 (Mo. App. W.D. 1996) (*Franks v. Delaware* test used by Missouri Courts).

State v. Turner, 471 S.W.3d 405 (Mo. App. E.D. 2015). Defendant's home was searched and drugs found. He filed a motion to suppress based on his claim that the officer made misrepresentations in the affidavit for the search warrant. He requested a *Franks* hearing, submitting an offer of proof in the form of statements from the officer's deposition. **HELD:** The trial court did not abuse its discretion in denying a *Franks* hearing because the defendant did not make a "substantial preliminary showing" of deliberate falsehood (a lie) or reckless disregard for the truth by the officer in the affidavit. It is not enough to make a cursory statement that the officer's affidavit was false; rather, the defendant must submit an offer of proof specifying how a specific statement made by the officer was false. The same test applies for material omissions. The defendant must show that the officer omitted the face with the intent to make, or with reckless regard whether he was making, a misleading affidavit, and that if the omitted facts were added to the affidavit, no probable cause would have existed. The defense failed here, because the facts they

offered did not show material misrepresentation. For example, omitting the fact that the CI was “working off a case” did not make the affidavit misleading.

State v. Watson, 715 S.W.2d 277 (Mo. App. S.D. 1986). Mistakes made by officer citing facts in affidavit as to the description of a car held not shown to be knowingly false nor a reckless disregard of the truth by the officer. The defendant must offer “substantial proof” of deliberate falsehood or reckless disregard.

B. Where the judge wholly abandons his judicial role

Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 327 (1979). The *Leon* Court specifically referred to this case as an example. A judge watched two films purchased at an adult bookstore, concluded they were obscene, and issued a warrant to search the store for other copies of those films, and issued a second warrant for other unspecified items, said to have been determined by the judge to be illegal. The judge then accompanied the police on the raid of the bookstore and at the scene made an item-by-item determination of what else could be seized. The Supreme Court said the judge “allowed himself to become a member, if not the leader, of the search party which was essentially a police operation” and thereby caused “an erosion of whatever neutral and detached posture existed at the outset.”

C. Warrant Clearly Lacking Probable Cause

In circumstances where the affidavit on which the warrant was issued is so clearly lacking in indicia of probable cause that no reasonably well-trained officer would rely on it. “This is an instance where the police officer cannot excuse his own mistake by pointing to the greater incompetence of the judge.” Wayne R. Lafave, *Search and Seizure: A Treatise on the Fourth Amendment*, Vol. 1, p. 125 (Fifth Ed. 2012), quoting *Malley v. Briggs*, 475 U.S. 335, 346 (1986).

Dixon v. State, 511 So.2d 1094 (Fla. 1987). A search warrant affidavit for drugs did not say when the illegal drugs had been seen on the premises; thus, even the good faith exception could not save it because it was so lacking in indicia of probable cause. BUT SEE: *State v. Wilbers*, 347 S.W.3d 552 (Mo. App. W.D. 2011) (a search warrant affidavit failed to say when the confidential informant had seen the drugs, so it was error to issue the search warrant; but good faith applied to allow the evidence since a reasonably well-trained officer’s reliance on the “poorly-drafted affidavit cannot be considered entirely unreasonable.”); *State v. Robinson*, 454 S.W.3d 428 (Mo. App. W.D. 2015) (“A reasonably well-trained officer’s reliance on this poorly drafted affidavit cannot be considered entirely unreasonable. And in this case, on this record, we cannot find that the error rests on the officer but on the issuing court.”).

State v. Pattie, 42 S.W.3d 825 (Mo. App. E.D. 2001). Witness giving affidavit had seen child pornography in the male suspect's home 13 months earlier. A search warrant was issued and videotapes of children in sex acts were found. Defendant claims the information was too stale to be probable cause. **HELD:** Unlike marijuana, which would be smoked up, child pornography is the sort of thing that a pedophile could be expected to keep around to use over and over. Even if 13 months was too stale, the issue was too close to say that an officer could not rely upon it, so the search is saved by the good faith exception.

State v. Rouch, 457 S.W.3d 815 (Mo. App. W.D. 2014). The police got a search warrant to search a college professor's home for firearms because of a bad joke the college professor made on Facebook: "At the beginning of the semester, I'm always optimistic. By October, I'll be wanting to get up to the top of the bell tower with a high-powered rifle – with a good scope, and probably a gatling gun as well." No guns were found, but marijuana was. **HELD:** The affidavit was so clearly lacking in probable cause that no reasonably well-trained officer would have relied upon it, so even the good faith exception did not save this search.

State v. Hammett, 784 S.W.2d 293 (Mo. App. E.D. 1989). A search warrant affidavit based on fourth-hand hearsay was "so lacking in indicia of probable cause" that reliance on the search warrant was unreasonable. A police officer was told by an informant that his wife told him that another lady told her that defendant's mother told her that there was going to be a "drug meeting" at defendant's house where lots of people were coming to buy, use and trade drugs. The officer had known the informant for years and found him to be truthful and reliable, but nothing was indicated in the affidavit about the reliability of the informant's wife, the unnamed person who talked to informant's wife, or defendant's mother. Although hearsay may be the basis of probable cause, there were so many levels of hearsay here it did not amount to a fair probability that a crime was being committed and was so lacking in probable cause that reliance on the search warrant was unreasonable. *But see: State v. Fowler*, 467 S.W.3d 352 (Mo. App. W.D. 2015) (Multiple levels of hearsay are permissible in establishing probable cause in a search warrant affidavit.)

State v. Brown, 708 S.W.2d 140 (Mo. banc 1986). Under the totality of circumstances there was probably no probable cause for the issuance of this search warrant, but even assuming there was no probable cause, the good faith exception applied. The police officer was investigating a burglary of a hardware store that occurred in August. In November he saw lots of tools in defendant's home, still in new packages, including a gray bench grinder. He cannot say they are exactly the same as the 200 tools taken, but they look similar. Defendant tells

the officer it is none of his business where he got the tools and to get out of his house. The officer took a hardware store owner with him to execute the search warrant and only seized those items the victim could identify. This was reasonable.

State v. Lucas, 452 S.W.3d 641 (Mo. App. W.D. 2014). A search warrant was issued to search for drugs, but in hindsight, even the state admits there was not sufficient probable cause. The state urges the court to allow the evidence under the good faith exception. **HELD:** The use of the good faith exception “assumes” the warrant was properly executed. Here, the officers seized as much evidence not allowed by the warrant (BB guns, videos, etc.) as allowed by the warrant. Their conduct evidenced “a flagrant and widespread disregard for the scope of the warrant.” Since the officers did not properly execute the warrant by flagrantly disregarding its scope, the good faith exception does not apply.

D. Warrant So Facially Deficient Officers Cannot Presume it Valid

Groh v. Ramirez, 540 U.S. 551, 564 (2004). An ATF agent typed up a search warrant, supporting affidavit and application to search Ramirez’s home for various firearms and grenades. The affidavit and application were okay, but the search warrant completely omitted any description whatsoever of the items to be seized. Neither the agent nor the judge noticed, and the judge signed the defective warrant and the agents executed the search. **HELD:** The Fourth Amendment requires a warrant to describe the “things to be seized.” This warrant was so clearly invalid on its face that no reasonable officer could claim to presume it valid. Even a “simple glance” would have shown it to be defective.

United States v. Nelson, 36 F.3d 758 (8th Cir. 1994). Police believed defendant was transporting heroin in his rectum so they applied for a search warrant for a body cavity search. Although their application sought a body cavity search, the warrant itself did not specifically authorize a cavity search, but only a search of defendant’s person. Nor did the warrant incorporate the application or affidavit by reference. The defendant was extremely uncooperative with the search, clenching his rectum to the point where they went to the hospital and a doctor tried to retrieve it. When no one was watching, the defendant pooped out the heroin (wrapped in a plastic bag and sealed with duct tape) and then swallowed it. X-rays revealed it would take surgery or an endoscopy to retrieve it. The doctors did the endoscopy for medical reasons. **HELD:** The good faith exception did not save this search since a reasonably well-trained officer should have read the search warrant and realized it said nothing at all about a body cavity search.

State v. Cummings, 714 S.W.2d 1 (Mo. App. 1986). The search warrant said to search

the 2nd house east of LaCompte Road, but the police searched the 3rd house. The search warrant address was incorrect, but the officer had been able to tell which house was the proper one by the description of a “metal bin” on the property and immediately realized the warrant should have said 3rd house. **HELD:** Even though search warrant had a mistake in it, the good faith exception applied to save the search.

29. Good Faith Generally Not Applicable to Warrantless Searches

NOTE: As of now, the Good Faith Exception under *Leon* is normally limited to “with warrant” cases. It generally does not extend to cases where the police officer has conducted a warrantless search solely on the basis of his personal and mistaken judgment about the existence of probable cause or exigent circumstances.

Narrow exceptions:

1. Warrantless Administrative Searches Per Unconstitutional Statute

Illinois v. Krull, 480 U.S. 340 (1987). Police conducted a warrantless search of an auto junkyard pursuant to an administrative inspection statute later held unconstitutional. **HELD:** The good faith exception to the Fourth Amendment exclusionary rule applies when an officer’s **reliance on the constitutionality of a statute** is objectively reasonable.

2. Warrantless Stops on Court Clerk’s Error

Arizona v. Evans, 514 U.S. 1, 15 (1995). An officer pulled over the defendant for a traffic violation, routinely put his name into the computer in the patrol car and discovered an outstanding arrest warrant. He arrested the defendant and in a search incident to the arrest found a bag of marijuana in the car. It turned out that the warrant had been recalled but never removed from the computer due to the **failure of court clerk** to notify law enforcement that the warrant had been quashed. **HELD:** The reasoning of *Leon* made the exclusionary rule inapplicable. “Because court clerks are not adjuncts to the law enforcement team engaged in the often competitive enterprise of ferreting out crime, they have no stake in the outcome of particular criminal prosecutions.” No deterrent basis exists for applying the exclusionary rule.

3. Warrantless Search on Negligent Failure of Police to Notice Warrant Recalled

Herring v. United States, 555 U.S. 135 (2009). A police officer knew that defendant was coming to an impound lot to pick up his car. He asked the

dispatcher to check for outstanding warrants. She found one from a neighboring county and the officer arrested defendant and found meth in his pocket and a gun in his car incident to the arrest. The other police department had been negligent in not removing the recalled warrant. **HELD:** Although reckless or intentional failure to remove the warrant from the active list could result in suppression, negligence does not call for application of the exclusionary rule.

4. Warrantless Search in Reliance on Binding Appellate Court Precedent

Davis v. United States, 131 S.Ct. 2419 (2011). Good faith exception applies to officer who reasonably relied on binding appellate court precedent when searching the interior of a car incident to an arrest under *New York v. Belton's* "bright line rule," which was subsequently changed by the Supreme Court. No purpose would be served by using the exclusionary rule since the officer was diligently keeping up on the law and acting reasonably. The officer should not be punished "for the appellate judges' error."

State v. Carrawell, 481 S.W.3d 833 (2016). The defendant was arrested for peace disturbance and resisting arrest after yelling crude comments at police in front of a crowd. He struggled and dropped a plastic grocery bag. The officers subdued him and picked up the bag he dropped and took him to the police car. He struggled again at the car, and the officer put the bag on the roof of the car. After defendant was handcuffed and in the car, the officer searched the bag and found a broken plate with heroin on it. **HELD:** On a 4-3 vote, the Court finds the search unconstitutional, on the theory that the bag was like the trunk in *Chadwick* or the iPhone in *Riley*, and required a warrant to look into it, even though it had been in defendant's hands at the time he was arrested. On a 6-1 vote, however, the Court holds that the exclusionary rule does not apply, since Missouri case law at the time held that a bag in one's hands at the time of arrest, could be searched, even after the defendant had been handcuffed.

5. Warrantless Search in Reliance on Reasonable Interpretation of Law

Helen v. North Carolina, 135 S.Ct. 530 (2014). Police officer pulled a car over for having a burned-out taillight. An ordinance had made it a requirement to have working tail lamps. While the car was stopped for this reasonable suspicion, the officer obtained consent to search, and found a baggie of methamphetamine. It turned out that the ordinance was satisfied by having one working taillight, so it was not a violation, after all, to have one burned out. Should the evidence be suppressed? **HELD:** The Supreme Court says no, but does NOT call this a good faith case. The Court says: "Because the officer's mistake about the brake-light law was reasonable, the stop in this case was lawful under the Fourth

Amendment.” The Court says reasonable suspicion existed because his mistake about the law’s interpretation was reasonable. Reasonable men can make mistakes of law, and the touchstone of the Fourth Amendment is reasonableness.

30. Good Faith Exception Applies to Arrest Warrants:

The good faith exception applies to arrest warrants as well as search warrants. Thus, in situations where an arrest warrant was issued improperly (without sufficient probable cause or for some other reason) the exclusionary rule can be avoided and the evidence admitted if the officer conducting the arrest reasonably relied upon a warrant that appeared valid upon its face. *U.S. v. Gobey*, 12 F.3d 964 (10th Cir. 1993) (summons issued without judicial finding of probable cause was later converted to bench warrant, still without finding of probable cause; although the warrant was thus invalid, the search incident to the arrest was saved by the good faith exception). *See also: Juriss v. McGowan*, 957 F.2d 345 (7th Cir. 1992).

31. Warrant Based on Facts Learned Through Unlawful Police Activity

State v. Oliver, 293 S.W.3d 437 (Mo. banc 2009). After setting aside any tainted evidence, the untainted information remaining in the affidavits is to be examined for sufficiency to justify the issuance of the search warrant.

32. Severability Doctrine

State v. Douglas, ___ S.W.3d ___ (Mo. App. W.D. 3/29/16). Officer improperly checked too many boxes as to what evidence he was seeking in a case where a purse had been stolen and the key in it used to commit a burglary. He improperly checked the box that he was looking for a fetus or part of human corpse. Instead of calling it a mistake, he said he did it intentionally, so that if he did happen to find a fetus, he would not need to get a “piggy-back warrant.” The trial judge ruled the entire warrant invalid and suppressed all the evidence. **HELD:** Under the severability doctrine, the infirmity of part of the search warrant requires suppression of the evidence seized pursuant to that part, but does not require suppression of items seized pursuant to the valid part of the warrant. In this case, the stolen items should not have been suppressed. Had a fetus been located, it could have been suppressed. NOTE: THE MISSOURI SUPREME COURT HAS ACCEPTED TRANSFER OF THIS CASE.

33. Who Searches:

- A.** A search warrant may be executed only by a peace officer. Peace officer is defined in 542.261 as: “a police officer, member of the highway patrol to the extent otherwise permitted by law to conduct searches, sheriff or deputy sheriff.”
- B.** Section 43.200, RSMo, provides that the Missouri Highway Patrol may request the

prosecutor to apply for, and members of the patrol may serve search warrants anywhere in MO, provided that the Sheriff or his designee shall be notified about the application and the Sheriff or his designee shall participate in the search.

- C. The Missouri Supreme Court has said that a prosecuting attorney should not accompany a sheriff in serving a search warrant in absence of exceptional circumstances. *State v. McIntosh*, 333 S.W.2d 51 (Mo. 1980).

NOTE: Under **FEDERAL** law, if the officer preparing the inventory must prepare and verify it before at least one other credible person. 41 (f)(B).

34. Practical Tips for Officers Regarding Conducting Searches.

1. Photographs:

- a. Photograph every room before beginning search.
- b. Photograph each item in place found before moving.
- c. Photograph every room when you leave to show lack of damage.

2. Diagram:

Diagram the layout of house (you will quickly forget it if you don't) indicating where items were found.

3. Labeling:

Easiest way: Separate items in boxes or bags by parts of house, with each item in a bag separately numbered.

35. Motions to Close Search Warrant File to Public:

Although no Missouri statute or appellate case address the issue, cases from other jurisdictions set out the common law that the judge who issues a search warrant has the authority to order all or part of the search warrant file sealed. This can keep the target criminal from finding out about the search warrant before its execution, or from reading the probable cause affidavit containing the known facts, informants, etc. prior to the search. Missouri prosecutors have successfully used a Motion For Sealing Search Warrant Affidavits. Some applicable cases include: *Baltimore Sun Company v. Goetz*, 886 F.2d 60, 64-65 (4th Cir. 1989); *Certain Interested Individuals, John Does I-IV, Who Are Employees of McDonnell Douglas Corporation v. Pulitzer Publishing Company*, 895 F.2d 460 (8th Cir. 1990); *In re Search Warrant for Secretarial Area*, 855 F.2d 569 (8th Cir. 1988); *Times Mirror Company v. U.S.*, 873 F.2d 1210 (9th Cir. 1989).

36. Do Not Let Press Accompany Police Into Someone's Home for the Execution of a Search or Arrest Warrant.

Wilson v. Layne, 526 U.S. 603 (1999). It violates the Fourth Amendment for police to allow a news reporter and photographer to accompany them into a suspect's home for

the execution of a warrant (in this case an arrest warrant). Police doing so can face civil liability.

Parker v. Clark, 905 F.Supp. 638 and 910 F.Supp. 460 (E.D. Mo. 1995). The police officer who obtained a search warrant, made the decision to execute it, and brought the television station with him to film the inside of the defendant's home without defendant's permission violated the Fourth Amendment and subjected himself to civil liability. A search warrant carries with it the authority for the police to enter upon the premises, but not for the press to do so. They are trespassers in that situation. *See also: Le Mistral, Inc. v. CBS*, 61 A.2d 491 (1978) (A camera crew accompanied Health Inspector on the search of restaurant for unsanitary conditions. This violated Fourth Amendment. Although health inspector had the right to enter, he did not have the right to bring the TV station employees, who only had the same right of entry as the general public).

37. Computer Searches

"Probable cause to seize a computer and its hard drive or disks is not all that difficult to establish, nor is it based on any special rules. Searches and seizures of computers, by their nature, however, inherently involve particularity problems." John Wesley Hall, *Search and Seizure*, Sec. 40.9 (3d ed. 2000).

The magnitude of a computer search is understood when one considers that the contents of an entire library can fit on a hard drive.

In most ways, searching a computer is analogous to searching a file cabinet for specific documents. The key is to describe with "particularity" what the officer is to look for, to prevent a general rummaging expedition.

United States v. Hall, 142 F.3d 988, 997 (7th Cir. 1998). Description of files to search for as "child pornography" consisting of "minors engaged in sexually explicit conduct" and "sexual conduct between adults and minors" was sufficiently specific. "Police officers executing the warrants were not unguided and free to rummage through defendant's property."

United States v. Clough, 246 F. Supp. 2d 84, 88 (D. Me. 2003). Warrant for all text files "of any variety" in a computer was too overbroad since it included no description of the alleged crime under investigation. The search warrant should have included the same language used in the affidavit that the officers were to look for "evidence of the crime of possession of unregistered machine guns and destructive devices." The affidavit was not incorporated by reference into the search warrant, however.

United States v. Carey, 172 F.3d 1268, 1270 (10th Cir. 1999). Police got warrant to search the computer of a drug suspect for “names, telephone numbers, ledger receipts, addresses, and other documentary evidence pertaining to the sale and distribution of controlled substances.” This was sufficient for items found pertaining to drug dealing. However, when the officer stumbled across a picture in the computer that was child pornography, he should have stopped and gotten another search warrant for child pornography. While that first picture was in “plain view” the later ones were not, since by that point he was opening files he was fairly certain were child pornography rather than drug information. The child pornography evidence should have been suppressed.

The ability to use a utility program to search computer data for key words or files “enables the searcher to drastically limit the scope of the search.” Hall at Sec. 40.10. Once a warrant or consent is obtained to search the contents of the computer, an additional warrant is not required to use one of these search applications.

Commonwealth v. Copenhefer, 587 A.2d 1353 (Pa. 1991). Defendant kidnapped a bank vice president and sent a ransom note for money in exchange for her safe return, but ended up killing her, anyway. The FBI executing a search warrant for the contents of his computer found the ransom note in it. He had deleted it from his directory, but the officers used a program designed to find deleted files. He argued that an additional search warrant should be obtained to use this program. The court held that no additional search warrant was necessary.

When officers are trying to determine which computer disks are subject to seizure under a warrant, the disks may be perused (just like documents) to determine whether they may be seized. The officer is not required to accept the label as being truly indicative of the contents.

United States v. Aldahondo, 2004 WL 170252 (D. Puerto Rico Jan. 15, 2004). In a child pornography case, the entire computer system and all videotapes can be searched because of the likelihood of deliberate mislabeling.

With probable cause, police may seize a computer and, like a suitcase or other container, hold it a reasonable time while they are applying for a search warrant.

United States v. Hall, 142 F.3d 988 (7th Cir. 1998). A computer repair man working on defendant’s computer at the computer store found child pornography. It was permissible for the police to have it held an additional day while they were applying for a search warrant. “Where law enforcement authorities have probable cause to believe that a container holds contraband or evidence of a crime, but have not secured a warrant, the Court has interpreted the Fourth

Amendment to permit seizure of the property, pending issuance of a warrant to examine its contents, if the exigencies of the circumstances demand it or some other recognized exception to the warrant requirement is present.” *Citing United States v. Place*, 462 U.S. 696 (1983).

The United States Department of Justice has written guidelines for officers pertaining to searches of computers. The document is 200 pages long and collects the relevant cases. It can be downloaded from the Department of Justice web page. It is called: “Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations.”

Part Three - Warrantless Searches

I. General Rule: A Warrantless Search is Presumptively Unreasonable

The general rule is that a warrantless search is presumptively unreasonable unless it fits into a recognized exception to the warrant requirement. This chapter discusses those exceptions.

1. Search Incident to Arrest

This is the oldest exception, talked about by Sir Matthew Hale in 1687, and was not even new then. Traditionally called A **SEARCH INCIDENT TO LAWFUL ARREST**, it is now more accurately called A SEARCH INCIDENT TO A **“CONSTITUTIONALLY PERMISSIBLE”** ARREST. The arrest must be LAWFUL under the Fourth Amendment (i.e. based upon probable cause or upon a warrant). It may be for a misdemeanor or felony (or even a traffic offense if defendant is taken into custody). The issues usually involve the scope of the search.

A. ARREST:

Missouri’s Arrest Statute is 544.216: “Any [law enforcement officer] may arrest on view, and without a warrant, any person he sees violating or who he has reasonable grounds to believe has violated any law of this state, including a misdemeanor or infraction, or has violated any ordinance over which such officer has jurisdiction.”

B. PROBABLE CAUSE:

United States v. Mario Darnell Smith, 715 F.3d 1110 (8th Cir. 2013). “Probable cause to arrest exists when there is reasonable ground for belief of guilt that is particularized to the person to be searched or seized. Whether probable cause exists is viewed from the standpoint of an objectively reasonable police officer. We consider whether the facts are sufficient to warrant a man of reasonable caution in the belief that the person was involved in the commission of a crime. A probability or substantial chance of criminal activity, rather than an actual showing of criminal activity, is sufficient.”

State v. Ard, 11 S.W.3d 820 (Mo. App. S.D. 2000). “Probable cause to arrest exists when the facts and circumstances within the knowledge of the arresting officers, and of which they have reasonably trustworthy information, are sufficient to warrant a belief by a person of reasonable caution that the person to be arrested

has committed the crime for which he is being arrested. While the quantum of information necessary to furnish probable cause means more than mere suspicion, its existence must be determined by practical considerations of everyday life on which persons act and not the hindsight of technicians.”

State v. Adams, 719 S.W.2d 873 (Mo. App. W.D. 1990). Probable cause to arrest is determined on the facts collectively available from all officers participating in the arrest; it is not necessary for the arresting officer to personally possess all of the available information.

United States v. Wajda, 810 F.2d 754 (8th Cir. 1987). “Probable cause exists to make a warrantless arrest when, at the moment of the arrest, the collective knowledge of the officers involved was sufficient to warrant a prudent man in believing that the defendant had committed or was committing an offense.”

Maryland v. Pringle, 540 U.S. 366, 372 (2003). An officer stopped a car for speeding and pursuant to a consent search found 5 baggies of cocaine hidden behind the backseat armrest and \$763 in the glove compartment. He arrested all three occupants: the driver, the front-seat passenger, and the back-seat passenger. Defendant (front-seat passenger) confessed later that morning. The defense claims his confession should be suppressed as the fruit of an illegal arrest unsupported by probable cause. **HELD:** The Court holds 9-0 that being one of three occupants of a car in which 5 baggies of cocaine are found constitutes probable cause to be arrested. It was “an entirely reasonable inference from these facts that any or all three of the occupants had knowledge of, and exercised dominion and control over, the vehicle.” Thus, a reasonable officer would conclude that probable cause existed to believe that Pringle possessed cocaine, either solely or jointly.

C. A SEARCH INCIDENT TO AN UNLAWFUL (NO PROBABLE CAUSE) ARREST IS INVALID:

State v. Gant, 211 S.W.3d 655 (Mo. App. W.D. 2007). Defendant was arrested without a warrant outside a motel room where police had already found cocaine. Probable cause did not exist for his arrest. Additional crack cocaine was found in his pocket. **HELD:** The police lacked probable cause for the arrest so the search incident to that arrest was unconstitutional and the evidence found on his person had to be suppressed.

BUT: A SEARCH INCIDENT TO AN ARREST CAN BE VALID EVEN WHEN THE ARREST WAS UNLAWFUL UNDER STATE LAW, AS LONG AS THE ARREST WAS “CONSTITUTIONALLY PERMISSIBLE” UNDER THE FOURTH AMENDMENT.

Virginia v. Moore, 553 U.S. 164 (2008). A police officer pulled the defendant over for driving while suspended. Unlike Missouri, Virginia had a statute saying that for this particular misdemeanor offense, the officer “shall” release the offender on a citation, unless (1) the suspect refuses to discontinue the unlawful act; or (2) the offender is likely to cause harm to himself or others; or (3) the offender is likely to disregard a summons. In spite of the statute, the officer made a custodial arrest, handcuffed the defendant, and put him in the patrol car. The officer later admitted that none of the statutory reasons existed for this custodial arrest. A search of the defendant’s pockets incident to the arrest revealed 16 grams of crack cocaine. The defense argued that the evidence should be suppressed since the arrest was invalid under Virginia law. This argument looked like a winner since it had long been held that there is no such thing as a valid search incident to an unlawful arrest. The State argued that the search was valid under the 4th Amendment so the evidence should not be suppressed simply because the arrest violated state law. **HELD:** Since the arrest was based upon probable cause, it was a valid arrest for Fourth Amendment purposes; thus, the evidence was seized pursuant to a “**constitutionally permissible**” search. “Officers may perform searches incident to constitutionally permissible arrests in order to ensure their safety and safeguard evidence . . . Warrantless arrests for crimes committed in the presence of an arresting officer are reasonable under the Constitution . . . [W]hile States are free to regulate such arrests however they desire, state restrictions do not alter the Fourth Amendment’s protections.” The Court finds it significant that the Virginia legislature and courts do not apply any state exclusionary rule to violations of this arrest statute. “It is not the province of the Fourth Amendment to enforce state law. That Amendment does not require the exclusion of evidence obtained from a constitutionally permissible arrest.” The Court concludes: “We affirm against a novel challenge what we have signaled for more than half a century. When officers have probable cause to believe that a person has committed a crime in their presence, the Fourth Amendment permits them to make an arrest, and to search the suspect in order to safeguard evidence and ensure their own safety.”

D. SCOPE OF SEARCH INCIDENT TO ARREST:

Incident to a valid arrest (upon probable cause or with arrest warrant) police may search the person and area within his immediate control without probable cause to believe he has evidence upon him.

Chimel v. California, 395 U.S. 752 (1969). After arresting defendant in his home for burglary of a coin shop, police officers conducted a full search of his entire three-bedroom house, including the attic, garage, workshop and drawers. The

search was done over defendant's objection. Several stolen coins were found in a dresser drawer. **HELD:** The search was invalid since it went far beyond his person and the area from which he could have obtained a weapon or destroyed evidence. "A warrantless search incident to a lawful arrest may generally extend to the area that is considered to be in the possession or under the control of the person arrested." Justice Potter Stewart explained the exception well: "When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area within his immediate control - construing that phrase to mean the area from which he might gain possession of a weapon or destructible evidence. There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs - or, for that matter, for searching through all the desk drawers or other closed concealed areas in the room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant." See also: *United States v. Robinson*, 414 U.S. 218 (1973); *United States v. Edwards*, 415 U.S. 800 (1974).

United States v. Morales, 923 F.2d 621 (8th Cir. 1991). Defendant was arrested at an airport. He had two bags in his hands as officers approached him and was three feet away from them at the time of his arrest. The woman accompanying him was six feet away from him when he was arrested, and had a purse in her hands, to which he could have lunged. **HELD:** The area within his immediate control included the bags and purse.

Three classic rationales allow searches incident to arrest: (1) To protect officers from weapons; (2) To prevent defendant from destroying evidence; (3) To prevent defendant from escaping by getting access to weapons or other items.

The number of officers vs. number of defendants can affect the size of the area considered within immediate reach. Seven officers arresting one defendant could search a smaller zone than one officer arresting seven suspects.

The "wingspan" of Muhammad Ali in his prime (who could float like a butterfly

and sting like a bee) would be much larger than the “wingspan” of Whistler’s invalid mother sitting in her rocking chair.

The immediate area includes:

- a) **Body.** *United States v. Robinson*, 414 U.S. 218 (1978). Defendant was arrested for driving while revoked. A pat-down revealed a crumpled cigarette package in his pocket, but the contents did not feel like cigarettes. Inside the package, the officer found 14 heroin capsules. **HELD:** A custodial arrest gives the authority to search the person being arrested, including containers on his person such as a cigarette package.
- b) **Area within his reach, lunge or grasp – immediate control. “The Wingspan” of defendant.**

Chimel v. California, 395 U.S. 752 (1969); *People v. Gothard*, 185 P.3d 180 (Colo. 2008) (immediate control included drawers of nightstand next to defendant at time of his arrest).

State v. Carrawell, 481 S.W.3d 833 (2016). The defendant was arrested for peace disturbance and resisting arrest after yelling crude comments at police in front of a crowd. He struggled and dropped a plastic grocery bag. The officers subdued him and picked up the bag he dropped and took him to the police car. He struggled again at the car, and the officer put the bag on the roof of the car. After defendant was handcuffed and in the car, the officer searched the bag and found a broken plate with heroin on it. **HELD:** On a 4-3 vote, the Court finds the search unconstitutional, on the theory that the bag was like the trunk in *Chadwick* or the iPhone in *Riley*, and required a warrant to look into it, even though it had been in defendant’s hands at the time he was arrested. The 8th Circuit reached a different result in *Curd v. City Court of Judsonia, Arkansas*, 141 F.3d 839 (8th Cir. 1998); see also 3 Wayne LaFare, *Search & Seizure*, Section 5.3(a) at 593 (5th ed. 2012) (“The notion seems to be that *Robinson* recognized that anything on the person was ‘fair game’ for a search, and that the opportunity of the police to search should not be more limited merely because there may have been reasons making a full search there impractical or because the police opted for the less humiliating alternative of a search in the privacy of the stationhouse.”).

- c) **Fingerprinting.** *State v. Blair*, 691 S.W.2d 259 (Mo. 1985). Okay to fingerprint as part of routine booking procedure.
- d) **DNA Buccal Swab.** *Maryland v. King*, 133 U.S. 1958 (2013). Okay to take buccal swab from mouth of defendant arrested upon probable cause for a violent crime as part of a routine booking procedure.

- e) **Clothing and fingernail scrapings.** *State v. Magnotti*, 502 A.2d 404 (Conn. 1985).
- f) **Gunshot residue.** *State v. Howell*, 524 S.W.2d 11 (Mo. 1975); *State v. Parsons*, 513 S.W.2d 430 (Mo. 1974); *People v. Larson*, 782 P.2d 840 (Colo. App. 1989) (calls it “trace metal” testing to see whether arrestee had held a gun).
- g) **Bringing arrested defendant to station after arrest for thorough search.**
A station search includes searching any closed containers in defendant’s possession, in accordance with department’s established inventory procedures. *Illinois v. Lafayette*, 462 U.S. 640, 103 S.Ct. 2605, 77 L.Ed2d 65 (1983).
- h) **Going back at a later time to search more closely any clothing or effects that were seized from defendant at the jail and held in a “property room” at the jail.** *U.S. v. Edwards*, 415 U.S. 800 (1974). Defendant was in jail about 10 hours after his arrest when police collected his clothing and searched it for paint chips after they learned that paint had been chipped from the window when entry had been made in a burglary with a pry bar. “Once the accused is lawfully arrested and is in custody, the effects in his possession at the place of detention that were subject to search at the time and place of his arrest may lawfully be searched and seized without a warrant even though a substantial period of time has elapsed between the arrest and subsequent administrative processing and the taking of the property for use as evidence.”
- i) **Giving breathalyzer to arrestee.** *U.S. v. Reid*, 929 F.2d 990 (4th Cir. 1991).
- j) **Taking small hair sample from arrestee’s head.** *U.S. v. Weir*, 657 F.2d 1005 (8th Cir. 1981).
- k) **Taking blood sample.** *State v. Dowdy*, 332 S.W.3d 868 (Mo. App. S.D. 2011).
- l) **Split whether it includes urine sample.** Yes says *Ewing v. State*, 160 Ind. App. 138, 310 N.E.2d 571 (1974); No says *People v. Williams*, 192 Colo. 249, 557 P.2d 399 (1976).
- m) **Taking dental impressions from arrestee.** *Spence v. State*, 795 S.W.2d 743 (Tex. Crim. App. 1990).
- n) **Putting hands under ultraviolet light.** *U.S. v. Baron*, 860 F.2d 911 (9th Cir. 1988); *U.S. v. Williams*, 902 F.2d 678 (8th Cir. 1990).
- o) **Checking messages on an electronic pager found on or near the person at the time of arrest.** *U.S. v. Chan*, 830 F.Supp. 531 (Cal. 1993) (pager checked immediately at time of arrest contemporaneously with arrest); *U.S. v. Lynch*, 908 F.Supp. 284 (V. I. 1995).
- p) **Cell Phones.**

Riley v. California, 134 S.Ct. 2473 (2014). Police officers may not search the contents of a cell phone under the search incident to arrest doctrine. When a person is arrested, the cell phone on his person may be seized, but not searched without a warrant. Other traditional exceptions such as consent or

exigent circumstances to pursue a fleeing felon, to prevent destruction of evidence, or to assist a person who is threatened with serious injury could apply, but they will be the rare case. Riley involved two separate cases. One was a man who was arrested for possession of concealed firearms, whose smartphone was searched incident to arrest. Police found a photograph that tied him to a prior shooting, and texts that suggested membership in a gang. The other was a man who had been arrested right after a drug deal, whose smartphone rang at the station. The police answered it and saw the photo and phone number of his girlfriend, then went to her address. Once they saw her inside, they got a search warrant for her home and recovered 215 grams of crack cocaine. In both cases, the Court held the warrantless search of the phone unconstitutional, noting that with modern smart phones, a person can have more information on his phone than in his house, including photos, address book, e-mail correspondence, a history of websites visited, bank statements, medical history, etc. Nor did the possibility that the phone might be “remotely” wiped make a difference, since it was not shown that the ability to conduct a warrantless search would prevent remote wiping.

Previously, there had been a split of authority as to whether phones could be searched incident to arrest. *State v. Finley*, 477 F.3d 250 (5th Cir. 2007) (analogized them to containers like wallets and said they could be searched incident to arrest); *State v. Smith*, 920 N.E.2d 949 (Ohio 2009) (held that once the phone was in police custody, officers needed a warrant to look inside it). The cases are collected in: H. M. Swingle, “Smartphone Searches Incident to Arrest,” 68 *J. Mo. Bar* 36 (2012).

q) Automobile passenger compartment and containers therein.

The passenger compartment of a car may be searched incident to the arrest of an occupant in two different scenarios: (1) The arrestee (or presumably another occupant of the car) is unsecured and within reaching distance of the passenger compartment at the time of the arrest; or (2) The officer has a “reasonable belief” that evidence relevant to the crime of arrest might be found in the vehicle.

Prior to 2009, the Court had drawn a “**bright line**” around the passenger compartment of an automobile, holding that it may be searched incident to the arrest of a person in the automobile.

New York v. Belton, 453 U.S. 454 (1981). A Trooper pulled a car over for speeding. He smelled burnt marijuana and saw on the floorboard an

envelope marked "Supergold" which he associated with marijuana. He arrested the four people in the car for possession of marijuana and patted them down. He checked the Supergold envelope and found marijuana. He checked the passenger compartment of the car and found a coat with cocaine in the pocket. **HELD:** The search was lawful because of the "bright line" around the interior of a car for a search incident to arrest. The "bright line" area does not apply to the trunk, but does apply to a locked glove compartment.

Arizona v. Gant, 556 U.S. 332 (2009). The defendant, whom officers knew did not have a driver's license, drove up to a scene where officers were doing an investigation and got out of his car. When he was 12 feet from the car he was arrested for driving while suspended. He was handcuffed and put into a patrol car. The officers then searched his car incident to the arrest and found a jacket containing cocaine in the back seat. **HELD:** The "bright line" test of *New York v. Belton* is rejected. It previously held that when an occupant of a car is arrested, the interior compartment could be searched incident to the arrest. The idea was that the court was drawing a "bright line" around the interior compartment of the car so it would not be necessary to litigate every car search under the *Chimel* test of whether the item found in the car was within the immediate control of the person being arrested. In *Gant*, the court replaces the "bright line" test for searches of an automobile incident to arrest with a new test, whereby the search incident to arrest can produce admissible evidence in two scenarios: (1) the arrestee [or presumably other occupants of the car] are unsecured and within reaching distance of the passenger compartment at the time of the arrest; or (2) the officer has "reasonable belief" that evidence relevant to the crime of arrest might be found in the vehicle. **NOTE:** The Court said the result of *Belton* would still be the same because the officer was outnumbered by the four suspects. The Court also made it clear that any of the other exceptions to the search warrant requirement would still be available if warranted by the facts (e.g. automobile exception; search for weapon upon reasonable suspicion; plain view; consent search; valid inventory search; etc.)

United States v. Davis, 569 F.3d 813 (8th Cir. 2009). Defendant was pulled over for speeding, and the officer smelled the odor of marijuana coming from the car. He did a pat-down of the driver and found a bag of marijuana in his pocket. He had the three passengers get out of the car and searched it, finding a gun. **HELD:** This was a valid search, even post-*Gant*. The officer was outnumbered, plus finding the marijuana on the driver had given reasonable suspicion that evidence related to the crime of arrest might be in the vehicle.

Davis v. United States, 313 S.Ct. 2419 (2011). The good faith exception applies to an officer who relied on *New York v. Belton's* bright line rule to conduct a search of the interior of a car incident to arrest. An officer should not be punished for reasonably keeping up with the law and relying on binding appellate precedent in force at the time of the search.

State v. Richardson, 313 S.W.3d 696 (Mo. App. S.D. 2010). Police responded to a report of a robbery of a convenience store at 2:00 a.m. The clerk said a black man wearing a ski mask and red shirt, dark pants and tennis shoes had used a knife to rob the store. Minutes later, they spotted a car backing out of a nearby driveway with its lights off. After a short pursuit, the driver jumped out with cash in hand. He was arrested. Officers spotted a red shirt, dark pants and a knife in the car. **HELD:** The car could be searched incident to the arrest since it was "reasonable to believe that the car contained evidence of the offense of the arrest."

Thornton v. U.S., 124 U.S. 2127 (2004). The officer noticed defendant driving a car with tags listed to a different vehicle. Before he could pull the car over, the defendant drove to a parking lot, parked, and hopped out of the car. The officer pulled up right behind him. The suspect consented to a pat-down and the officer found drugs and arrested him. Incident to the arrest, he found a gun in the car. The defendant moved to suppress the gun. **HELD:** The *Belton* "bright line" rule extends to a "recent occupant" of a car. **NOTE:** Although the "bright line" analysis is no longer correct, the Court in *Gant* said the result in this case would still be the same because there was "reasonable belief" that evidence relating to the drug arrest would be in the car.

NOTE: The "bright line" rule for a search incident to arrest of a car interior only applied when the person was an occupant – either the driver or a passenger – of the car. Otherwise, the *Chimel* "immediate control" test applied.

United States v. Adams, 26 F.3d 702 (7th Cir. 1994). *Chimel* rather than *Belton* is applicable when defendant was not an occupant of the car immediately prior to the arrest, but was merely standing at the tail of the Cadillac, and was only linked to it because the keys to the car were found upon his person. From his position it would have been impossible for him to reach anything in the passenger compartment of the car.

Brown v. Commonwealth, 890 S.W.2d 286 (Ky. 1994). A search of the trunk is usually permissible if at the time of the arrest defendant was standing at the open trunk of a car.

Noble v. State, 647 S.W.2d 174 (Mo. App. S.D. 1983). The search of a car after it was towed to the police station was upheld under *Belton*. **NOTE:** On its facts, this search would still be upheld since the defendant was being arrested for pointing a gun at an officer and it was reasonable to think the gun would be in the car; BUT, after *Arizona v. Gant*, it is no longer generally true that a car that has been impounded may automatically be searched on the theory that it is a search incident to an arrest. Often, the automobile exception or the inventory exception will need to apply.

r) Includes protective sweep of house if defendant is in a house when arrested.

Protective Sweep - In effecting a lawful arrest the officers may also conduct a “protective sweep” of the premises to discover the presence of other people (not evidence) who might be security risks. The sweep must be quick and cursory, but items observed under the plain view doctrine during the sweep may be seized. *State v. Miller*, 499 S.W.2d 496 (Mo. 1973); *State v. Dayton*, 535 S.W.2d 479 (Mo. App. 1976).

Maryland v. Buie, 494 U.S. 325 (1990). Police officers were investigating an armed robbery. One suspect had been wearing a red running suit. The officers obtained arrest warrants for the two suspects. One warrant was executed at the house of one of the suspects. Upon entering the house a suspect emerged from the basement and was arrested. An officer went to the basement to make a protective sweep to be sure no one else was hiding there and found in “plain view” a red running suit. The officer seized the running suit as evidence. **HELD:** A warrantless protective sweep of a house in conjunction with an arrest is permissible under the Fourth Amendment if the officer reasonably believes the area to be swept harbors an individual posing danger to the officer or others.

State v. Johnson, 957 S.W.2d 734 (Mo. banc 1997). Police were called to defendant’s home on a “severe sick case.” They found his wife dead at the scene, beaten so severely it was impossible to tell if she’d been shot or died from the beating. Defendant was kicking walls, claiming a rival biker gang had killed her. Police learned that a young son lived in the home. Right after learning that his wife was dead, defendant flew into a rage and told the police and paramedics to leave. Instead, they did a protective sweep of the house to make sure no one else was present. Various items were seen in plain view, including a bloody washcloth in a sink, blood and hair samples in various places, and a dented pipe. **HELD:** The police had first entered the home upon

consent. Once the dead body was found, it became a crime scene and they could lawfully do a cursory check (protective sweep) of the home for other victims or suspects. Evidence seen in plain view would be admissible. All items seized were in plain view except a rifle, which had been under a sofa, not visible until the sofa was moved, and a pair of bloody jeans under a bed, not visible until the bed was moved. Except for those two items, the evidence was admissible.

s) Pretextual Arrests – Okay as long as some violation occurred.

Whren v. United States, 517 U.S. 806 (1996). As long as a traffic violation really occurred, it does not matter if the officer had an ulterior motive for pulling over the defendant. Regardless of whether the police officer subjectively believes that the occupants of a car may be engaging in some other illegal behavior, as long as a reasonable officer in the same circumstances could have stopped the car for the suspected traffic violation, the stop is legal. In this case, police officers were in a “high drug area” and saw a truck with temporary plates and youthful occupants stopped at a stop sign. The driver was looking down into lap of the passenger. They sat there an unusually long time – more than 20 seconds. The police car did a U-turn to go back for another look. The truck turned suddenly without signaling and sped off at an unreasonable speed. Police followed and caught up when it stopped behind other traffic at a red light. An officer got out and went to the driver’s door and ordered the driver to put the car in park. He immediately saw two bags of crack cocaine in passenger Whren’s hands.

State v. Mease, 842 S.W.2d 98 (Mo. banc. 1992). The Court overruled *State v. Blair*, 691 S.W.2d 259 (Mo. banc. 1985) and *State v. Moody*, 443 S.W.2d 802 (Mo. 1969), which involved the pretextual arrest doctrine. In *Mease*, a murder case, the officer had arrested the defendant on a nonsupport warrant. Even though part of the reason for issuing the nonsupport warrant had been the desire to locate and question the defendant concerning the murder, the facts truly did support issuing a nonsupport warrant. Under the new law, as long as there really was a valid reason for stopping defendant, “so long as the police do no more than they are objectively authorized and legally permitted to do” the officer’s other motivations for pulling defendant over and making an arrest are irrelevant.

State v. Malaney, 871 S.W.2d 634 (Mo. App. S.D. 1994). The officer saw defendant’s car weaving from centerline to sideline three times. He pulled the car over. Because of observations he made after pulling the defendant over, he asked for consent to search the contents of the car. Defendant

consented. Defendant claims this was a pretextual use of a traffic violation to pull over a car the officer wanted to search. **HELD:** The officer's motives and state of mind in wanting to search the car were irrelevant as long as the traffic offense really occurred. The stop was not unlawful and the consent given was valid. *Same result: State v. Peterson*, 964 S.W.2d 854 (Mo. App. S.D. 1998); *State v. Bunts*, 867 S.W.2d 277 (Mo. App. S.D. 1993).

State v. Rodriguez, 877 S.W.2d 106 (Mo. banc. 1994). The defendant was driving a tractor-trailer rig. He stopped at a weight station for a safety inspection. As the inspectors did their routine work (about 25 minutes) they became suspicious that he might have something more than onions and potatoes in his padlocked truck bed. They called the Highway Patrol, who arrived before the regular inspection was over. The officer was given consent to search by the defendant, and found 700 grams of marijuana among the potatoes. **HELD:** The search was valid. A commercial operator of a motor vehicle has a low expectation of privacy. As long as the length of the stop is consistent with the requirements of a vehicle inspection, the subjective reasons the inspectors had in calling the Highway Patrol were irrelevant. The length of the stop was okay and the consent to search was valid.

United States v. Hambrick, 630 F.3d 742 (8th Cir. 2011). Officers saw defendant driving and knew his license was suspended. They had a tip that he was transporting cocaine, which was their ulterior motive for the traffic stop. **HELD:** "It is well-settled that any traffic violation provides a police officer with probable cause to stop a vehicle, even if the officer conducted the traffic stop as a pretense for investigating other criminal activity."

t) Does not include full searches for traffic stops where suspect is only being given a traffic ticket.

Knowles v. Iowa, 525 U.S. 113 (1998). Defendant was pulled over for speeding 43 in a 25 mph zone. The officer issued him a ticket, but then conducted, without consent or probable cause, a full search of the car and found a bag of marijuana and a pipe. **HELD:** The bright-line rule of *Belton* allowing searches of cars incident to the arrest of an occupant, does not apply to traffic cases in which the person just received a ticket. Officer safety is sufficiently accomplished by the *Wilson* and *Mimms* cases, which allow the officer to order the driver and passengers out of the car, and to pat them down if reasonable suspicion exists that they might be armed and dangerous.

u) Defendant may be arrested even for offenses punishable only by a fine.

Atwater v. City of Lago Vista, 532 U.S. 318 (2001). A Texas statute made it a misdemeanor, punishable by fine, to fail to wear a seatbelt. The officer made a full custody arrest of a “Soccer Mom” who was in her truck with her children, none of whom were wearing seat belts. **HELD:** “The question is whether the Fourth Amendment forbids a warrantless arrest for a minor criminal offense, such as a misdemeanor seatbelt violation punishable only by a fine. We hold that it does not.” An arrest may be made upon probable cause without violating the Fourth Amendment, whether the offense is a felony or misdemeanor, and whether punishable by jail or fine. States may provide more protection to citizens by statute. For example, in Missouri, officers cannot make an arrest solely for a seatbelt offense. *Atwater* was followed in Missouri in *State v. Mondaine*, 178 S.W.3d 584 (Mo. App. E.D. 2005) (arrest for misdemeanor trespass).

v) Officer Need Not Articulate Correct Basis For Arrest, As Long As There Was One

State v. Shaw, 81 S.W.3d 75 (Mo. App. W.D. 2002). Defendant was driving without a front license plate in violation of Missouri law. The officer pulled him over and asked for his driver’s license, which defendant claimed not to have. A further check with the dispatcher revealed an arrest warrant for defendant for a parking violation. The officer arrested him on the warrant and found cocaine in his pocket. **HELD:** Whether or not the parking violation arrest warrant was valid is irrelevant, because the officer had probable cause to arrest defendant for not having a front license plate. Thus, at the time of the arrest the officer had probable cause to arrest him. It doesn’t matter if the officer thought he was arresting him for something else. “The test for determining the validity of Mr. Shaw’s arrest is whether [the officer] had actual probable cause to arrest him, not whether [the officer] articulated the correct basis for the arrest.”

w) An Arrest Upon an Invalid Warrant Can Result in Suppression of Evidence Seized Incident to Arrest, but Does Not Bar Prosecution of Defendant

Unlawfulness of an arrest can result in the suppression of the evidence seized incident to that arrest, but does not affect the jurisdiction or power of the trial court to proceed in a criminal case. *Gerstein v. Pugh*, 420 U.S. 103 (1975) (warrant issued without finding by judge of probable cause rendered the continued detention of defendant without a probable cause hearing unconstitutional; but this did not mean that he could not be prosecuted at all,

however, because of “the established rule that illegal arrest or detention does not void a subsequent conviction”). *See also: Ker v. Illinois*, 119 U.S. 436 (1886). In addition, the good faith exception applies to arrest warrants as well as to search warrants, so in many instances the evidence will still be admissible. *U.S. v. Gobey*, 12 F.3d 964 (10th Cir. 1993) (a summons issued without a judicial finding of probable cause was later converted to bench warrant, still without a finding of probable cause; although the warrant was thus invalid, the search incident to the arrest was saved by the good faith exception).

x) An Arrest Upon a Valid Warrant Discovered After an Invalid Detention of Defendant

Utah v. Strieff, 136 S.Ct. 2056 (2016). The officer made an unconstitutional investigatory stop (no reasonable suspicion to stop this person who had just left a house suspected of drug activity) but learned during that stop that a valid outstanding arrest warrant existed for the defendant. The officer arrested him on that warrant, and during a search incident to that arrest, the officer found a baggie of methamphetamine on his person. **HELD:** The evidence should not be suppressed because the existence of the valid outstanding arrest warrant “attenuated the connection between the unlawful stop and the discovery of the contraband.” The Court notes: “Suppression of evidence has always been our last resort, not our first impulse.” The attenuation doctrine is articulated: “Evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.” The arrest warrant was valid and unconnected to the stop. It required an officer to arrest the defendant upon learning about the warrant. This evidence would only be suppressed if the police misconduct was flagrant, and it was not in this case. **NOTE:** This result seems particularly correct in Missouri, where the officer would have been committing a class A misdemeanor had he NOT arrested the defendant once he knew about the arrest warrant. Section 575.180, RSMo.

State v. Grayson, 336 S.W.3d 138 (Mo. banc 2011). An officer heard a dispatch to be looking for a drunk driver named Terry Reed in a red Ford pickup. He pulled over a red Mazda pickup and quickly determined it was not Terry Reed, but someone else he’d arrested before, who was not drunk. With no reason to detain him except that he’d arrested him before, he asked for his driver’s license and ran it for warrants. Sure enough, defendant was wanted

for marijuana possession. During a pat-down incident to the arrest on the warrant, the officer found a meth pipe. **HELD:** The seizure of defendant was unreasonable since it lacked reasonable suspicion, so any evidence obtained as its “fruit” is inadmissible. The trial court should have suppressed the evidence. NOTE: THIS CASE IS NO LONGER GOOD LAW AFTER UTAH V. STRIEFF.

State v. Waldrup, 331 S.W.3d 668 (Mo. banc 2011). Defendant was a passenger in a car driven by Shields. An officer stopped the car at a routine driver’s license check and noticed defendant reaching for something at his feet. Defendant’s movements made the officer think he was armed, so he had him get out and submit to a pat-down. He found no weapon. Meanwhile, the driver was issued a citation for driving while suspended. The officer with the defendant ran a check on him since he was acting “differently” as if on drugs or having mental problems and because he seemed like he might be a threat. The officer detained defendant an additional 10 minutes until the computer check came back showing an outstanding arrest warrant. Defendant was arrested and crack cocaine was found in his shoe. **HELD:** This detention was valid since it was based on “reasonable suspicion” even after the driver’s detention had ended. Since defendant was being validly detained when the existence of the warrant was discovered, the evidence seized pursuant to the arrest on that warrant is admissible.

y) Search of person detained because danger to himself or others

People v. Hammas, 141 P3d 966 (Colo. App. 2006). Defendant was detained because he appeared to be in a mental condition that made him a danger to himself or others. Pursuant to standard procedure, he was taken to the jail to await a mental health interview. He was patted down and officers felt something. They took out a clear plastic baggie. Based upon the officer’s experience, he felt it contained meth. He confirmed it with a test. **HELD:** When an inventory is done on a person taken into protective custody, it is limited by the privacy interests of the individual, and closed containers cannot be opened without a warrant. In this case, plain view controlled, because it was “immediately apparent” to the officer that the powder was meth. By contrast, evidence was suppressed when an officer took out a folded up dollar bill and opened it and found drugs inside. *People v. Chaves*, 855 P2d 852 (Colo. 1993).

2. Probable Cause Search of Motor Vehicles

The “automobile exception” to the warrant requirement is the second oldest exception, and came into being in 1925.

Carroll v. United States, 267 U.S. 132 (1925). Prohibition was in full swing in the U.S., but Canada was wet. Large quantities of booze were brought over the U.S.-Canadian border through Detroit and transported to Grand Rapids. The road between them was known as “Whiskey Run.” Police spotted George Carroll, a known liquor runner. His car was running suspiciously low, a tell-tale sign that bootleg whiskey was in it. He was pulled over. Police tapped the seats and realized the upholstery was harder than it should be. They tore open the seat and found 68 bottles of whiskey under the upholstery. **HELD:** A person has a reasonable expectation of privacy in a car, but it is not as great as in a house. The movable nature of car makes it reasonable to search it upon probable cause without the need of getting a warrant. A SEARCH WARRANT IS NOT NORMALLY REQUIRED TO SEARCH A CAR SO LONG AS THE OFFICERS HAVE PROBABLE CAUSE TO BELIEVE IT CONTAINS CONTRABAND OR EVIDENCE SUBJECT TO SEIZURE.

Maryland v. Dyson, 527 U.S. 465 (1999). A separate finding of exigency is not necessary if the officer has probable cause for a search of a motor vehicle. *Carroll* reaffirmed.

A. Probable Cause

United States v. Rodriguez, 414 F.3d 837, 843 (8th Cir. 2005). “Under the automobile exception, if a law enforcement officer has probable cause, he may search an automobile without a warrant. Probable cause exists when, given the totality of the circumstances, a reasonable person could believe that there is a fair probability that contraband or evidence of a crime would be found in a particular place.”

The definition of probable cause for a search is best set out in *Illinois v. Gates*, 462 U.S. 213 (1983).

The task (of the judge reviewing the actions of the police officer) is to make a practical, common-sense decision whether, given all the circumstances known to the police, including the “veracity” and “basis of information,” there is a fair probability that contraband or evidence of a crime will be found in that particular place.

I.E. “Probable cause exists when there are facts and circumstances within the knowledge of the seizing officer that are sufficient to warrant a person of reasonable caution to have the belief that an offense is being committed or that the contents of the car offend against the law.”

The *Gates* test applies to warrantless searches of cars. *United States v. Blackman*, 904 F.2d 1250 (8th Cir. 1990).

B. Scope of Search

Under the automobile exception, officers may search the entire car, including the trunk (*i.e.* anywhere the item they are looking for could be hidden).

U.S. v. Ross, 456 U.S. 798 (1982). Police had a tip from a reliable informant that the defendant had drugs in his car trunk and was selling them out of his trunk. An informant had just seen defendant sell some drugs, and defendant told the informant he had more drugs in his trunk. The informant gave a good description of defendant (“Bandit”) and the car, a purplish-maroon Chevrolet Malibu, currently parked at 439 Ridge Street. Without warrant, police spotted the car, ran its license plate and saw it checked to Albert Ross, a/k/a “Bandit.” Police stopped it and searched the trunk. A brown paper bag, containing heroin, and a leather pouch, containing \$3200, were found in trunk. **HELD:** If the police have probable cause, the entire car may be searched, including any closed containers.

Wyoming v. Houghton, 526 U.S. 295 (1999). A search of a car upon probable cause includes inspecting a passenger’s belongings that are capable of concealing the object of the search, including the purse of a female passenger.

C. Impounding for Later Search

With probable cause, you may search at the scene, or impound and search later with the probable cause. *Chambers v. Maroney*, 399 U.S. 42 (1970); *State v. Childress*, 828 S.W.2d 935 (Mo. App. S.D. 1992); *State v. Shigemura*, 768 S.W.2d 620 (Mo. App. 1989).

United States v. Rodriguez, 414 F.3d 837, 844 (8th Cir. 2005). Defendant was the subject of a drug investigation. An informant arranged a controlled buy from him. When he showed up at the appointed time, gave the code word to the informant, and was identified by the informant, awaiting officers had probable cause to search his car. Instead of searching it at the scene, they took it back to the station to search. **HELD:** “A search pursuant to the automobile exception to the Fourth Amendment may take place at a separate place and time [from the seizure of the car].”

State v. Lane, 937 S.W.2d 721 (Mo. banc. 1997). A Trooper pulled over a car for failure to signal a lane change. Defendant was a passenger. After completing the registration and license check, the Trooper asked the driver if the car contained

anything illegal such as guns or drugs. The driver said no. The Trooper asked for permission to search, which was initially denied, but after the trooper said he would detain the car briefly for a drug dog to arrive for a sniff search (based upon reasonable suspicion of bloodshot eyes, strong scent of deodorizer, and nervousness), the driver gave consent. The trooper found two bags of marijuana in a duffel bag and a gallon bag of marijuana in the driver's suitcase. The Trooper arrested the driver and asked the defendant to drive the car to Headquarters for a more detailed search. At Headquarters, the Trooper found psilocybin mushrooms in a duffel bag bearing defendant's name. The trial court granted a motion to suppress as to the mushrooms in defendant's duffel bag. **HELD:** The search was proper. The search of the bag was based upon the automobile exception to the warrant requirement. The police may search an automobile and the containers within when they have probable cause to believe contraband or evidence is in the car. If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search, including luggage and closed containers. Having the car moved to Headquarters did not remove the probable cause to continue the search. An officer may search a vehicle on the spot where it was stopped and/or search it after it has been moved to the station.

D. Odor of Marijuana Provides Probable Cause

United States v. Beard, 70 F.3d 1062 (8th Cir. 2013). Officer pulled defendant over for traffic offense and smelled odor of raw marijuana immediately after defendant rolled down his car window. **HELD:** The odor of marijuana provided probable cause for warrantless search of the automobile.

State v. West, 58 S.W.3d 563 (Mo. App. W.D. 2001). After lawfully stopping a car, the officer smelled the odor of marijuana as he approached the car. He ordered the occupants out and frisked them, finding marijuana in defendant's pocket. **HELD:** "Where there is a legitimate reason to stop a car and the officer thereafter detects the odor of marijuana, an ensuing search is based on probable cause."

State v. Gambow, 306 S.W.3d 163 (Mo. App. S.D. 2010). Defendant was the front seat passenger in a car stopped for speeding. The deputy smelled the odor of marijuana and asked him to get out. A *Terry* pat-down for officer safety revealed nothing that felt like a weapon, but he found a small container in defendant's pocket and opened it without permission, finding xanax pills. **HELD:** Although the odor of marijuana justified a search of the car and the containers inside it, it will not alone justify the warrantless search of the vehicle's occupants themselves since people have a "heightened expectation of privacy" against searches of their persons without warrants. *Same result: State v. Lee*, 498 S.W.3d 442 (Mo. App. W.D. 2016).

E. Small Amount of Marijuana Found in Passenger Compartment Provides Probable Cause For Search of Trunk

State v. Irvin, 210 S.W.3d 360 (Mo. App. W.D. 2006). Defendant was stopped for speeding and was arrested for DWI. A search of the passenger compartment incident to arrest produced a small amount (7.9 grams) of marijuana in a duffel bag and 3.0 grams in an Altoids tin in the center console. The officer then searched the trunk.

HELD: Finding the marijuana in the passenger compartment provided probable cause to believe there may be more in the trunk. **NOTE:** Post-*Gant*, an issue on these facts will be whether the DWI arrest provided “reasonable belief” that evidence pertaining to DWI would be in the car. It seems reasonable for the officer to be looking for beer cans, etc., but so far there has not been an appellate case on point.

F. Other Examples of Probable Cause in Drug Context:

State v. Burkhardt, 795 S.W.2d 399 (Mo. banc. 1990). Two troopers stopped a car for speeding 64 in 55 zone on I-44. Defendant driver came back to trooper’s car. Defendant was from California and had rented the car. Passenger was from North Carolina. They were going from California to Ohio. Trooper asked why defendant rented a car to travel from CA to OH, but defendant had no answer. Trooper asked how long defendant had known passenger and got story that they had known each other for a long time, that defendant went to college with passenger’s sister, and that passenger worked near defendant’s home. Defendant was nervous, figity. Officer asked for permission to search the car. Defendant said officer could search the car but not the suitcases because she didn’t want her underwear stretched out over the highway. Officer said he wouldn’t know if the car contained drugs unless he looked inside the luggage. Defendant asked, “Are you going to search it, anyway?” He said he felt he had probable cause. She said, “I’m not going to tell you where it’s at.” The search revealed 127 pounds of marijuana in the luggage. **HELD:** Probable cause existed for search of car. The factors establishing probable cause included: (1) the speeding violation occurred on a route that was notorious for use by drug traffickers in bringing controlled substances into the State (I-44 near Joplin); (2) trained observers (police) could consider the late hour when the automobile was stopped for speeding; (3) the driver of the car was from California and passenger was from North Carolina and they were driving 2500 miles instead of flying; (4) defendant’s suspicious conduct and movements, stories of driver and passenger not matching as to how they met, where they lived, jobs, etc., and nervousness on part of defendant while speaking to the trooper; (5) defendant’s statement to trooper, “I’m not going to tell you where it’s at!” after trooper told defendant he felt he had probable cause to search defendant’s luggage and car for drugs.

State v. Milliorn, 794 S.W.2d 181 (Mo. banc. 1990). No probable cause for search in traffic stop. No inevitable discovery via inventory. Defendant was arrested for speeding 4 miles over limit. Trooper smelled marijuana in passenger compartment, but did not find any there. Trooper could not see into back of truck defendant was driving, which was enclosed by camper shell, because windows were tinted. Trooper took defendant's keys and opened the door of the camper shell and found 15 trash bags of marijuana. Court says an inventory search must be valid in scope. The justification for the search is threefold: (1) Protection of vehicle owner's property; (2) Protection of police from claims of lost property; and (3) Protection of police from potential danger. State did not assert these reasons to justify the search of the camper shell, nor did the evidence show that this inventory search complied with established written policy of the department. Defendant has greater expectation of privacy in locked trunk or camper shell than in passenger compartment.

NOTE: The "automobile" exception also includes airplanes, boats, and other motor vehicles. *State v. Sullivan*, 935 S.W.2d 747 (Mo. App. S.D. 1996) (applies to boats); *California v. Carney*, 471 U.S. 386 (1985) (applies to motor homes); *United States v. Coleman*, 700 F.3d 329 (8th Cir. 2012) ("The automobile exception applies equally to motor homes.").

3. Container Exception – Suitcase Exception.

A. General Rule: When Probable Cause is Focused on a Container (Suitcase, Baggage, Etc.), the Container May be Seized Without a Search Warrant; It May be Detained Briefly Upon Reasonable Suspicion, and May be Detained for a Reasonable Amount of Time (Sometimes Days) Upon Probable Cause, But it May Not be Opened and the Contents Seized Until the Police Have Obtained a Search Warrant.

U.S. v. Chadwick, 433 U.S. 1 (1977). The search of a locked footlocker at railroad station. Police may seize a suitcase warrantlessly but must get a warrant to get inside the suitcase. A person has a greater expectation of privacy in a suitcase than in a car.

B. Computer as Container:

United States v. Hall, 142 F.3d 988 (7th Cir. 1998). A computer repair man working on defendant's computer at the computer store found child pornography. It was permissible for the police to have it held an additional day while they were applying for a search warrant. "Where law enforcement authorities have probable cause to believe that a container holds contraband or evidence of a crime, but have not secured a warrant, the Court has interpreted the Fourth Amendment to permit seizure of the property, pending issuance of a warrant to examine its contents, if the exigencies of the circumstances demand it or some other recognized exception to the

warrant requirement is present.” *Citing United States v. Place*, 462 U.S. 696 (1983).

United States v. Clutter, 674 F.3d 980 (8th Cir. 2012). Defendant’s computer was seized upon probable cause to believe it contained child pornography. After the warrantless seizure, the officers got a warrant to search for child porn. **HELD:** There is a distinction between a seizure and a search in the container situation. With probable cause, the officers may make a warrantless seizure of a container (such as a suitcase or a computer) to prevent it from leaving the jurisdiction. It may be held for a reasonable amount of time while the officers apply for a search warrant. Once armed with the warrant, they may search its contents.

C. Rule for Containers Put Into Cars: When the probable cause is for the container, and not the whole car, if the container is put into the car, the container may be searched without a warrant upon that probable cause, but if nothing illegal is found in the container, the search is limited to the suitcase.

California v. Acevedo, 500 U.S. 565 (1991). After a controlled delivery of narcotics at a home, officers saw the defendant leaving the home with a bag about the size of the packages that had been delivered. Acevedo placed the bag in the trunk of his car and drove off. He was shortly thereafter stopped by the officers, who immediately searched the trunk, found the bag, and then searched the bag, finding drugs without a warrant. **HELD:** The Supreme Court established a new “bright line” rule for searching containers in cars, when the probable cause is for the container as opposed to the whole car:

1. If an officer has probable cause concerning the criminal content of the closed container; and
2. The container is located within a vehicle, then
3. The automobile exception to the warrant requirement will apply to a search of the closed container, WITH THE ONLY EXCEPTION BEING THAT:
4. If the probable cause is focused solely on the container and not the rest of the vehicle, the warrantless search must be limited to the container once it is found within the vehicle. It becomes a question of scope.

NOTE: Once you find the stuff in the container, arrest the defendant, search the rest of the interior as search incident to arrest, then impound the vehicle and search it again following standard inventory procedures.

State v. Borotz, 654 S.W.2d 111 (Mo. App. 1983). Defendant left the location where marijuana sales occurred and put his attache case in the car. **HELD:** Probable cause existed to believe that he was carrying a controlled substance as he left the apartment, either on his person or in the attache case so that once he entered the car “he, in effect, tainted the

interior and extended probable cause to any area within his reach” and thus no warrant was needed to search the attache case.

U.S. v. Johns, 469 U.S. 478 (1985). Three-day delay was okay for warrantless search of packages removed from vehicle upon probable cause. As long as probable cause existed, the search did not need to be simultaneous with the seizure. If all police have is reasonable suspicion, though, even a 90-minute delay is too long. *United States v. Place*, 462 U.S. 696 (1983).

D. Containers Placed in Mail, UPS, Etc.

United States v. Van Leeuwen, 398 U.S. 249 (1970). It is reasonable to delay a package placed in the U.S. mail for 29 hours while probable cause is being developed and a warrant is then obtained to search it.

4. Exigent Circumstances Exception

A. Exigent Circumstances In General

“While the courts have long recognized the concept of exigent circumstances as a basis for the ‘few specifically established and well-delineated’ exceptions to the warrant requirement, it was said in 1972 that ‘the contours of this exception have not fully been developed . . . and the Supreme Court has never pinned it down to a workable and effective meaning.’ Two decades of litigation have, at least, given some form to the specter of ‘exigent circumstances.’”

John Wesley Hall, Jr., *Search and Seizure* (3rd Ed. 2000)

“Whether sufficient exigent circumstances exist for the police to make a warrantless search and seizure defies a ‘bright line’ rule analysis simply because the question is always so fact bound. Nevertheless, the question is not as difficult to apply on the streets and in court as it first may seem. Ultimately, exigent circumstances can only be determined by considering the totality of the (exigent) circumstances involved. As with probable cause, this is a ‘flexible, easily applied standard [which] will better achieve the accommodation of public and private interests that the Fourth Amendment requires.” *Id.*

Although no comprehensive list of exigencies can be compiled, a number have come up over and over again. These include: (1) imminent destruction or removal of evidence; (2) hot pursuit of a fleeing suspect; and (3) immediate threats to public safety.

Paul R. Joseph, *Warrantless Search Law Deskbook* (1998)

The United States Supreme Court has described the Exigent Circumstances Exception as

follows:

A warrantless intrusion into a home may be justified by:

- (1) Hot pursuit of a fleeing felon; or
- (2) Imminent destruction of evidence; or
- (3) The need to prevent a suspect's escape; or
- (4) The risk of danger to the police or to other persons inside or outside the dwelling.

In the absence of hot pursuit, there must be probable cause that one or more of the other factors were present. In assessing the risk of danger, the gravity of the crime and likelihood that the suspect is armed should be considered. *Minnesota v. Olson*, 495 U.S. 91 (1990).

B. Hot Pursuit

If an officer is in "Hot Pursuit" of a person whom he has probable cause to arrest for a crime freshly committed and if he reasonably believes that person to be dangerous, he may enter a premises to search for that person, and may, with probable cause, seize that suspect, and weapons, or other evidence that might otherwise have been destroyed if the officer had to stop to get a warrant.

Warden v. Hayden, 387 U.S. 294 (1967). Defendant robbed a taxi station. Taxi drivers who overheard it followed the fleeing robber and saw him go into a house. Police responded and entered the house and found the defendant in bed, pretending to be asleep. They found the weapon in the head of the toilet (the water was still running) and the clothing worn by robber in a washing machine. The key word in Fourth Amendment is "reasonableness." It is not reasonable to require an officer chasing an armed robber to freeze at door of house when the robber goes inside. It was reasonable to look for the weapon and evidence.

Compare *Minnesota v. Olson*:

Minnesota v. Olson, 495 U.S. 91 (1990). A gas station was robbed at 6:00 a.m. A lone gunman fatally shot the manager. An officer who heard the report suspected Joe Ecker and went to Ecker's home. He saw a car pull up and he gave chase. The car took evasive action, spun out of control and stopped. Two men got out and ran. Ecker was captured and identified as the gunman. The other man escaped. In the car, police found the money and the murder weapon and a rent receipt made out to Rob Olson at 3151 Johnson St. The next morning a woman giving her name called and said a man named Rob drove the car in the gas station robbery and that Rob was going to leave town by bus. At noon, the woman called back and said Rob had told Maria and two other women - Louanne

and Julie - that he was the driver in the robbery, and that Louanne was Julie's mother and they lived at 2406 Fillmore. The police talked to Louanne's mother, Helen, who lived next door. Although Louanne and Julie were not home, Helen confirmed that a Rob Olson had been staying upstairs but was not then home. At 2:45 p.m. Helen called police and said Olson had returned. Police surrounded the house. The police called Julie and told her Olson should come out. They heard a male voice say, "Tell them I left." Julie said Rob had left. At 3:00 p.m. the police went in without Julie's permission or a search warrant, and with weapons drawn. Defendant was found hiding in a closet. **HELD:** Not enough exigent circumstances because no indication existed that Julie was in danger and since the defendant was not going anywhere in that he was surrounded; the police could have gotten warrant. Also, the defendant was not suspected of being the murderer but only the driver, and the murder weapon had already been recovered. Confession suppressed.

State v. Foster, 392 S.W.3d 576 (Mo. App. S.D. 2013). Officers on patrol for drunk drivers saw a car cross a centerline twice late at night and then pull into a driveway. They activated their emergency lights as defendant pulled into his garage. As the garage door was closing, the officers slipped under it and into the garage, without a warrant or consent. Nor did they have probable cause that defendant had committed any felony – just a traffic offense of crossing the centerline. They asked defendant to step outside but he refused. They took him by the shoulder and led him outside for field sobriety tests, and afterward arrested him for DWI. **HELD:** Exigent circumstances did not justify a warrantless entry of a suspect's home for a crossing a centerline traffic investigation.

1. Hot Pursuit Must Usually be Immediate and/or Continuous.

Welsh v. Wisconsin, 466 U.S. 740, 753 (1984). Police entered defendant's home to arrest him for DWI only minutes after a witness had observed him in an apparently intoxicated condition fleeing from a car he had been driving erratically which had gone off the road. **HELD:** "The claim of hot pursuit is unconvincing because there was no immediate or continuous pursuit of the defendant from the scene of the crime." It was also significant in this case that Wisconsin had classified DWI at the time as an infraction carrying no jail time, so it was not a serious offense.

2. Hot Pursuit Must Have Begun in Officer's Jurisdiction

State v. Renfrow, 224 S.W.3d 27 (Mo. App. W.D. 2007). A municipal police officer sees defendant commit a traffic offense but does not activate his red lights until the defendant is outside the city limits. He pulls him over and determines he is

drunk and calls for a State Trooper to take over. The trooper arrives and does the field sobriety tests and runs the suspect on a breathalyzer. **HELD:** The evidence is inadmissible. Missouri's "hot pursuit" statute, Section 544.157, RSMo, requires that "fresh pursuit must be initiated from within the officer's jurisdiction and implies instant pursuit." Absent fresh pursuit, the municipal officer had no authority to pull over the suspect outside the city limits.

NOTE: For a municipal or misdemeanor case, a stop by an officer outside his jurisdiction that does not meet the "fresh pursuit" requirements is not saved by the law allowing a citizen's arrest. *City of Ash Grove v. Christian*, 949 S.W.2d 259 (Mo. App. S.D. 1997).

State v. Williams, 409 S.W.3d 428 (Mo. App. E.D. 2013). Officers trailing electronic signal of a stolen laptop followed the defendant's car into Illinois, where they made a search incident to arrest. **HELD:** The arrest was valid because the entry into Illinois to make the arrest was valid under Illinois law.

3. Hot Pursuit Begun at Door of Defendant's House

United States v. Santana, 427 U.S. 38 (1976). An undercover officer arranged to buy heroin from McCafferty and waited outside while McCafferty went into Santana's house (her supplier) to obtain the drugs. After McCafferty's return and her delivery of heroin to the officer, he placed her under arrest. Other officers traveled the two blocks to the Santana residence. Santana was standing in her doorway with a bag in her hand. They approached her and announced "their office." She turned and retreated into the house. They followed and caught her in the vestibule, finding the marked money from the purchase on her person. **HELD:** Defendant's act of retreating into her home could not thwart her arrest. The case was a true "hot pursuit." Even though this normally connotes some sort of chase, it "need not be an extended hue and cry." This chase ended almost as soon as it began. Once Santana saw the police, there was a realistic expectation that any delay would result in the destruction of evidence.

C. Danger to Police or Other Persons or Evidence.

"As a matter of constitutional principle, the emergency doctrine is not just another means to justify a warrantless search, but for entry onto private premises to respond to urgent need for aid or protection, promptly launched and promptly terminated when the exigency which legitimized the police presence ceases." *State v. Rogers*, 573 S.W.2d 710, 716 (Mo. App. W.D. 1978).

1. Dead Body

State v. Rogers, 573 S.W.2d 710 (Mo. App. W.D. 1978). Report from dispatcher of dead body at a residence. Responding officers entered the home without consent (occupants fled) and found the dead body of a badly beaten female victim lying upon a recliner chair. A sweep of the house revealed items of evidence in plain view. A more extensive search revealed a rope behind a heater (used to bind the victim), bottles of vodka and fingernail polish in the trash (used to poison the victim by forcible consumption), and bottles of alcohol and silver polish from the kitchen cabinets (also used to poison her). **HELD:** Although the entry was valid pursuant to “the exigent circumstances exception” and anything seen in plain view during the protective sweep was properly seized, the scope of the search was limited to plain view unless there had been “apt cause for concern that evidence would have been lost, destroyed or removed before a search warrant could be obtained.” Thus, the items seized from behind the heater, from the trash can and from the kitchen cabinets should have been suppressed.

State v. Epperson, 571 S.W.2d 260 (Mo. banc. 1978). Defendant’s mother-in-law was suspicious that defendant might have harmed her daughter and grandchildren. Daughter and children had been missing several days. The defendant told her his wife had gone shopping in nearby Columbia, but the mother-in-law noticed her daughter’s purse was still at the house and called the police. Responding officers detected the odor of death. Without consent, they went inside and searched the home and found the bodies of defendant’s wife and children in the bedrooms. **HELD:** The exigent circumstances exception applied. “Whenever the police have reliable information of a death, an emergency exists sufficient to justify an immediate search because apparent death may turn out to be a barely surviving life, still to be saved . . . Here, although the odor of decomposing flesh would indicate death of one of the persons involved, at least three persons were missing under very unusual circumstances and defendant could not be found. One or more could have been in immediate need of help to prevent death.” Following entry, the officers could “seize evidence of the crime in the bedroom under the theory of plain view.”

2. Wounded Person or Threat to Life

United States v. Williams, 521 F.3d 902 (8th Cir. 2008). Officers responding to motel about people smoking marijuana in a room had just found an assault rifle and marijuana in one motel room when the manager said the same suspect had rented the room across the hall. The officers knocked, but got no

answer. As they tried to use the manager's key, the door was slammed from the inside and they heard the sound of the sliding of the action of a handgun and also the rattling of window blinds. They entered and caught the defendant on the windowsill, and found a gun hidden under the mattress.

HELD: Exigent circumstances permitted the search because it was reasonable for the officers to believe that the sound of a gun being chambered meant their lives were in danger.

United States v. Janis, 387 F.3d 682 (8th Cir. 2004). Defendant arrives at hospital with gunshot to leg. His girlfriend claims defendant accidentally shot himself and says the gun is still at their home. Officers respond to get it. They see a blood trail going into the house and follow it. They find the gun, among others. Defendant, a convicted felon, finds himself being prosecuted for felon in possession and contests the warrantless entry. **HELD:** A blood trail after a shooting provides exigent circumstances. It was possible another injured person was in the home. Plus, an unsafe, unsecured gun was still in the home. *See also: Smith v. State*, 789 S.W.2d 172 (Mo. App. E.D. 1990). Police following a trail of blood into murder victim's home need no warrant.

State v. Butler, 676 S.W.2d809 (Mo. banc 1984). If exigent circumstances exist, a warrantless entry of a home is permissible in emergency situations in response to a need for help. This was a medical emergency. The police got call from victim that he had just been shot by his wife in his home. From outside the house, police could see him lying on the floor in his family room.

3. Preventing Injury (“Emergency Aid Exception”)

The “emergency aid exception” or “community caretaker exception” is when police warrantlessly enter to prevent injury or to respond to a threat to life or safety of another.

Brigham City, Utah v. Stuart, 547 U.S. 398 (2006). Police officers responding to loud party complaint were standing in the backyard of a residence and saw a fight going on inside the house. Through the screen door and windows they could see four adults trying to restrain a teenager, who broke free and punched one in the face. The victim began spitting blood. The officers rushed in and stopped the fight. The homeowner was later charged with contributing to the delinquency of a minor and disorderly conduct. **HELD:** Exigent circumstances applied, even though this assault was just a misdemeanor. “Officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury. . . . Here, the officers were confronted with ongoing violence occurring

within the home. We think the officers' entry was plainly reasonable under the circumstances. . . . Nothing in the Fourth Amendment required them to wait until another blow rendered someone unconscious or semiconscious or worse before entering. The role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties; an officer is not like a boxing or hockey referee, poised to stop a bout only if it becomes too one-sided.

Michigan v. Fisher, 558 U.S. 45 (2009). Officers responding to a "disturbance" call were directed by neighbors to a house where a man was "going crazy." Outside the house, they saw a pickup with a smashed front and blood on its hood and broken house windows with glass on the ground. Through a window, they could see defendant inside, cursing, screaming, throwing things, and bleeding from a cut on his hand, yelling that they would need a warrant to come inside. **HELD:** It was objectively reasonable to enter without a warrant. Someone might have been inside, in danger or needing assistance.

United States v. Valencia, 499 F.3d 813 (8th Cir. 2007). Police responded to reports that someone had fired shotgun blasts from a particular apartment. When they arrived, defendant was leaving the apartment and admitted it was his home. He claimed ignorance about any shotgun blast and claimed no one else was home. Other tenants said the shots had come from his apartment. Officers entered without a warrant and did a protective sweep. No one else was present, but they spotted shotgun shells on the floor. They backed off and got a search warrant. **HELD:** Exigent circumstances justified the belief that an injured victim might have been inside and to believe that a shotgun might be inside that needed to be secured for safety reasons.

United States v. Clarke, 564 F.3d 949 (8th Cir. 2009). Officers responded to a call that meth was being manufactured in a house. They knocked on the door but got no response. They smelled a strong odor of cooking meth. They went in and found defendant passed out and found items associated with meth manufacture. **HELD:** "The hazards of methamphetamine manufacture are well documented." It was reasonable to believe that a person might be unconscious, hiding, or that a heat source might be presenting a fire hazard.

State v. Brown, ___ S.W.3d ___ (Mo. App. S.D. July 19, 2016). Dangers from smoking meth lab constituted exigent circumstances for warrantless search.

State v. Orso, 789 S.W.2d 177 (Mo. App. E.D. 1990). Reasonable belief of medical emergency existed where defendant's grandmother had been missing for 7 days and defendant refused to allow the police to enter the home he

shared with the grandmother when they responded to a missing person report to check on her well-being. She was known to be elderly, not very mobile, and with a heart condition. Her blinds had been drawn for days, when usually kept open. Meals on Wheels visits had been canceled, the phone was never answered, and she had failed to keep her regular church visits. When the defendant came to the door he claimed she was at his sister's house but he did not know the address or phone number. He said he would go with them to the sister's house and told them to wait while he got his jacket. He closed the door. He came back and said he'd called his sister's house and his grandmother and sister were not home because they'd gone shopping. The police said they wanted to enter to "see if your grandmother is there" and he refused, saying, "Well, you need a search warrant." **HELD:** No warrant necessary because "there are numerous facts to support a reasonable belief that a medical emergency existed" or that "a need for help" existed.

United States v. Hill, 430 F.3d 939 (8th Cir. 2005). Police did surveillance of defendant's home to arrest him on an outstanding robbery warrant. When he came outside to put out his trash, they nabbed him. A man in the doorway of defendant's home turned and ran into the house. Police pursued him and found him flushing the toilet in the bathroom. Doing a protective sweep for others, they found guns in plain view. **HELD:** Officers were reasonably concerned for their safety when the man ran into the home because they were arresting the homeowner for robbery, so the other man might be going for a gun.

State v. Burnett, 230 S.W.3d 15 (Mo. App. W.D. 2007). A DFS worker requested police to assist with a well-being check on a 20-month-old child. The legal custodian of the child, the paternal grandmother, had been hospitalized. The biological father of the child (whose rights had been terminated for sexual abuse and use of drugs) had picked up the child and was believed to be at the biological mother's house. Police responded to the house and knocked on the door, but received no answer. They could hear movement in the house and at one point saw the silhouette of an adult in the house holding what appeared to be a baby. Eventually, a 10-year-old child came to the door and told the officers to leave since in his legal opinion they had no right to come in. The pesky officers entered, anyway. **HELD:** "When a young child is at risk from an individual with a history of violent or abusive behavior, exigent circumstances exist which may justify a warrantless search." The evidence seized in plain view during this entry (photographs taken of the child) was admissible.

United States v. Quezada, 448 F.3d 1005 (8th Cir. 2006). A deputy went to a house to serve a woman with a child protection order. He got no answer when he knocked on the door, but it was not locked and swung open. He saw that the lights and TV were on, but still got no response to his loud calls. Fearing someone might be in need of help, he drew his gun and went inside, where he found a felon passed out atop a shotgun. **HELD:** A police officer is a “jack of all trades.” The court refers to this subcategory of exigent circumstances as the “community caretaker function,” and is a “less exacting standard” than probable cause. This was not an entry to investigate a crime so much as to be a caretaker of the community to make sure there was not a person inside needing help. A reasonable officer would have believed that someone might be inside needing help.

State v. Tattamble, 720 S.W.2d 741 (Mo. App. E.D. 1986). Where officers knew the suspect had passed out from alcohol in his home, an entry without a warrant was not permissible under an exigent circumstances theory. Facts: Defendant’s adult daughter came to the police station and said her father had just raped her when she visited his house. She said he had weapons in the house but was currently passed out drunk. Officers went to the house and knocked on the door but could get no response. They went in without a warrant. **HELD:** The evidence “clearly falls short” of establishing “exigent circumstances.” At the time the police went into the house, no criminal activity was in progress, no “need for help” existed, and no reason existed to fear that defendant would escape. The information that he was passed out was corroborated. The information he had weapons was nullified by reliable information that he was in no shape to use them because he was passed out.

State v. Miller, 486 S.W.2d 435 (Mo. 1972). In response to a radio call that a man was “down” in a washroom at a bus station, police found defendant lying on the floor. They tried to wake him, checked him for injuries, and checked his pockets and found a syringe and some pills. **HELD:** Not an unreasonable search. The emergency doctrine makes a search of an unconscious person both “legally permissible and highly necessary.” Police summoned to investigate the circumstances of a distressed person who seems to be having a medical emergency can look for identification in their efforts to help.

State v. Young, 991 S.W.2d 173 (Mo. App. S.D. 1999). Defendant was a “passed out” passenger in a drunk driver’s car. Police were not alarmed by his unconscious state and did not consider it a medical emergency, but checked his wallet just to see who he was, and ran across a packet of meth. **HELD:** While exigent circumstances could justify checking the ID of an unconscious person, the state failed to show a medical emergency in this case.

4. To Prevent Destruction of Evidence or Property Damage.

Kentucky v. King, 131 S.Ct. 1849 (2011). After a controlled drug buy, the suspect ran into one of two apartments across from each other. Officers thought he ran into Apartment 1 (but he actually ran into Apartment 2). They smelled marijuana coming out of Apartment 2, so they knocked and announced "Police!" and heard sounds as if "things were being moved around." Fearing that evidence was being destroyed, they forced open the door and did a protective sweep. They saw marijuana and cocaine in plain view, secured the scene, and later seized it with a search warrant. **HELD:** The fact that the police created the exigent circumstances by knocking does not matter. As long as the officers themselves reasonably believed evidence was being destroyed and as long as they had not violated or threatened to violate the 4th Amendment, the evidence is admissible.

U.S. v. Scroger, 98 F.3d 1256 (10th Cir. 1997). Exigent circumstances applied when police were doing a "knock & talk" and defendant came to door with a hot plate in his hand, red phosphorous stains on both hands, and the odor of cooking meth billowed out of the door he just opened. Defendant tried to shove the officer out of way to close the door, then fled back into house. The officers pursued, arrested defendant, and did a protective sweep of home. They saw meth cooking in plain view. They secured the scene and applied for a search warrant for a further search. **HELD:** The police conduct met the 4 factors for exigency that allow entry of a home to seize evidence to prevent its destruction: (1) Clear probable cause; (2) Serious crime; (3) Limited in scope to the minimum intrusion necessary; and (4) Supported by clearly defined indicators of exigency that are not subject to police manipulation or abuse.

Dorman v. U.S., 435 F.2d 385 (D.C. Cir. 1970). Four armed men robbed a clothing store, leaving 6 people tied up in a stock room. A shot was accidentally fired and the robbers fled, arms full of clothing. A police officer saw them emerge from the store and pursued them, but they got away. An officer working the crime scene found probation paperwork pertaining to the defendant. A photograph was obtained and within 2 hours the victims had identified defendant from a photo lineup. Search warrant procedures were begun for defendant's home, but no judge was available. At 10:20 p.m., four hours after the robbery, the officers went to defendant's home and knocked on the door. As his mother was saying he was not there they heard a noise in a back room and brushed past her. Although defendant was not found, when they looked for him in a walk-in closet, the police found a brand new suit,

unhemmed, with the label of the store that had been robbed. **HELD:** The search was valid under the exigent circumstances exception. “While the numerous and varied street fact situations do not permit a comprehensive catalog of the cases covered by” the exigent circumstances, the court suggests several factors to consider: (1) The gravity of the offense involved; (2) Reasonable belief that the suspect is armed; (3) A clear showing of probable cause; (4) Strong reason to believe the suspect is in the premises being entered; (5) A likelihood that the suspect will escape if not swiftly apprehended; (6) Reasonableness in amount of force used in making the entry; (7) Time of day or night of entry.

NOTE: LaFave calls the *Dorman* case “the most ambitious attempt” to articulate the factors that bear upon the issue of whether it would have been objectively reasonable to conclude that exigent circumstances were present in a particular case. Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, Vol. 3, p. 409 (Fifth Ed. 2012). Although the U.S. Supreme Court has never officially adopted the *Dorman* factors, in *Welsh v. Wisconsin*, they did refer to it as a leading case defining exigent circumstances.

United States v. Leveringston, 397 F.3d 1112 (8th Cir. 2005). Police officers respond to hotel where management says drug activity is going on in a room. When officers knock, the curtains part, defendant looks out, then closes the curtains and officers hear noises of dishes breaking and the garbage disposal running. They knock for two more minutes, demanding entry, but the defendant jumps from the second story window and flees. After a chase, they catch him, bleeding, not far away. They return to the room and enter with the manager’s key, spotting crack cocaine, scales, baggies and blood. They secure the room and get a warrant. **HELD:** The entry was reasonable under exigent circumstances to prevent the destruction of evidence and to look for a person in need of assistance. In fact, the officers would have been justified in forcing their way in immediately instead of waiting based upon the belief that evidence was being destroyed.

State v. Rowland, 73 S.W.3d 818 (Mo. App. S.D. 2002). Motel staff alerted police that a strong smell of ether was coming from a motel room. Police noted the distinctive odor of ether and knocked on the door. Defendant opened it, started to step out, recognized them as police, and tried to get back inside to shut the door. Police stopped him, grabbed him, pulled him out of the room and handcuffed him. They entered the room for a protective sweep, found the odor very strong, and noticed in plain view coffee filters with a white substance (meth) on them, plus scales, jars, and baggies. They seized the items without a search warrant. **HELD:** The odor of ether

established exigent circumstances. “Given the room’s proximity to other rooms, the volatility of the chemical, and the possibility of unconscious persons being located in the room, it was reasonable that officers would have investigated the matter without a search warrant.” Once inside, plain view doctrine applied.

State v. Glisson, 80 S.W.3d 915 (Mo. App. S.D. 2002). Officers went to defendant’s house to investigate a report that a witness had seen someone carry a stolen rifle into the house. When they arrived, a man was outside next to a car in the driveway. They asked to see his I.D. While the officer went to the patrol car to run the I.D., the man went into the house and locked the door. The officers could see that despite the cold February weather, all windows of the house were open. They could smell a “tremendous” and “strong” odor of ether. They knocked on the front door. Defendant answered. They asked for consent to search but defendant cursed and turned away, running into the depths of the house. The officers followed because of the possible presence of the reported weapon and because of the possibility that a drug lab could be destroyed before a warrant could be obtained. They did a protective sweep, located three people in the house, handcuffed them and brought them to the front porch to await a search warrant. The evidence was not seized until a search warrant was obtained. **HELD:** Exigent circumstances justified the initial warrantless entry into the residence. The officers had reason to believe that weapons were present that could be used against them, and that evidence could be destroyed if they did not reenter without a warrant to secure the premises. The trial court order suppressing the evidence is reversed.

People v. Valencia, 237 Cal. Rptr. 128 (Cal. 1987). The location of a controlled drug buy involving an informer and marked money was suddenly moved from the informer’s car to the seller’s apartment. This alarmed the police because dangerous people were in the apartment and the informant would be out of sight of the observing police officers. This provided exigent circumstances for a warrantless entry of the apartment by police officers. The court noted that the officers acted in good faith; they had planned the transaction to occur in the car within their view; in addition to the risk to the informer when the deal moved inside, there was the possibility that the marked money might disappear when the people in the apartment disappeared.

State v. Wiley, 522 S.W.2d 281 (Mo. banc. 1975). An Informant calling a “tip” line provided police with information that suspects Wiley, Umfleet and Moore were storing drugs in the refrigerator of their apartment, that they were at the apartment right now eating a meal, and that they were taking the drugs to

Illinois as soon as they finished the meal. The prosecutor and police started working on a search warrant but couldn't find a judge. In the meantime, other people came to the apartment, spotted the police, and took off. The police decided they had to go in without a warrant to keep the drugs from being destroyed. They entered and arrested defendants and went straight to the refrigerator and seized a white plastic bag of drugs from the refrigerator. Nothing else was searched or seized. **HELD:** This search was justified as a reasonable search under the exigent circumstances exception. "When agents have probable cause to believe contraband is present and, in addition, based on the surrounding circumstances or the information at hand, they reasonably conclude that the evidence will be destroyed or removed before they can secure a search warrant, a warrantless search is justified." The Court cautions that this is a "restricted fact situation" and it was important that there was specific reason to fear the destruction of the evidence and that the scope of the search was limited to the one specific place (refrigerator) and was not a general search.

State v. Vega, 875 S.W.2d 216 (Mo. App. E.D. 1994). Police obtained a search warrant to search a residence for drugs. Five suspects (people other than defendant) were the supposed dealers. Defendant happened to be one of the people on the premises when the police arrived. When the police forced the door open, defendant fled the front room to a rear bedroom, where he picked up a black pouch and put it in his pants. An officer retrieved the pouch, which contained bags of cocaine. **HELD:** It is not necessary to consider whether the search of defendant's person exceeded a pat-down of a non-suspect on the premises, because "when probable cause exists to believe that evidence will be removed or destroyed before a warrant is obtained, a warrantless search and seizure can be justified under the exigent circumstances doctrine."

Cupp v. Murphy, 412 U.S. 291 (1973). Defendant Murphy voluntarily appeared at the police station with counsel for questioning in connection with the strangulation murder of his estranged wife. Shortly after his arrival, police noticed a dark spot on defendant's finger. Suspecting it might be dried blood and knowing that evidence of strangulation is often found under the fingernails of the assailant, they asked defendant if they could take a sample of scrapings from his fingernails. He refused and put his hands behind his back, appearing to rub them together, then put them in his pocket. The police took the samples without his consent. They were found to contain traces of skin and blood cells and fabric from the victim and her nightgown. **HELD:** With probable cause, a search for evidence on the person of a defendant which might be unavailable later may be made even without a search warrant or an arrest.

State v. Page, 609 S.E.2d 432 (N.C. App. 2005). Gunshot residue test of arrestee's hands without warrant can be considered a warrantless search upon probable cause and exigent circumstances since the delay to get a warrant would have allowed the evidence to be destroyed. Gunshot residue may easily be destroyed by wringing hands, putting them in pockets, washing hands or shaking hands.

State v. Varvil, 686 S.W.2d 507 (Mo. App. E.D. 1985). Defendant was convicted of receiving stolen property. A search warrant had been issued to search a "chop shop" operation for stolen car parts. The warrant only described building "A," but there was also a building "B", with defendant inside, which the officers searched. They had sufficient manpower that they could have secured the scene while a second warrant was obtained. Instead, they went ahead and searched building "B" and found a stolen car, for which defendant was prosecuted. **HELD:** The Court cites with approval the *Dorman* factors and concludes that since the crime did not involve violence and since evidence of cars being cut up was not the sort of thing that could easily be destroyed in the time it would take to get a valid search warrant, the exigent circumstances exception did not apply.

(a) BLOOD DRAW AS EXIGENT CIRCUMSTANCES:

Constitutional Law Regarding Warrantless Blood Draws

Breithaupt v. Abram, 352 U.S. 432 (1957). Police took a blood sample from an unconscious person who had been involved in a fatal accident. **HELD:** The interests in the scientific determination of intoxication outweighed so slight an intrusion of a person's body so the warrantless search did not violate the Fourth Amendment.

Schmerber v. California, 384 U.S. 757 (1966). At police officer's request, a physician took blood from DWI suspect at hospital. He had been injured in a one-car traffic accident two hours earlier. The blood was drawn without a warrant and over defendant's objection. **HELD:** No violation of Fourth Amendment: (1) The privilege against self-incrimination was not violated since it applies only to testimonial evidence; (2) The search was not unreasonable given the grounds for seeking the blood, the measures used, and the delay that would have been necessary to get a warrant, which would have threatened the destruction of the evidence. Because bodily intrusions are significant, though, the Court warned that a warrantless search was limited to facts such as those present here.

Missouri v. McNeely, 133 S.Ct. 1552 (2013). A trooper pulled over a weaving motorist at 2:08 in the morning and developed probable cause he was intoxicated. The suspect was a repeat offender and his arrest was a felony. Without trying to get a search warrant, the officer drove the suspect straight to the hospital and had blood drawn without a warrant at 2:35. **HELD:** In a routine DWI case, the fact that alcohol leaves the blood with each minute that passes, by itself, does not provide sufficient exigent circumstances for not trying to get a search warrant for a blood draw. Unlike *Schmerber*, there was no accident. Nor was any testimony offered that it would have taken a long time to get a search warrant. In fact, the testimony was that a warrant could typically be obtained in that county within 90 minutes. The Court reaffirms that the test for exigent circumstances is a totality of the circumstances test, and leaves for another day issues such as how long the officer must try to contact a prosecutor and judge before finally giving up. *Same result: State v. McNeely*, 358 S.W.3d 65 (Mo. Banc 2012).

State v. Setter, 721 S.W.2d 11 (Mo. App. 1986). Involuntary manslaughter case where officer ordered medical staff at hospital to take a sample of suspect's blood, even without consent of suspect, who gave no response when asked. **HELD:** Under *Schmerber*, it is constitutionally permissible for an officer arresting a defendant for manslaughter to take a sample of the suspect's blood without his consent and without a warrant.

State v. Dowdy, 332 S.W.3d 868 (Mo. App. S.D. 2011). In an investigation of defendant for murder and possession of a firearm while intoxicated, officers with probable cause could have blood drawn without a search warrant as a search incident to defendant's arrest.

Warrantless Blood Draws Under Statutory Law

State v. Ikerman, 698 S.W.2d 902 (Mo. App. E.D. 1985). In traffic accident DWI-related case, police had obtained a blood sample from defendant at hospital without a search warrant and without consent. **HELD:** Missouri implied consent statute contains a provision that "if a person under arrest refuses upon the request of the arresting officer to submit to a chemical test then none shall be given." Thus, if the person refuses, the officers cannot have blood drawn without a warrant (for DWI prosecutions, but can for involuntary manslaughter prosecutions, see *State v. Todd*, 935 S.W.2d 55 (Mo. App. 1996)). Motion to suppress upheld. See also: *Murphy v. Director of Revenue*, 170 S.W.3d 507 (Mo. App. W.D. 2005).

Under the wording of Section 577.020, RSMo, an officer is allowed to order the taking of a blood sample even without a warrant or consent when a driver is under arrest for a traffic violation involving in a vehicle crash resulting in a fatality or “readily apparent serious physical injury.”

See also: **Search Warrants For Blood and Urine**, supra.

(b) Preventing Burglary

Another exception to the warrant requirement is in emergency circumstances to protect a victim’s property from burglary.

Reardon v. Wroan, 811 F.2d 1025 (7th Cir. 1987). Police properly entered a fraternity house in response to a radio call reporting burglary in progress, where a lone car was parked in the driveway and the frat boys were on Christmas break. Officers found the back door unlocked and went in and arrested two people inside, who turned out to be two of the fraternity boys who were lawfully there. They filed civil suit, which they lost because the search was reasonable under exigent circumstances.

State v. Warren, 304 S.W.3d 796 (Mo. App. W.D. 2010). Officers responded to a house where a burglar alarm had gone off. The officers noticed the front door was unlocked and ajar, so they knocked and went inside, where they found marijuana in plain view. They secured it and used the information to get a search warrant. Pursuant to the warrant, they found two pounds of marijuana. **HELD:** A sounding burglar alarm, with a door ajar, provides exigent circumstances for police to enter without a warrant. “The very presence of a security system in the home suggests the police would be in dereliction of their duties had they not decided to investigate . . . It would defy reason to suppose that law enforcement officers had to secure a warrant before investigating, leaving the putative burglars free to complete their crime unmolested.”

5. Preventing Escape

State v. Wright, 30 S.W.3d 906, 910 (Mo. App. E.D. 2000). A rape victim had just escaped from her rapist who had bound her with duct tape. She told police he was last seen at his apartment where the rape occurred just hours before. The officers responded and knocked on the door. They heard a “commotion” inside. Fearing that if they left he would escape or destroy evidence, they entered the apartment with a landlord’s key and caught the defendant inside. They seized duct tape and rubber gloves in plain view.

HELD: “Exigent circumstances exist if the time required to obtain a warrant would endanger life, allow a suspect to escape, or risk the destruction of evidence because of an imminent police presence. An important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made.” Evidence admissible.

State v. Adams, 51 S.W.3d 94, 99 (Mo. App. E.D. 2001). A kidnapping victim escaped from her captor and called the police. She took them to the house where she had been held and reported that the suspects were a man and a woman, both armed. They had handcuffed her and put duct tape over her mouth. The officers approached the house and saw a woman inside. They entered and arrested her, finding a gun in a coat nearby. They did a “protective sweep” for the man, but did not find him, but did find weapons, duct tape and handcuffs. **HELD:** “Exigent circumstances exist if the time required to obtain the warrant would endanger life, allow a suspect to escape, or risk the destruction of evidence because of imminent police. Several factors are considered in determining when exigent circumstances exist, including: (1) the gravity of the offense; (2) whether the subject is reasonably believed to be armed; (3) whether there is a clear showing of probable cause; (4) whether the subject is inside the premises to be searched; (5) whether the suspect is likely to escape if not apprehended quickly; and (6) whether the entry is made peaceably.” All six factors were present here, said the court.

6. Scope of Search Under Exigent Circumstances:

Once it is determined that the suspicion which led to the entry was without substance, the officers must depart rather than explore the premises further. Thus, where entry of a hotel room was undertaken for the purpose of aiding a person the police were told had suffered a gunshot wound, but the room turned out to be unoccupied, it was illegal for the officers to open a suitcase found in the room. *U.S. v. Goldstein*, 456 F.2d 1006 (8th Cir. 1972).

(a) No Murder Scene Exception

Although the initial entry may be valid under the emergency doctrine, the SCOPE of the subsequent search may be limited. For example, THERE IS NO “MURDER SCENE” EXCEPTION TO THE SEARCH WARRANT REQUIREMENT.

Mincey v. Arizona, 437 U.S. 385, 394 (1978). A police officer was killed in shootout in suspect’s home in an undercover drug buy gone bad. Police conducted a four-day warrantless search of the

scene. **HELD:** The fact the premises searched was the scene of a recent murder did not automatically justify an extensive warrantless search of the premises when there was “no indication that evidence would be lost, destroyed, or removed during the time required to obtain a search warrant.” The burden is on the state to show the need for the search and the reasonableness of the belief that a warrant could not be obtained. There is no general murder scene exception to the search warrant requirement. Same result: *Flippo v. West Virginia*, 528 U.S. 11 (1999); *State v. Rogers*, 573 S.W.2d 710 (Mo. App. W.D. 1978), discussed *supra*.

(b) Fire Investigation Exception

The exigent circumstances exception also allows firemen to go into a building to extinguish the fire and determine the “cause and origin” of the fire. *Michigan v. Tyler*, 436 U.S. 499 (1978). Once the fire is out and reasonable administrative inspections are finished, however, the inspection can turn into a search that would require a warrant.

5. Stop & Frisk and Similar Lesser Intrusions.

“The stop is a watered-down junior varsity arrest. The frisk is a watered-down junior varsity search.” —Hon. Charles Moylan.

(A) Stop – The officer must have reasonable suspicion to believe that a crime has occurred, is occurring or is about to occur.

When an officer observes unusual conduct leading him to reasonably believe criminal activity may be afoot, he may stop that person, identify himself as a police officer, and make reasonable inquiries. “Reasonable suspicion” or “articulable suspicion” is all that is required, not probable cause. The Supreme Court has noted that the “level of suspicion” is considerably less than proof of wrongdoing by a preponderance of the evidence. *United States v. Sokolow*, 490 U.S. 1 (1989). It will suffice if at the time of the stop there exists a substantial possibility that criminal conduct has occurred, is occurring or is about to occur.” *United States v. Arvizu*, 534 U.S. 266 (2002).

(B) Frisk – In order for a frisk to be lawful, the officer must have reasonable suspicion to believe the person may be armed.

If a reasonably prudent man in the officer’s position would believe his safety or that of

others is in danger, he may go a step further and pat down the exterior clothing of the person for weapons. The officer need not be absolutely certain the defendant is armed. The test is whether a reasonably prudent person in same circumstances would believe he was in danger.

“Reasonable suspicion” and “articulable suspicion” is what is required, not probable cause.

Terry v. Ohio, 392 U.S. 1 (1968). Officer Martin McFadden was patrolling in plain clothes in downtown Cleveland at 2:30 p.m. on Halloween. He had been a police officer for 39 years. He saw two men he’d never seen before standing on a corner. They “didn’t look right.” He moved out of sight and watched. One left the other, walked past some stores, looked in a store window, walked a short distance, turned around and walked back toward corner, paused to look in the same window, rejoined his companion, and they talked. Then the second man did the same thing. They were briefly joined by a third man, who spoke to them and left. They did this five or six times. McFadden suspected they were “casing a job, a stick-up” and he feared they “might have a gun.” They met the third man and stopped in front of a jewelry store. The officer came up to them, identified himself as a police officer and asked for their names. They mumbled something. He grabbed Terry and spun him around so they faced the other two. He patted down Terry’s clothing and found a loaded .38 in the upper breast pocket of Terry’s overcoat. He ordered all three men into the store and found another gun on Chilton. **HELD:** This case established the stop and frisk doctrine – Terry’s conviction for CCW was affirmed.

Sibron v. New York, 392 U.S. 40 (1968). A narcotics officer watched the defendant standing on a street corner, engaging in a number of brief encounters with passing pedestrians, who seemed to be getting something from him. The officer thought the man was probably selling drugs. The officer followed him into all-night diner. Both sat at the counter. Defendant left. The officer followed him. Outside, the defendant reached into his pocket, saying, “I know what you’re after.” As the defendant reached into his pocket, the officer stuck his hand in defendant’s pocket, too. Together, they pulled out a packet of heroin. The honest officer admitted he had not suspected that defendant was drawing a weapon, but rather thought the pocket contained a stash of drugs. The officer said he was not afraid at all. **HELD:** The only reason a warrantless **frisk** is allowed without probable cause is to protect an officer’s life, not to get evidence. This search was improper.

State v. Purnell, 621 S.W.2d 277 (Mo. 1981). Defendant was looking into a business at 2:00 a.m. “when every store or place of business in the area was

closed” and as the marked police car approached the defendant “began to hurriedly walk away.” This was reasonable suspicion.

State v. Valentine, 584 S.W.2d 92 (Mo. 1979). The stop of a car was proper after a detective doing a stakeout noticed it pass by a cleaning establishment several times at the same time of evening that earlier cleaning establishment robberies had taken place. The officer was doing the stakeout specifically because of the robbery problem in the neighborhood.

State v. Haldiman, 106 S.W.3d 529 (Mo. App. W.D. 2003). A State Trooper got a call that a gray Camaro was transporting illegal drugs, but the broadcast contained no corroboration nor did it indicate the source of the information. He spotted the car and followed it. After it veered onto a shoulder he pulled it over for the traffic offense. The driver came back and sat in the patrol car. The driver was not antagonistic, nor did he make any hostile moves. The trooper got consent to search the car. The trooper admitted he did not fear for his safety. Nevertheless, after backup arrived, he told the driver to step outside the patrol car and he patted him down, finding a golf ball-sized baggie of methamphetamine inside the driver’s boot. **HELD:** The pat-down frisk was not reasonable under the Fourth Amendment. A *Terry* frisk must be supported by specific and articulable facts that the suspect is armed and presents a risk to the safety of the officer. “The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence.” Also: “Consent to search a vehicle does not automatically equate consent to a pat-down search.” Nothing had been said about a pat-down, so the pat-down exceeded the scope of the consent.

State v. Lovelady, 432 S.W.3d 187 (Mo. banc 2014). Officers spotted defendant riding a bike in circles at 10:30 at night in a high crime area. When they got closer they spotted a gun tucked in his waistband and he told them, “They went that way!” They checked the gun and it was a toy. Afterward, they detained him an additional two minutes while they checked with dispatch to see if any warrants existed for his arrest. They learned that a pick-up order existed, so they arrested him, and found cocaine in his pocket. **HELD:** The original *Terry* stop was lawful. Although it is not illegal to carry a gun, the combination of being late at night in a high crime area while riding a bike, each separately an innocent behavior, combined to provide reasonable suspicion that a crime might be afoot. The detention was still lawful after the gun proved to be a toy because under the totality of the circumstances, reasonable suspicion was still present that a crime was occurring or had just occurred.

C. Reasonable Suspicion is Much Less Than Probable Cause and May Consist of a Combination of Otherwise Unsuspicious Facts – Court Should Not “Divide and Conquer” When Analyzing Those Facts.

United States v. Arvizu, 534 U.S. 266, 273-74 (2002). A border patrol officer developed reasonable suspicion that a van might be transporting illegal aliens or drugs, based upon a combination of otherwise unremarkable facts. The van had taken an unpaved back road, as if trying to avoid a checkpoint; when it drove by, the driver sat stiff and ignored the officer; the direction it was going led to nowhere and was rarely traveled; the children in the back were riding unusually high, as if sitting on something; the children waved mechanically for four full minutes, as if being coached by the adults in the front. The officer ran the license plate and found that the van was registered to an address in an area “notorious for alien and narcotics smuggling.” He stopped the van on reasonable suspicion and obtained consent to search. He found 128 pounds of marijuana worth \$99,080.00. **HELD:** The combination of facts amounted to reasonable suspicion. The test is whether reasonable suspicion exists to believe that criminal activity “may be afoot. An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity . . . Courts must look at the ‘totality of the circumstances’ of each case to see whether the detaining officer has a ‘particularized and objective basis’ for suspecting legal wrongdoing . . . Although an officer’s reliance on a mere ‘hunch’ is insufficient to justify a stop, the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard.” In this case the 9th Circuit had improperly taken each factor and found that each, standing alone, was not suspicious. A 9-0 Supreme Court precludes “this sort of divide-and-conquer analysis.” Rather, the Court looks at all of the facts together, and holds that reasonable suspicion did exist that the van was engaged in illegal activity.

State v. Peery, 303 S.W.3d 150 (Mo. App. W.D. 2010). The police were doing surveillance of a parking lot because a confidential informant had reported he was going to buy marijuana from Dustin Peery and was wired up to do so. Peery was to arrive at that time and place in a green Plymouth Neon. The Neon arrived, followed closely by a teal Ford Contour. Both cars stopped near the informant, who said “hi” to the driver of the Contour. The Contour moved to a spot where the driver could watch as the drug sale took place. After the sale, the Contour started to leave but the police stopped it and spotted evidence in plain view. **HELD:** Reasonable suspicion is determined from the totality of the circumstances as to whether there is “a fair inference that criminal activity was afoot.” While each fact alone was not enough, when all were put together reasonable suspicion existed that this second car was also involved in the criminal activity. *Arvizu* cited.

State v. Bizovi, 129 S.W.3d 429 (Mo. App. W.D. 2004). Defendant was pulled over on the interstate for a traffic offense. While waiting for the computer's response on the license and criminal history checks, the officer noticed that defendant was nervous, was not driving his own car, had inadequate luggage for a week-long trip from Nevada to Michigan, had food wrappers and a cooler indicating a straight-through drive, his story that he planned to stay in Michigan for a week did not jibe with his later story that he planned to start school in Nevada in four days, and he was traveling from a known drug source (Nevada) to a known drug destination (Detroit). **HELD:** Although each factor alone was innocent, added together they amounted to reasonable suspicion to detain him for the few minutes it took for the drug dog to arrive. "Factors that may be consistent with innocent conduct alone may amount to reasonable suspicion when taken together."

BUT NOTE: NERVOUSNESS, AN ATLAS ON THE CAR SEAT AND FAST FOOD WRAPPERS ON THE FLOOR DO NOT AMOUNT TO REASONABLE SUSPICION.

State v. Richmond, 133 S.W.3d 576 (Mo. App. S.D. 2004). Defendant was pulled over for a traffic offense. As he was being issued a warning, he seemed nervous. He had an atlas open on the seat and fast food wrappers on the floor. He was alone in the car. He said he was traveling from California to Michigan in his girlfriend's car, but she was not along because of her pregnancy. Based upon these facts, the officer detained the car for 50 minutes awaiting a drug dog. He let the defendant leave on foot. **HELD:** The nervousness, atlas and fast food wrappers did not amount to reasonable suspicion "in this era of carry-out dining and cannot serve to separate the suspicious from the innocent traveler." The motion to suppress was properly granted. **NOTE:** The defendant had reason to be nervous – he had 40 kilos of marijuana in his trunk!

D. The determination of reasonable suspicion may be based upon a mistake on the officer's part as to the facts or the law

Helen v. North Carolina, 135 S.Ct. 530 (2014). Police officer pulled a car over for having a burned-out taillight. An ordinance appeared to make it a requirement to have working tail lamps. While the car was stopped for this reasonable suspicion, the officer obtained consent to search, and found a baggie of methamphetamine. It turned out that the ordinance was satisfied by having only one working taillight, so it was not a violation, after all, to have one burned out. **HELD:** "Because the officer's mistake about the brake-light law was reasonable, the stop in this case was lawful under the Fourth Amendment." The Court says reasonable suspicion existed because his mistake about the law's interpretation was reasonable. Reasonable men can make mistakes of law, and the touchstone of the Fourth Amendment is reasonableness. The Court notes that if an officer pulled a person

over for being in a multiple-user car-pool lane, thinking the driver was alone, but then found two small children in car seats in the back, the officer would have made a mistake in the stop, but the Fourth Amendment would not be violated. (Presumably anything seen in plain view would have been admissible.)

E. Fleeing From Police Constitutes Reasonable Suspicion for Terry Stop.

Illinois v. Wardlow, 528 U.S.119, 124 (2000). Defendant fled upon the approach of a caravan of four police cars in an area of Chicago known for being a place where drug deals occur. The officers chased him and caught him and frisked him for weapons. They found a gun. **HELD:** No Fourth Amendment violation. A person's presence in a high crime area, standing alone, is not reasonable suspicion, but "nervous, evasive behavior" in a high crime area is a relevant consideration, and "headlong flight - where ever it occurs - is the consummate act of evasion" and did provide reasonable suspicion for a stop.

State v. Crabtree, 398 S.W.3d 57 (Mo. App. W.D. 2013). Fleeing in car from police officer after another person had pointed to the suspect's car constituted reasonable suspicion to pull the car over for a *Terry* stop.

F. Fellow Officer Rule

Under the fellow officer rule, the Fourth Amendment test of reasonable suspicion or probable cause is satisfied if the information known by all of the officers collectively amounts to probable cause or reasonable suspicion.

State v. Hernandez, 954 S.W.2d 639, 642 (Mo. App. W.D. 1997). Officers were making a *Terry* stop of defendant and he ran. Although the officer who tackled him might not, on his own knowledge, have had reasonable suspicion for the stop, the court should look at the facts known by all of the officers in determining whether reasonable suspicion existed. **HELD:** "When multiple police officers are working together closely in order to effect an arrest or engage in an investigatory stop, the Fourth Amendment is satisfied if the information known by all of the officers collectively amounts to probable cause or reasonable suspicion." *See also: State v. Goff*, 129 S.W.3d 857 (Mo. banc 2004).

G. Scope Limitation to the Stop – Must be Brief, Must be in That Place, Not to Station House. Although, Okay to Put Suspect in the Police Car.

Pliska v. City of Stevens Point, 823 F.2d 1168 (7th Cir. 1987). Officer suspected a person of "casing" a burglary in a neighborhood and made a proper *Terry* stop for investigation. He put the suspect in a locked police car and drove a short distance

while still determining his identity. No force was used, the detention lasted only 10 minutes, and the only intrusion was asking questions. This was reasonable.

H. Scope Limitation - Amount of Force Should be Least Amount Necessary, but Tackling a Fleeing Suspect is Reasonable.

State v. Hernandez, 954 S.W.2d 639 (Mo. App. W.D. 1997). Officers had reasonable suspicion to believe defendant was throwing rocks at the back of a building, based upon a call describing four Hispanics throwing rocks at the back of a building at a particular location. They responded and found four to six Hispanic men. One, the defendant, put his hand in his pocket and took off running. The police chased him. He was carrying a black object. He fled across a busy street. One officer caught and tackled him. Defendant popped up and produced a knife, raising it above his head as if to cut the officer. Another officer caught his arm and prevented the stabbing and banged defendant's hand on the ground until he dropped the knife. Defendant claims the seizure of the knife was improper. **HELD:** The police were making an investigative *Terry* stop of defendant based upon reasonable suspicion. When he ran it became reasonable for the officer to tackle him since the officers had reasonable suspicion he had committed a crime and was fleeing.

I. Scope Limitation – Handcuffs May Be Used

United States v. Walker, 494 F.3d 688 (8th Cir. 2007). Officer following defendant's car saw him driving reckless and appear to be in an altercation with his female passenger. When he pulled the defendant over, he immediately handcuffed him. **HELD:** During a *Terry* stop, officers are permitted to take steps reasonably necessary to protect their personal safety and maintain the status quo. Protective searches allow for the use of handcuffs.

J. Scope Limitation – Weapon May Be Displayed if Reasonably Necessary

United States v. Smith, 648 F.3d 654 (8th Cir. 2011). Officers approached bank robbery suspect with guns drawn. **HELD:** During a *Terry* stop, officers “may take any steps that are reasonably necessary to protect themselves and maintain the status quo.” When reasonable to protect themselves from danger, “they may brandish weapons or even constrain the suspect with handcuffs in order to control the scene and protect their safety.”

K. Scope Limitation – A “Stop & Frisk” For Weapons Requires Reasonable Suspicion that the Person is Violating the Law AND is Armed With a Weapon.

Taylor v. State, 234 S.W.3d 532 (Mo. App. W.D. 2007). The Kansas City Police

Department designated a certain area of town as a “zero tolerance enforcement zone.” They vigorously enforced a jaywalking ordinance by stopping people who walked in the middle of the street and giving them citations. They stopped defendant, and immediately told him to put his hands on the police car so they could frisk him for weapons and sharp objects. The defendant had NOT been arrested, so this was not a search incident to arrest. The officer admitted that he did not honestly expect to find a weapon on this individual because he knew him and had frisked him “more than 50 times” in the past, and had never once found a weapon on him, nor had this individual ever committed a violent crime. **HELD:** While stopping the person and giving him a citation was a reasonable stop and he could be detained a reasonable amount of time while issuing the citation, the additional frisk was not supported by specific reasonable grounds to believe that this suspect was armed. The fact that it was a high crime neighborhood was not enough to overcome the known fact that the officer had frisked this person 50 times and he had never been armed.

United States v. Hughes, 517 F.3d 1013 (8th Cir. 2008). At 9:30 in the morning, a police officer got a call to respond to “suspicious parties on property.” An anonymous caller, when asked what was suspicious about the people, said they were trespassing. Nothing in the dispatch implied a dangerous situation. The apartment complex was in a high crime area due to “reputed narcotic trafficking.” The trespassers were described as two black males, one without a shirt, the other wearing a brown shirt and having braids. The responding officer found two men matching that description, but they were with a third man at a nearby bus stop. He immediately stopped and frisked them. The officer testified the “first thing” he normally does when stopping an individual is to “have that person place their hands on the vehicle and I pat them down and I frisk them.” **HELD:** Improper *Terry* stop. While the officer could have “initiated a simple consensual encounter, for which no articulable suspicion is required,” it was improper to physically detain and frisk the subjects because no reasonable suspicion existed they were committing or had committed a crime, and it is especially true that no evidence existed that they were armed and dangerous. “Being stopped and frisked on the street is a substantial invasion of an individual’s interest to be free from arbitrary interference by police.” Here, that interest was not outweighed by the public interest in investigating a vague anonymous call about a potential misdemeanor trespassing. This was not a situation where an officer making a valid *Terry* stop noticed a bulge in the person’s clothing and decided to frisk for a weapon. *United States v. Roggeman*, 279 F.3d 573 (8th Cir. 2002). Nor was it a search incident to a valid arrest since this uncorroborated anonymous call did not supply probable cause for an arrest. Sadly for the officers on the street, “being outnumbered does not justify a frisk where the initial *Terry* stop is not justified.”

State v. Bones, 230 S.W.3d 364 (Mo. App. S.D. 2007). Defendant was pulled over for

an improper turn traffic offense. The officer, also a member of the SWAT team, recognized defendant as a person who had been present two or three times when the SWAT team was called out to assist on search warrants for high risk houses where drugs were found. The officer got defendant's license and car title and asked the dispatcher to run a check for defendant's license status and any outstanding warrants. Defendant admitted he did not have his proof of insurance with him. The officer asked defendant to step out of the vehicle. Concerned that he must have a weapon, he began patting him down. At the moment when the officer felt a long, hard object that might be a weapon, the defendant pulled away and began running. Defendant dropped the object, which turned out to be a hard plastic cylinder filled with 144 grams of methamphetamine. **HELD:** Defendant's claim that the search was improper is overruled. First, the detention was a lawful traffic stop. Second, the officer may order a person stopped for a traffic offense to get out of the car. *Pennsylvania v. Mimms*, 434 U.S. 106 (1977). Third, the officer had reasonable suspicion for a pat-down, based on his recognizing defendant as being present at the scene of prior searches involving drugs and guns. "When a valid traffic stop has been made, officers may pat down a suspect's outer clothing if they have a reasonable, particularized suspicion that the suspect is armed."

State v. Norfolk, 366 S.W.3d 528 (Mo. banc 2012). Police officer saw a man on a street corner in an area where there had recently been several armed robberies make eye contact with her and "adjust his pants" by reaching behind him with a single hand, which made her think he might have a gun. She approached him and made him put his hands on the wall and frisked him, finding a gun and drugs. **HELD:** This conduct in a high-crime area amounted to reasonable suspicion to detain and frisk.

State v. Strong, 464 S.W.3d 221 (Mo. App. E.D. 2015). A man who identified himself by name pulled up next to a police car and said his nephew had seen a man in a white tank top and jeans lift his shirt to reveal a gun, and gave the address where it happened. The officers approached the defendant, who matched the description. As they neared him, his hand moved to his pocket as if concealing a gun. They pulled their guns and handcuffed and frisked him, finding a concealed gun. They ran a check and learned he had no concealed-carry permit. **HELD:** The tip was corroborated by the defendant's actions as they approached. They had reasonable belief that he was armed and carrying concealed. "Missouri courts have not required, and should not require, the officer to first make an inquiry into whether a person has a permit to conceal a weapon before performing a *Terry* stop and pat-down search."

United States v. Menard, 95 F.3d 9 (8th Cir. 1996). Defendant was a passenger in a car pulled over for failing to dim headlights. The officer recognized another passenger as a known drug dealer who was the subject of a recent "officer safety warning." He

patted down the known drug dealer and found a gun. As a result, he patted down defendant and found his gun. Defendant cries foul, claiming the officer had no reasonable suspicion to pat him down. **HELD:** This was a car stop at 2:00 on a deserted road and the officer was outnumbered. Traffic stops are inherently dangerous. Especially after a gun was found on his companion, a pat-down of the passenger was reasonable for officer safety. While some circuits have authorized an “automatic” pat down of a group when officers have probable cause to arrest one member of the group, the Eighth Circuit has rejected that analysis and instead looks at the totality of the circumstances.

L. Detention Ends When Reasonable Suspicion Ends

State v. Perry, ___ S.W.3d ___ (Mo. App. W.D. 10/18/2016). An officer suspected defendant of being involved in meth, so she drove by his house, and saw him getting into his car. Two weeks earlier an officer had told her that the defendant’s driver’s license might be suspended. She followed defendant for four minutes and when he stopped and got out at his girlfriend’s house, she approached and demanded to see his license. She checked it and it was valid. Still suspicious, she went to her car with his license in hand to run him on the computer. While he was being detained, he took something small from his pocket and pushed a bike to the girlfriend’s house, with whatever it was still in his hand. When the officer tried to approach him, he ran, and ultimately hid meth in a crack at the top of a fencepost. **HELD:** The reasonable suspicion ended once he showed a valid driver’s license, so from that point on, the detention was illegal. The evidence derived from it was inadmissible.

M. Scope Limitation of Detention – Cannot Fingerprint on Less than Probable Cause.

Hayes v. Florida, 470 U.S. 811, 816 (1985). A warrantless station house detention for fingerprinting on less than probable cause was unreasonable. The “full protection” of the Fourth Amendment comes into play “when the police, without probable cause or a warrant, forcibly remove a person from his house or other place in which he is entitled to be and transport him to the police station, where he is detained, although briefly, for investigative purposes.”

N. Scope of Detention – If Suspect Refuses to Give Name and Address, the Detention may Include a Search for ID.

State v. Flynn, 285 N.W.2d 710, 717-18 (1979). An officer was told to patrol an area for suspects in a just-completed burglary. Thirty minutes later he saw two men emerge from an alley. One fit the description of the burglar. He identified himself, but the other refused to do so, even after the officer explained the reason for the inquiry. The officer frisked the detainee for a wallet, checked the ID, and found that a

“pick-up” order was out for him. The officer also found pliers and a flashlight during the frisk. **HELD:** In *Adams v. Williams* the Court stated that an officer may stop a person [upon reasonable suspicion] “in order to determine his identity.” To accept defendant’s contention that the officer can stop the suspect and request ID, but that the suspect can turn right around and refuse to provide it, would reduce the authority of the officer . . . recognized by the U.S. Supreme Court in *Adams* . . . to identify a person lawfully stopped by him to a mere fiction. Unless the officer is given some recourse in the event his request for ID is refused, he will be forced to rely either upon the good will of the person he suspects or upon his own ability to simply bluff that person into thinking he actually does have some recourse.” Using the 4th Amendment reasonableness test, the Court balanced the need for the search against the invasion of personal rights that the search entails. The intrusion was limited, the scope narrow – and the defendant could have avoided the intrusion by simply producing the ID himself. The police action was justified, particularly when you consider that if the officer lets the suspect go without even identifying him, and it later turns out he was the perpetrator, locating him will be impossible. The “right to remain silent” under the Fifth Amendment does not necessarily encompass an unlimited freedom to remain anonymous.

NOTE: If a state or municipality wants to make it a crime to refuse to provide identification after being stopped on reasonable suspicion, it may do so. Such a law allows the officer to arrest the uncooperative suspect once the suspect refuses to provide any identification. *Hiibel v. Sixth Judicial District*, 542 U.S. 177 (2004).

O. Scope Limitation on Frisk – Pat-Down For Weapons May Include Looking into Purse.

State v. Fernandez, 691 S.W.2d 267 (Mo. 1985). Where the suspect was stopped because of a citizen’s report that she was armed, the officer is justified in taking a purse from defendant’s hands and looking inside it.

P. Timing of Frisk –

The officer does not need to ask any questions and may do the frisk immediately if his reasonable suspicion is for a crime of violence or that the suspect is committing, has committed or is about to commit a crime for which he would likely be armed, such as robbery, burglary, homicide, rape, assault with a weapon or dealing in large quantities of narcotics. This is what was done in *Terry v. Ohio*, supra; Wayne A. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, Vol. 4, p. 844-45 (Fifth Ed. 2012).

Adams v. Williams, 407 U.S. 143 (1972). The officer did a *Terry* stop and frisked the suspect before asking any questions at all. An informant known to Sgt. Connolly told

him while he was alone on patrol duty in the early morning in a high crime area that a person (defendant) seated in a nearby vehicle was carrying narcotics and had a gun at his waist. No details of how he knew. Sgt. Connolly approached the vehicle and tapped on the window, asked defendant to open the door, then seized the gun.

HELD: The stop and frisk was justified by reasonable suspicion. As Justice Harlan said in his concurrence in *Terry*: “Where such a stop is reasonable ... the right to frisk must be immediate and automatic if the reason for the stop is, as here, an articulable suspicion of a crime of violence. Just as a full search incident to lawful arrest requires no additional justification, a limited frisk incident to lawful stop must often be rapid and routine. There is no reason why an officer, rightfully but forcibly confronting a person suspected of a serious crime, should have to ask one question and take the risk that the answer might be a bullet.” 392 U.S. at 33.

Q. The “Terry” Frisk Doctrine Extends to the Interior of a Passenger Compartment of a Car.

Michigan v. Long, 463 U.S. 1032 (1983). Two deputies saw a car traveling erratically and go off the road into a ditch. Defendant got out of the car and seemed to be under the influence. Defendant was near his car door. An officer saw a knife on the floorboard and seized it and frisked him and searched the rest of the passenger compartment, finding marijuana. **HELD:** The stop and frisk doctrine applies to the passenger compartment, including locked glove compartments of vehicles. Under *Long*, a protective frisk of the passenger compartment is valid even though the passengers have been removed from the car prior to the frisk taking place. Factors typical for establishing an objectively reasonable belief to justify a compartment frisk include: (1) facts giving rise to stop itself; (2) events occurring during the detention of the occupants of the vehicle; (3) nervous behavior; (4) furtive conduct and movements; (5) evasive actions; (6) lying; and (7) the existence of other incriminating information about the vehicle or its occupants.

State v. Hutchinsen, 796 S.W.2d 100 (Mo. App. S.D. 1990). The State appealed an order granting a motion to suppress “all objects seized at the scene of the arrest.” The Court rejected the State’s position that the officer was entitled to conduct a limited *Terry* search during a traffic stop for erratic driving. The officer had seen handcuffs as he wrote the ticket, but the officer’s testimony did not support a reasonable belief that the suspect was armed and dangerous. Other than the handcuffs, nothing indicated any danger; the officer said he was not worried about his safety when he searched the jacket in the back seat and found a gun in its pocket.

Turner v. U.S., 623 A.2d 1170 (D.C. App. 1993). Where a police officer had reasonable suspicion that a small hatchback car driven by defendant contained a gun, he could conduct a limited weapons search of the passenger compartment under *Michigan v.*

Long and also search a covered storage compartment in the back of the hatchback which would be considered part of the passenger compartment since defendant could have reached it by reclining the front seat.

State v. Duke, 924 S.W.2d 588 (Mo. App. S.D. 1996). An officer pulled over defendant's car for a *Terry* investigatory stop based upon reasonable suspicion that the car contained illegal drugs. After being stopped, the defendant consented to a search of the car, and drugs were found. Trial court had granted a motion to suppress, but appellate court reverses. **HELD:** "Police may conduct *Terry* stops of moving vehicles upon reasonable suspicion that the occupants are involved in criminal activity. Reasonable suspicion is dependent upon the totality of the circumstances." In this case, at the time the officer stopped the car, his reasonable suspicion included: (1) He had been called by an informant earlier in the day who told him that a man named Utley had a substantial amount of drugs in his house; (2) He had done surveillance of Utley's house and had seen one Bradshaw drive away from the house, had stopped him, searched the vehicle with consent, and found marijuana; (3) He had returned to the house within 10 minutes and then found defendant's car parked outside the drug house; (4) He recognized defendant's truck as being defendant's, a known drug dealer based upon information from other reliable informants; (5) He watched defendant exit Utley's house and get into the truck and drive away after being at the house just a few minutes. He then stopped defendant and obtained consent to search. Marijuana was found.

R. A Police Officer Making a Traffic Stop may Order Both Driver and Passengers to Get Out of Car.

Pennsylvania v. Mimms, 434 U.S. 106 (1977). Police stopped defendant on a traffic violation and directed the driver to step out of the car, which was standard procedure in this situation. When the driver got out, the officer noticed a large bulge under his sports jacket. Consequently, he frisked him and found a revolver. **HELD:** Frisk was reasonable.

Maryland v. Wilson, 519 U.S. 408 (1997). An officer pulled a car over for speeding. He noticed that car had no license plate and had a torn piece of paper saying "Enterprise Rent-A-Car" dangling from its rear. While he had been following it, he had noticed that its two passengers kept looking back at him and ducking out of view. As he approached the car after stopping it, the driver alighted and met him halfway, trembling and nervous. The driver produced a valid driver's license. The officer had him return to the car to get the rental documents. The front seat passenger (defendant) was sweating and appeared nervous. The officer ordered defendant out of the car. As defendant got out, he dropped some crack cocaine on the ground. **HELD:** In *Pennsylvania v. Mimms* (1977) the U.S. Supreme Court held that a police

officer as a matter of course may order the driver of a lawfully stopped car to exit the vehicle. The Court now extends the rule to passengers as well. This rule is established by a Fourth Amendment reasonableness test of balancing the government invasion of personal security against the public interest. In this case, the great weight of improved officer safety outweighs the de minimis intrusion of being asked to step out of the car.

Knowles v. Iowa, 525 U.S. 113 (1998). Defendant was pulled over for speeding 43 in a 25 zone. The officer issued him a ticket, but then conducted, without consent or probable cause a full search of the car and found a bag of marijuana and a pipe. **HELD:** The bright-line rule of *Belton* allowing searches of cars incident to the arrest of an occupant, does not apply to traffic cases in which the person just received a ticket. Officer safety is sufficiently accomplished by the *Wilson* and *Mimms* cases, which allow the officer to order the driver and passengers out of the car, and to further pat them down if reasonable suspicion exists that they might be armed and dangerous.

S. Detention of Passenger is a Seizure, and the Passenger Can Later Contest Whether Grounds Existed for the Seizure

Brendlin v. California, 551 U.S. 249, 257 (2007). Defendant was a passenger in a car that was illegally pulled over on a traffic stop. The State concedes the illegality. The officer pulled over the car because he wanted to “verify” that a temporary permit was affixed to the car, even though he had already confirmed by computer check that the car had a temporary permit and he could see it. Once he pulled the car over, he recognized the passenger (defendant) and learned that an outstanding warrant existed for him. He arrested him and found a syringe cap on his person. A search of the car revealed items used to produce meth. **HELD:** The California Supreme Court had ruled that a passenger is not seized by a traffic stop. The U.S. Supreme Court reverses, holding that a passenger is seized by a traffic stop, so the passenger may contest the illegality of the stop. The proper test is the *Mendenhall* objective test, where one looks at whether a reasonable person would have believed that he was not free to leave and whether a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter. *United States v. Mendenhall*, 446 U.S. 544 (1980); *Florida v. Bostick*, 501 U.S. 429 (1991). A person in a car during a traffic stop would not feel free to leave. In fact, he would reasonably feel that “his attempt to leave the scene would be so obviously likely to prompt an objection from the officer that no passenger would feel free to leave.” This comports with previous cases holding that for officer safety, even the passengers in a traffic stop may be ordered out of the car. *Pennsylvania v. Mimms*, 434 U.S. 106 (1977). It was error to deny the suppression motion on the ground that the defendant had not been seized.

T. A Traffic Stop is a Lawful *Terry* Stop of Everyone in the Car, But in Order to Pat Down For Weapons, the Officer Must Have Reasonable Suspicion to Believe the Person Patted Down May Be Armed and Dangerous.

Arizona v. Johnson, 555 U.S. 323 (2009). Police officers pulled over a car for a traffic violation. Three people were in it, two in the front seat and one in the back. While one officer dealt with the driver, another spoke with the back seat passenger and noticed that he was in a neighborhood associated with the Crips gang, the guy was wearing a blue bandana associated with Crips membership, he had a police scanner in his pocket, he volunteered that he was from Eloy, Arizona, a place known to harbor a Crips gang, and he had just got out of prison. Suspecting he might be armed, the officer patted him down and found a gun. **HELD:** During a traffic stop, the driver or passengers may be patted down for a weapon when the officer has reasonable suspicion to believe the person is armed and dangerous.

U. Split of Opinion Whether Officer May Routinely Frisk Traffic Offender for Weapons Before Placing in Patrol Car

State v. Lozada, 92 Ohio St. 3d 74 (2001). During a routine traffic stop, the police officer asked the defendant to exit the car and show his driver's license. The officer requested the defendant to accompany him to his patrol car while he ran the license. He asked if the defendant had on him any guns, knives or hand grenades. The defendant said no. The officer then said he'd pat him down to make sure he had no weapons. He found cocaine. **HELD:** Although an officer may ask a traffic offender to come to the patrol car, he may not automatically pat down the person for weapons just because the person is getting into his car; rather, he must have some specific articulable reason to suspect a weapon. "We hold that during a routine traffic stop, it is unreasonable for an officer to search the driver for weapons before placing him or her in a patrol car, if the sole reason for placing the driver in the patrol car during the investigation is for the convenience of the officer."

United States v. Glenn, 152 F.3d 1047 (8th Cir. 1998). Officer pulled defendant over for having a cracked windshield and broken taillight. Officer had difficulty getting a good ID since defendant did not have his license with him. He told defendant to come to the patrol car, where he patted him down for weapons because it was his routine practice to do so before putting a traffic offender in his car to talk about the offense. He found a loaded gun during the pat-down. **HELD:** The officer lacked a reasonable and articulable suspicion that defendant was armed and dangerous, so the pat-down was improper.

O'Hara v. State, 27 S.W.3d 548 (Tex. App. 2000). A police officer was giving a traffic ticket to a truck driver at 3:30 a.m. The trucker was wearing a belt knife. The officer

asked him to come back to the patrol car while the license was run, and asked him to leave the knife in the truck, which he did. The officer then said he would need to pat him down for weapons before he put him in the car. He found marijuana. **HELD:** Although it would be improper to routinely frisk every single traffic offender placed into a squad car, in this case it was reasonable because it was the middle of the night in a rural area and he had already noticed a knife upon this particular person.

Q. Detention of Bystander For Officer Safety

State v. Drury, 358 S.W.3d 158 (Mo. App. E.D. 2011). A police officer pulled over one car for DWI and another car pulled over next to the stopped car. The officer told the second driver to remain in her vehicle while he conducted his investigation of the first driver. He did this for officer safety because he was alone. **HELD:** An officer may reasonably detain a bystander for a limited time in response to officer safety concerns during the investigation of a crime to which the bystander is not a suspect.

R. Anonymous Tip + Innocent Detail Corroboration = Reasonable Suspicion:

Alabama v. White, 496 U.S. 325 (1990). Police got anonymous telephone call that Vanessa White would leave Lynwood Ap. 234 at a particular time later that day and get into a brown Plymouth with a broken right taillight, and would go to Dobey's Motel, and she would have one ounce of cocaine in a brown briefcase. Police saw a woman leave the apartments and get into a car matching that description. Nothing was in her hands. She drove to the area of Dobey's Motel, where she was pulled over for a *Terry* stop. She consented to a search of her car and cocaine was found in a briefcase. **HELD:** The anonymous tip plus the innocent detail corroboration amounted to reasonable suspicion.

Navarette v. California, 134 S. Ct. 1683 (2014). An anonymous 911 caller reported that she had just been run off the road by another car and described it. Officers located the car 18 minutes later 19 miles away. After they pulled him over they smelled marijuana. They searched the car on that probable cause and found 30 pounds of marijuana. **HELD:** An anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity, but this call indicated personal knowledge and that it had just happened. This call bore adequate indicia of reliability for the officers to credit the caller's account. The officers were justified in believing that the driver may be a danger to the public because of his dangerous driving. Reasonable suspicion that drunk driving was occurring was established by the totality of the circumstances.

State v. Massaro, 419 S.W.3d 812 (Mo. App. S.D. 2013). This anonymous tip accurately predicted future behavior, so it was sufficiently corroborated for a *Terry*

stop.

State v. Berry, 54 S.W.3d 668 (Mo. App. E.D. 2001). An anonymous caller reported that the defendant would be bringing drugs from Mexico, MO. The caller called back three times, reporting that the defendant would be in a white Cadillac with “fancy” wheels and a “temp tag” in the left rear window, and giving the approximate time of arrival at 3:00 to 4:00 p.m. The officers set up surveillance and spotted a car in the area being driven by the defendant, whom he knew from prior drug arrests. The car was stopped. Consent to search was obtained. Cocaine was found hidden in a speaker box in the trunk. **HELD:** The search was valid. The anonymous call was sufficiently corroborated, especially since the caller had provided “predictive” information about appellant.

State v. Long, 417 S.W.3d 849 (Mo. App. S.D. 2014). A woman called 911 to report an erratic driver who was weaving all over the road, and her call provided the reasonable suspicion for a stop. The defense claims she was an anonymous caller whose tip was not corroborated. **HELD:** The woman gave her full name, identified the suspect’s car, complete with license plate number, she remained on the line describing the car’s movements as she followed it, and remained at the scene to talk to the officer after defendant was pulled over. She was not merely an anonymous caller, but rather was a citizen informant who relates direct observations of criminal activity and who may be presumed reliable by the investigating officer. She did not need to be corroborated.

S. Anonymous Tip + Little or No Corroboration ≠ Reasonable Suspicion:

Florida v. J.L., 529 U.S. 266 (2000). An anonymous caller told police that a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a concealed weapon. Officers responded and saw three black males, one of whom, J.L., age 15, was wearing a plaid shirt. Apart from the tip, the police had no reason to suspect anyone of illegal conduct. The officers approached J.L. and ordered him to put his hands on the bus stop, frisked him, and found a gun in his pocket. **HELD:** This anonymous tip was not sufficiently corroborated and did not, standing alone, have sufficient indicia of reliability to provide reasonable suspicion of criminal activity for *Terry* stop. The tip did not contain “predictive information” such as future movements of the suspect as in *Alabama v. White*. This was merely a “bare-boned” and uncorroborated tip involving no indicia of reliability.

State v. Flowers, 420 S.W.3d 579 (Mo. App. S.D. 2013). Anonymous call said defendant was on his porch and had just committed an assault. No corroboration. Anonymous calls by themselves rarely supply a sufficient basis for a *Terry* stop.

State v. Bergmann, 113 S.W.3d 284 (Mo. App. E.D. 2003). Defendant was driving a car stopped by police. They were responding to a call about a “disturbance” but when they arrived they saw no sign of any disturbance. They did see a dark-colored SUV similar to one mentioned by the caller as belonging to one of the people in the disturbance. They pulled it over. **HELD:** An anonymous tip, without more, seldom demonstrates the reliability of the information provided, but if the police corroborate the tip it may exhibit “sufficient indicia of reliability” to provide the reasonable suspicion needed to make an investigatory stop. This tip merely described a vehicle; it did not show how the vehicle was involved in any crime, nor any particular knowledge of the tipster, nor any “predictive information” as to where the SUV would go. The motion to suppress should have been granted.

T. Furtive Gestures Provide Reasonable Suspicion to Search Vehicle for Weapon.

State v. McFall, 991 S.W.2d 671 (Mo. App. W.D. 1999). Police pulled over defendant for failing to use a turn signal. They waited 5 minutes before approaching his car. The officer saw defendant making furtive movements as if scooting to get something out of his pocket, then leaning forward as if hiding it under the seat. Defendant was removed from the car and patted down to assure he was unarmed. Following the pat down, the officer went to the car and searched the area under the seat and found a baggie of several rocks of crack cocaine. **HELD:** The standard for a *Terry* protective search of a car is whether the officer possesses a reasonable belief based upon specific and articulable facts that his safety or that of others is in danger. “Many jurisdictions have addressed whether furtive gestures by a vehicle’s occupants during a traffic stop support a reasonable suspicion that the occupants are armed and potentially dangerous . . . Generally, movement indicating that a driver is attempting to conceal something in the car is found to support an officer’s reasonable suspicion that the driver may have a weapon.” **NOTE:** In this case the defendant denied making furtive gestures and claimed he just sat still awaiting the officer. The trial judge resolved the swearing match in favor of the defendant so the appellate court deferred to that ruling.

U. Buying Unusually Large Amounts of Cold Medication Can Amount to Reasonable Suspicion for *Terry* Stop

State v. Monath, 42 S.W.3d 644 (Mo. App. W.D. 2001). Two different store managers called police to report that a man in a car with a specified license plate had just tried to buy “large quantities” of pseudoephedrine pills. At one store, he bought three packages (the store limit) after trying to buy six. Police stopped the car and obtained consent to search the vehicle. They found multiple containers of pseudoephedrine, glass tubing and other items related to manufacturing methamphetamine. **HELD:** The tip from the citizens that defendant was trying to buy large quantities of

pseudoephedrine provided sufficient reasonable suspicion to make a *Terry* stop.

V. Conduct Indicating Street Drug Deal Justifies Investigative Stop

State v. Hawkins, 137 S.W.3d 549 (Mo. App. W.D. 2004). A police officer working an area known for drug transactions saw a car pull up. Its passenger got out and met with a man who came from a building. In a 30-second hand-to-hand transaction, something passed between them before the passenger returned to the car. The officer pulled over the car and got consent to search from the driver. Meanwhile, another officer asked the passenger (defendant) to consent to a pat-down for weapons. Defendant consented. The officer immediately felt a paper bag with a leafy substance in it. Without manipulating the bag, the officer immediately believed it was a bag of marijuana. He removed it. **HELD:** The officers had reasonable suspicion to stop and detain the car to investigate whether a drug transaction had just occurred. The totality of circumstances – high crime area, recent reports of drug transactions, hand-to-hand transaction – amounted to a particularized and objective basis for suspecting wrongdoing. The pat-down was justified for weapons for officer safety. Under the “plain feel” exception to the warrant requirement, once the officer felt the bag, he had probable cause to believe he was touching a bag of marijuana, so he could seize it.

State v. Lanear, 805 S.W.2d 713 (Mo. App. W.D. 1991). A police officer patrolling an area with large problem with drug sales saw a car parked 12 inches from the curb, with its engine running, occupied by three males, with several other males leaning into open windows on the driver’s side. The men outside the car took off running in various directions as the patrol car approached. The men in the car looked nervous and made furtive movements as if hiding something. The officer drew his gun, ordered them to keep their hands where he could see them, and radioed for backup. A limited search for weapons was done when backup arrived and a gun was found under the front seat. **HELD:** The *Terry* stop was based upon reasonable suspicion, as was the “frisk” of the car for weapons. *See also: State v. Long*, 303 S.W.3d 198 (Mo. App. S.D. 2010). **NOTE:** The following cases said such conduct was not only suspicious, but amounted to probable cause: *United States v. Hughes*, 898 F.2d 63 (6th Cir. 1990) (one person in drug area hands small object to another in return for money); *United States v. Davis*, 458 F.2d 819 (D.C. Cir. 1972) (well-dressed man slides paper currency to shabbily-dressed man in exchange for small brown package); *United States v. Orozco*, 982 F.2d 152 (5th Cir. 1992) (young man on bicycle removes something small from his mouth and hands it to another person in exchange for money); *In re J.D.R.*, 637 A.2d 849 (D.C. App. 1994) (possessing a ziplock bag in an area known for drug trafficking). *See also: State v. Damon Starks*, ___ S.W.3d ___ (Mo. App. E.D. 8/18/2015).

W. Offering Roadside Assistance To Parked Motorist Does Not Require Reasonable Suspicion.

State v. Schroeder, 330 S.W.3d 468 (Mo. banc 2011). Trooper saw defendant pull his vehicle onto shoulder of road and put his headlights on bright. The trooper turned around and parked behind defendant's car, both to see if the driver needed assistance and to take enforcement action regarding the traffic violation of failing to dim the headlights. Defendant was intoxicated and the trooper arrested him for DWI. **HELD:** "Under the Fourth Amendment, a law enforcement officer may approach a vehicle for safety reasons, or if a motorist needs assistance, so long as the officer can point to reasonably articulable facts upon which to base his actions." Reasonable suspicion of criminal activity is not required.

State v. Baldonado, 847 P.2d 751 (N.M. App. 1993). Whether the action of police officer in pulling up behind an already stopped vehicle and turning on the patrol car's flashing lights amounts to a *Terry* stop that must be justified by reasonable suspicion, as opposed to a routine procedure to offer assistance to a motorist possibly in need of help, depends largely upon the type of behavior exhibited by the police officer after he leaves the car and walks up to the subject vehicle. "We believe that a trial court should ordinarily find a stop that must be justified by reasonable suspicion whenever officers pull up behind a stopped car, activate their lights, and approach the car in an accusatory manner. On the other hand, a trial court should ordinarily find no stop whenever officers pull up behind a stopped car, activate their lights, and approach the car in a deferential manner asking first whether the occupants need help. To classify the latter type as an investigatory detention under *Terry* would discourage officers from assisting potential stranded motorists, acting in the interest of the safety of the traveling public, or from acting in the interest of their own safety."

X. Terry Stop Based Upon a "Wanted Flyer" or Radio Dispatch.

United States v. Hensley, 469 U.S. 221 (1985). Upholds a *Terry* stop based on a "wanted flyer" that defendant was a suspect in a robbery. The lower court held the stop illegal since the flyer did not communicate the factual basis of the suspicion. The Supreme Court disagreed, holding the *Terry* stop proper. It is only necessary that: (1) The officer making the stop has acted in objective reliance on the flyer or bulletin; (2) The police who issued the flyer or bulletin had a reasonable suspicion justifying the stop; and (3) The stop that in fact occurred was not significantly more intrusive that would have been permitted by the issuing department.

State v. Franklin, 841 S.W.2d 639 (Mo. banc. 1992). The officer got a radio dispatch saying: "Party armed, occupying a black 1984 Pontiac Fiero in the area of 4200 East

60th Terrace.” He went to that area, saw the Fiero, and pulled it over. He approached the car with gun drawn, had the driver get out, handcuffed him, patted him down but found no weapon. He searched the car for a weapon and found none. He asked defendant for a driver’s license. Defendant did not have one so the officer arrested him for failure to display a driver’s license. On a search incident to arrest, the officer found a marijuana cigarette in defendant’s pocket, and three more in the car. **HELD:** The Court holds this initial stop unconstitutional. A *Terry* stop can be based upon information received from other officers, but evidence seized pursuant to the *Terry* stop and frisk is inadmissible if the officer or department requesting the stop lacked reasonable suspicion to make the stop. In this case, the State produced no evidence whatsoever concerning the basis of the radio dispatch, other than the arresting officer’s testimony that it was ultimately determined that “the call seemed to be unfounded.” The record “was devoid” of evidence that the initial dispatch was supported by reasonable suspicion. The arresting officer did not have reasonable suspicion based just on the facts he observed. Thus, the stop and all evidence obtained from it were properly subject to a motion to suppress.

State v. Miller, 894 S.W.2d 649 (Mo. banc. 1995). Detective Himmel called Officer Thomas on his portable telephone and told him the probable cause information to pull over a car. Thomas relayed this to Officer Robinson. Robinson and another officer pulled the car over. The information was that a red Nissan Sentra, belonging to Ramona Tope, VJS976 plate, would be transporting controlled substances in the vicinity of the Rainbow Village Trailer Court. A car of that description was spotted and pulled over. Tope was driving. Defendant Miller was passenger. When Miller got out, he put his hand in his pocket. The officer made him show what was in his hand. It was a vial with cocaine residue. **HELD:** The prosecutor screwed up by not calling Himmel to testify as to the basis of his information. Although the court would have looked at the collective information known to all officers to determine whether there was reasonable suspicion, the officers who testified at the suppression hearing did not know the basis for Himmel’s information. Remanded for further proceedings.

State v. Norfolk, 966 S.W.2d 364 (Mo. App. E.D. 1998). Defendant was prosecuted for possession of crack cocaine found in his car after a car stop and search incident to arrest for being in possession of a stolen car. The car was stopped because it was on a “hot sheet,” which was a list of reportedly stolen cars circulated each day to law enforcement officers. At the suppression hearing, the State merely offered proof that the car was on the “Hot Sheet” but did not offer any other proof that the car was really stolen or how cars end up being listed on the “Hot Sheet.” **HELD:** A car stop may be made on reasonable suspicion, and the fact that a car is reportedly stolen is reasonable suspicion. In order to prevail at a suppression hearing, though, the State must offer not just proof from the officer making the stop that the car was reportedly stolen, but must also offer proof “that the officer disseminating the information had

a reasonable suspicion which would have allowed him to make the stop himself.” The State needed to show the origin of the information on which the officers relied. The motion to suppress should have been granted. Remanded.

Y. Brief Seizure of Object at Terry Stop.

United States v. Place, 462 U.S. 696 (1983). Agents were suspicious that defendant was transporting drugs, but defendant refused a consent search of his luggage at the airport and the officers did not have probable cause yet. They detained his luggage for a drug dog sniff, but no dog was on the premises. It took 90 minutes for the dog to arrive. They gave the defendant the choice whether to stay or leave and he left, leaving a phone number. Since it was Friday, they did not get a search warrant until Monday. **HELD:** The *Terry* balancing test applies. When an officer’s observations lead him to reasonably believe that a traveler is carrying luggage that contains narcotics, *Terry* permits the officer to detain the luggage briefly to investigate the circumstances that aroused his suspicion, provided the investigative detention is properly limited in scope. (This 90-minute detention is considered too long in an airport setting.)

Bond v. United States, 529 U.S. 334, 338-39 (2000). Border Patrol Agent boarded a bus to check the immigration status of its passengers. He went down the aisle squeezing the soft luggage placed in overhead storage. The squeeze of a canvas bag above defendant’s seat detected a “brick-like” object. Defendant admitted owning the bag and consented to a search, revealing a brick of methamphetamine. **HELD:** Defendant had an actual expectation of privacy, one that society is prepared to recognize as reasonable. “When a bus passenger places a bag in an overhead bin, he expects that other passengers or bus employees may move it for one reason or another [but] he does not expect that other passengers or employees will, as a matter of course, feel the bag in a exploratory manner.” The manipulation of the bag amounted to a violation of the Fourth Amendment as an unreasonable search.

Z. Brief Detention May Result in Consent Being Given or Probable Cause Being Acquired

United States v. Riley, 684 F.3d 758 (8th Cir. 2012). Officer pulled defendant over for a traffic violation and developed reasonable suspicion that he had drugs in the car based on his nervousness, his confusion about his trip, and his lies about his criminal history related to drugs. After 11 minutes, the officer called for a drug dog. Since the dog handler was off duty, he did not arrive until 54 minutes after the stop. **HELD:** Unlike the airport situation, where a 90-minute detention of luggage was unreasonable because officials should have known that luggage may need to be sniffed and should have a dog available on short notice, this officer acted reasonably

and the delay was caused only by the remote location of the stop and the time it took for the dog to respond. The Eighth Circuit has held that even an 80-minute delay is not too long in the traffic stop situation. *United States v. White*, 42 F.3d 457 (8th Cir. 1994). See also *State v. Joyce*, 885 S.W.2d 751 (Mo. App. 1994).

NOTE: See other cases in the sections dealing with Consent Searches, Plain View and Plain Sniffs.

Z(1). A Category of Terry Stop is the “Drug Profile Stop”

U.S. v. Sokolow, 490 U.S. 1 (1989). Defendant was stopped by DEA agents as he returned to Hawaii from trip to Miami. He fit the drug “profile” in that he paid for tickets with \$2,100 in cash from roll that looked like \$4,000; he wore a jumpsuit and lots of jewelry; he and a female with him carried four handbags onto the plane but checked no luggage; the name given his ticket agent was not the same name as the telephone number he gave; he stayed in Miami only 48 hours. The drug dog sniff during this brief detention alerted positive for drugs and the officers got a search warrant. The officers found 1,063 grams of cocaine in his carry-on bags. Defendant pled guilty to possession of cocaine with intent to distribute. **HELD:** The U.S. Supreme Court rules these facts enough for defendant to be detained and questioned because they constituted “reasonable suspicion.”

NOTE: Officers should remember that the fact a person fits a drug courier profile merely gives **reasonable suspicion**, not necessarily probable cause. The officer should: (1) look for some other valid reason to detain the person (such as a traffic offense); (2) try for consent; (3) try to build probable cause via a drug dog or inconsistent stories or other accepted ways.

Z(2). Stops – Roadblocks – Based Not Upon Individualized Suspicion, but Pursuant to a Neutral Plan.

A. Driver’s License & Registration Checks.

Delaware v. Prouse, 440 U.S. 648, 663 (1979). Whether a car stop to check for a license and registration is “reasonable” under the Fourth Amendment (absent reasonable suspicion) must be judged by balancing its intrusion on the individual’s Fourth Amendment interests versus its promotion of legitimate governmental interests. *Prouse* declared unconstitutional a random and discretionary procedure of pulling people over to check for licenses, but hinted that roadblocks where discretion was not involved would be okay. “Questioning all incoming traffic at roadblock-type stops is one possible alternative.” Justice Blackmun in his concurrence notes that it would be possible to stop every tenth car, for

instance, instead of 100 percent of the cars, so long as neutral selection criteria foreclosed a subterfuge being used.

United States v. Morales-Zamora, 914 F.2d 200, 205 (10th Cir. 1990). Defendant was traveling in a car and came to a police roadblock, the purpose of which was a routine check of drivers' licenses, vehicle registration, and proofs of insurance. During the short check, before the officer finished the check, another officer walked a drug-sniffing dog around the vehicle and the dog alerted to the trunk of the car. The car was then searched without consent under the automobile exception to the search warrant requirement. Officers found 126 pounds of marijuana. **HELD:** A brief roadblock detention to check for valid driver's licenses, vehicle registrations and proofs of insurance is reasonable under the Fourth Amendment. The dog sniff was not a "search" within the meaning of the Fourth Amendment, and thus individualized reasonable suspicion of drug-related criminal activity was not required before the dog could sniff the air around the car. There is "a lesser expectation of privacy in a vehicle than in a home" and "when the odor of narcotics escapes from the interior of a vehicle, society does not recognize a reasonable privacy interest in the public airspace containing the incriminating odor. A search warrant was not necessary. Nor was consent. The dog established probable cause, and the automobile exception to the warrant requirement applied.

State v. Biggerstaff, 496 S.W.3d 513 (Mo. App. S.D. 2016). Traffic safety checkpoints are permissible.

B. DWI Roadblocks/Sobriety Checkpoints.

Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990). The Court used its balancing test to balance the public interest being served by the practice of DWI sobriety checkpoints against the Fourth Amendment interests of the individuals who are interfered with by being stopped. **HELD:** The State's interest in preventing drunken driving and the extent to which this procedure advances that interest outweighs the minimal intrusion upon individual motorists who are briefly stopped.

State v. Welch, 755 S.W.2d 624 (Mo. App. W.D. 1988). The Missouri Highway Patrol established a roadway sobriety checkpoint. A sign warned "Sobriety Checkpoint Ahead." Flares were used to route approaching traffic. Patrol vehicles with flashing lights were readily visible and a trooper with a light directed vehicles to stop or proceed. When a vehicle stopped, a trooper would approach, ask to see a driver's license, and make a general observation of the driver. The delay for a sober motorist would be less than 60 seconds. If reasonable suspicion

indicated a driver might be intoxicated, he was requested to move his vehicle to a nearby parking area, where he would be given field sobriety tests. There was no random selection as to which vehicle to stop. All were stopped. **HELD:** This procedure is constitutional under the Fourth Amendment balancing test. See also: *State v. Payne*, 759 S.W.2d 252 (Mo. App. E.D. 1988).

C. Drug Enforcement Traffic Checkpoints.

City of Indianapolis v. Edmond, 531 U.S. 32 (2001). Police conducted vehicle checkpoints in an effort to catch drug offenders. At the checkpoint, each car would be stopped, an officer would advise that it was a drug checkpoint and would ask the driver to produce a license and registration. Meanwhile, a drug-dog would walk around the outside of the vehicle while the officer checked for visual signs of impairment or drugs. The duration of each stop would be two to three minutes or less, absent probable cause developing or consent being given for a further search. **HELD:** In balancing the privacy interests of the individual against the government's interest in public safety, checkpoints for drunk drivers, illegal aliens and unlicensed drivers have been upheld, but the Court notes: "We have never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing . . . Without drawing the line at roadblocks designed primarily to serve the general interest in crime control, the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life." The general attempt by the State to rid the community of drugs is much broader than the specific effort of DWI checkpoints to deal with an "immediate vehicle-bound threat to life and limb." Also, they are "far removed" from the border context crucial in the illegal alien checkpoints. The Court will always look at the purpose of a checkpoint; if it is primarily to uncover evidence of ordinary crime, it will violate the Fourth Amendment's requirement of individualized suspicion being required for a stop. *Edmond* overrules *State v. Damask*, 936 S.W.2d 565 (Mo. banc. 1996).

State v. Mack, 66 S.W.3d 706 (Mo. banc 2002). Officers conducting a drug checkpoint placed a sign warning of POLICE DOG DRUG CHECKPOINT ONE MILE AHEAD. Instead of actually searching people at a checkpoint one mile ahead, though, they were really only going after people who took a low-traffic exit before reaching the advertised checkpoint. On that late night, there was little or no valid reason to take the exit, which only led to the high school, a church and a couple of residences. Defendant's car veered suddenly when it saw the exit and came up it. He was stopped and gave consent for a search. Drugs were found. **HELD:** The case is distinguished from *Edmond* because of the "quantum of individualized suspicion." The conduct of the driver in swerving up the ramp to avoid the checkpoint amounted to reasonable suspicion for a *Terry* stop. **NOTE:**

The dissent argues that reasonable suspicion was not present, as it would have been had the defendant made an obvious U-turn to avoid the checkpoint. *Same ruling: United States v. Williams*, 359 F. 3d 1019 (8th Cir. 2004).

D. Illegal Alien Checkpoints.

U.S. v. Martinez-Fuerte, 428 U.S. 543 (1976). Court upheld a checkpoint for illegal aliens, at which every car passing by would be briefly stopped and checked for illegal aliens. The locations were not selected by the field officers, but by their superiors; every car was stopped, so no discretion was left to enforcement.

HELD: Under a Fourth Amendment reasonableness test, the minimal intrusion on the public is outweighed by the legitimate need, purpose and public interest involved. [In 1973 alone, 17,000 illegal aliens were apprehended at the San Clemente checkpoint.]

E. Roadblocks for Checkpoints or Escape Routes Pertaining to Recent Serious Crime.

Assume a serious crime has just occurred, such as an armed robbery of a bank, and that it is known that the robber fled in a particular direction in a vehicle. Under these circumstances, would it be permissible for the police to set up a roadblock to check all vehicles passing that point in an effort to identify and apprehend the robbers?

Yes, according to the Model Code of Pre-Arrest Procedure, Sec. 110.2(2) (1975):

“A law enforcement officer may, if

(A) he has reasonable cause to believe that a felony has been committed; and

(B) stopping all or most automobiles, trucks, buses or other such motor vehicles moving in a particular direction or directions is reasonably necessary to permit a search for the perpetrator or victim of such felony in view of the seriousness and special circumstances of such felony, order the drivers of such vehicles to stop, and may search such vehicles to the extent necessary to accomplish such purpose. Such action shall be accomplished as promptly as possible under the circumstances.”

United States v. Harper, 617 F.2d 35 (4th Cir. 1980). A roadblock was set up on the only paved road leading away from a place where a large-scale smuggling operation was occurring. Authorities had intercepted a vessel on the high seas

and found it loaded with 400 bales of marijuana. It proceeded to its destination. Agents moved in but learned that several of the drug-smugglers awaiting delivery had fled. A roadblock was set up on the only paved road leading from the area and all passing vehicles were stopped and the occupants questioned. One of those stopped ultimately implicated himself, but claimed the roadblock violated the teachings of *Delaware v. Prouse*. The Court disagreed: “We think this analysis misses the mark. In *Prouse*, the Supreme Court was concerned with random stops of vehicles made at the will and whim of officers in the field, where the officers have no reason to stop any particular vehicle, other than for general police surveillance. Here, the problem is very different. The purpose of these stops was to arrest suspects for a known crime, not to discover evidence of undetected crimes by the happenstance of visual searches. A serious crime had been committed involving numerous participants, some of whom were known to be fleeing the scene along a route reasonably expected to be used for their escape. Stopping all cars was, under such circumstances, a necessary means of law enforcement, and as such, justifies the minimal intrusion on privacy rights posed to passing motorists . . . By virtue of the exigency of fleeing, perhaps dangerous suspects, we think the stops of all persons found on a likely access route to the scene of the crime was reasonable, both in its purpose and in the manner in which it was conducted.”

Perry v. State, 422 So.2d 957 (Fla. App. 1982). The Court approved a roadblock set up after an escape of three felons from the Key West jail. The Court stressed that “the unique geography of Monroe County and the fact that the Overseas Highway is the only means of egress from Key West” were important factors in determining the reasonableness of the roadblock.

NOTE: Undoubtedly, there could be circumstances where a roadblock would be set up so far from the crime as to be unreasonable, but this can only be taken up on a case-by-case basis. Wayne R. LaFare, *Search and Seizure: A Treatise on the Fourth Amendment*, Vol. 4, p. 954 (Fifth Ed. 2012). Also, the seriousness of the crime is an important factor in the balancing process. As U.S. Supreme Court Justice Robert Jackson wrote: “If we assume, for example, that a child is kidnapped and the officers throw a roadblock about the neighborhood and search every outgoing car, it would be a drastic and indiscriminating use of the search. The officers might be unable to show probable cause for searching any particular car. However, I should candidly strive hard to sustain such an action, executed fairly and in good faith, because it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect a vicious crime. But I should not strain to sustain such a roadblock and universal search to salvage a few bottles of bourbon and catch a bootlegger.” *Brinegar v. U.S.*, 338 U.S. 160, 183 (1949).

Illinois v. Lidster, 540 U.S. 419, 424 (2004). A 70-year-old bicyclist was killed by a hit-and-run driver. A week later, police set up a checkpoint at the same place and stopped every car going by, handing out flyers seeking information about the accident and trying to locate any witnesses. Each detention lasted only 10 to 15 seconds. Officers ended up noticing that this defendant was driving drunk and arrested him. **HELD:** The initial stop was reasonable under the Fourth Amendment test of balancing the government interest (in this case grave) against the individual's privacy interest (in this case just 10 to 15 seconds).

6. Plain View Doctrine

(A) No search really involved, just a seizure.

If an officer can, by virtue of use of his senses, plainly observe evidence which the officer knows is subject to seizure and the officer makes the observation from a lawful vantage point, then there is no search – just a seizure. This is the plain view doctrine.

It has two elements:

1. The officer is in a place he has the right to be. (Searching per warrant or hot pursuit or consent or valid traffic stop or vehicle parked in public place or search incident to valid arrest, etc.)
2. Probable cause to believe thing seized is indeed evidence. (*i.e.* it is immediately apparent to the officer that the item is either contraband or evidence.)

Horton v. California, 495 U.S. 128 (1990). A robbery occurred. The defendant was a suspect because he matched the description. A search warrant was issued, but it only listed and described the stolen property; the police forgot to mention the machine gun and stun gun used by the robbers. The officers doing the search knew about them, though, and when they saw these items during the execution of the search warrant it was immediately apparent to them that they were evidence. **HELD:** Police may seize without a warrant any evidence that is in plain view during a legal search, even if they had expected in advance that the evidence would turn up at the scene, but had not listed that evidence in the search warrant. "Inadvertence" (previously a third element necessary in the plain view analysis) is no longer a requirement for admissibility under plain view. *See also: State v. Collins*, 816 S.W.2d 257 (Mo. App. E.D. 1997) (Inadvertence in observing evidence which is seized is no longer a necessary precondition to plain view seizure); *United States v. Hughes*, 940 F.2d 1125 (8th Cir. 1991) ("The discovery of evidence in plain view need not be inadvertent.").

Arizona v. Hicks, 480 U.S. 321, 324 (1987). A police officer's slight movement of stereo equipment to obtain serial numbers while he was properly in an apartment to investigate a report about a gunshot, absent probable cause to believe equipment was stolen, was an unreasonable search under the Fourth Amendment. The police had entered defendant's apartment under the emergency exception to the warrant requirement because just minutes before a gunshot was fired through the floor of defendant's apartment, striking a man below. This entry was to search for the shooter, other possible victims and weapons. The police found three weapons and a mask. They also noticed expensive stereo equipment that seemed out of place in the squalid apartment. A police officer moved the equipment to see its serial numbers. He called headquarters to compare the serial numbers to a list of stolen items. It matched a stereo taken in a recent robbery. Defendant was convicted. **HELD:** (1) Moving the equipment was a search - a warrantless search; (2) "A warrantless search must be strictly circumscribed by the exigencies which justify its initiation" and this went beyond the search for the shooter; (3) This could have been seized under plain view if officer had probable cause it was stolen, but this did not amount to probable cause before the additional search.

Texas v. Brown, 460 U.S. 730 (1983). Applied plain view doctrine to car searches. Defendant was stopped at midnight at a routine driver's license checkpoint. The officer asked to see defendant's driver's license and shined his flashlight into the car and saw the defendant withdraw his right hand from his pants pocket and drop an opaque green party balloon, knotted about half an inch from the tip. The officer then shifted position to get a better view of the interior and saw, in the open glove compartment, small plastic vials with loose white powder and an open bag of balloons. **HELD:** Due to the officer's experience with drug cases, he recognized the balloons were tied in such manner as being drug packaging. He was justified under plain view in seizing them and arresting the defendant. The Court also said there was no problem with the officer changing his position to get a better view or in using his flashlight to illuminate the passenger compartment.

United States v. Bynam, 508 F.3d 1134, 1137 (8th Cir. 2007). Defendant was speeding and ran a stop a stop sign, so officers pulled him over. He stopped in a stranger's driveway, jumped out of his car, and looked back at the officers. He left the car door open. While one officer questioned him, another officer approached the car and spotted a gun, knives and vials of marijuana on the floorboard. **HELD:** "An officer may seize an object in plain view provided the officer is lawfully in the position from which he views the object, the object's incriminating character is immediately apparent, and the officer has a lawful right of access to the object."

United States v. Rodriguez, 711 F.3d 928 (8th Cir. 2013). Police were executing a search warrant at defendant's home for drugs, when they spotted guns in plain view. The guns had not been listed in the search warrant as items to seize. **HELD:** "The plain view

doctrine allows officers to seize an item if they have a lawful right of access to the item seized and the object's incriminating nature is immediately apparent." Here, the incriminating nature of the guns was immediately apparent because of their close proximity to drugs and because the officers knew defendant was a convicted felon making it illegal for him to possess a gun.

(B) Plain View in Curtilage – Police Spotting Items in Plain View During Warrantless Entry Upon Sidewalk to Knock on Front Door of Residence.

State v. Edwards, 36 S.W.3d 22 (Mo. App. W.D. 2000). Police officers, having received an anonymous tip that defendant was growing marijuana in his home, responded to the house. They walked up the "walk way" and knocked on the garage door, then continued to front door where they knocked again. In the process, they saw fertilizer boxes, a pump sprayer and boxes of "root cubes," all commonly used for plant cultivation. Minutes later, defendant came outside. Although he refused to sign a consent form, he admitted he was growing 500 marijuana plants in his attic and blamed an ex-sister-in-law for the anonymous tip. **HELD:** Defendant's motion to suppress was properly denied. Even though police were within the curtilage of the home, they were in an area open to the public conducting an investigation. "The issue in determining the legitimacy of police entry into a particular area is whether the occupant of the premises has somehow exhibited a reasonable expectation of privacy in that area . . . As LaFave summarizes the general rule: 'When the police come onto private property to conduct an investigation or for some other legitimate purpose and restrict their movements to places visitors could be expected to go (e.g., walkways, driveways, porches), observations from such vantage points are not covered by the Fourth Amendment.'"

BUT SEE: *State v. Kruse*, 306 S.W.3d 603 (Mo. App. W.D. 2009). Police suspected that a wanted felon was hiding in defendant's house. Instead of getting a search warrant, they decided to knock on the front door at midnight to ask for consent to search. Officers were sent into the back yard in case he'd come out the back, even though the back yard was posted with "No Trespassing" signs and was enclosed by trees. While trespassing, the officers saw defendant's meth lab. **HELD:** Since the officers were not in a place they had the right to be and were within the cartilage of the home, the plain view doctrine did not apply. *Same result: State v. Bates*, 344 S.W.3d 783 (Mo. App. S.D. 2011).

(C) What Level of Certainty Must Seizing Officer Have That the Item is Evidence or Contraband? ANSWER: Probable Cause.

United States v. Bustos-Torres, 396 F.3d 935 (8th Cir. 2005); *State v. Rushing*, 935 S.W.2d 30 (Mo. banc. 1996). "Immediately apparent" means probable cause. See Plain Feel below.

State v. Collett, 542 S.W.2d 783 (Mo. 1976). Police entered a motel room to look for a man wanted for escape, based upon a photo ID made by the hotel manager. They did not find the man, but they came upon two women's purses on the floor, which they searched for clues about the whereabouts of the fugitive. In the purse they found ID cards of recent robbery victims. The defendant ends up being charged with the robbery. **HELD:** In upholding the seizure of the purses, the Court explained that it "was reasonable for the officers to conclude that the purses might provide some evidence or clue as to where the defendant might be located or with whom he might be found."

State v. Blankenship, 830 S.W.2d 1 (Mo. 1992). Police entered defendant's bedroom to arrest him but he was not present. An officer saw a card case on the floor containing defendant's driver's license. The officer promptly picked it up and removed the license and checked it and the card case for any information that could lead to defendant's whereabouts. Instead, they found a bus pass that had been stolen in the robbery, which they knew had been stolen. **HELD:** Valid plain view search.

(D) Plain View When Arresting Officer Accompanies Arrestee Inside his Home After Arrest

Washington v. Chrisman, 455 U.S. 1 (1982). Campus police officer stopped defendant outside his dormitory room. Defendant had a bottle of gin and appeared to be underage. When asked for ID, the defendant said his ID was in his dorm room. He agreed to retrieve it and the officer accompanied him and noticed drugs in plain view. **HELD:** A police officer after an arrest may accompany the defendant who wants to go inside his home to get something. It is not unreasonable under the Fourth Amendment for a police officer, as a matter of routine, to monitor the movements of an arrested person, as his judgment dictates, following the arrest. The officer's need to ensure his own safety – as well as the integrity of the arrest – is compelling. Such surveillance is not an impermissible invasion of privacy or personal liberty of an individual who has been arrested. Any evidence or contraband the officer sees inside the home in plain view can be seized.

United States v. Butler, 980 F.2d 619, 622 (10th Cir. 1992). The defendant was arrested outside his mobile home. He was barefoot. Broken glass and trash were on the ground. The officer directed defendant to go inside his home and put on some shoes. The officer went with him and saw an illegal firearm in plain view. **HELD:** The *Chrisman* doctrine fits because the "presence of a legitimate and significant threat to the health and safety of the arrestee" justified telling him to go inside and get his shoes, and the officer was entitled for the usual safety reasons to stay with him and was in a place he was entitled to be when he made the plain view observation. The Court warns: "This in no way creates a blank check for intrusion upon the privacy of the sloppily dressed."

State v. Wise, 879 S.W.2d 494, 504-05 (Mo. banc. 1994). After defendant was arrested

outside his wife's apartment, he sent his step-son inside the apartment to get his jacket, shoes and cigarettes. An officer followed the step-son inside and saw BMW keys that were obviously evidence in plain view, and then searched the jacket pockets before providing it to the defendant and found credit cards that had been stolen from the murder victim. **HELD:** Police may accompany an arrestee "at his elbow" if he is being allowed to retrieve items in areas that would otherwise be protected from warrantless search, and likewise they may also accompany a third person sent to retrieve items for the arrestee. Police safety is the rationale. Evidence seized in plain view thereby is admissible.

(E) Plain Hearing

People v. Hart, 787 P.2d 186, 187 (Colo. App. 1989). Officers conducting a drug investigation rented a motel room next to the room of the suspects. Through the adjoining door, they could overhear the drug transaction. **HELD:** "[W]hen a police officer overhears a conversation without the aid of any listening device, from a vantage point at which he is legally present, the officer's use of his sense of hearing does not constitute a Fourth Amendment search."

(F) Aided Plain View: Flashlights, Binoculars, Telescopes, Nightscopes, Etc.

1. Electronic Eavesdropping

NOTE: When we talk about "Aided Plain View," we are not talking about electronic eavesdropping (wiretapping), which since *Katz* has been unconstitutional unless done by warrant under the strict guidelines of federal and Missouri statutes. See *A Prosecutor's Introduction to Electronic Surveillance: Missouri's Drug Wiretap Law*, by John M. Morris.

Katz v. United States, 389 U.S. 347 (1967). The FBI, without seeking a warrant, put a bug in an outdoor telephone booth to monitor the calls of Katz, a gambling suspect. **HELD:** Defendant had a reasonable expectation of privacy in his telephone calls from "the uninvited ear." It violates the Fourth Amendment to eavesdrop and record telephone calls without a search warrant from a judge.

2. Flashlights

Many cases have held that the use of a flashlight to illuminate a dark place does not make a plain view search any less plain.

United States v. Lee, 274 U.S. 559 (1927). A boat carrying illegal booze (71 cases) was pulled over by coast guard, who used a search light to see the 71 cases in

plain view upon the deck. HELD: Such use of a search light is not prohibited by the Constitution.

United States v. Johnson, 506 F.2d 674 (8th Cir. 1974). A police officer stopped a car for running a stop sign and shined his flashlight into the car. In the process he saw the butt end of a shotgun in plain view. **HELD:** The fact that the contents of the vehicle were not visible without the flashlight does not preclude the application of the plain view doctrine.

State v. Hawkins, 482 S.W.2d 477 (Mo. 1972). A police officer writing a parking ticket to used his flashlight to look at the sticker on the windshield. He saw a hand-rolled marijuana cigarette on the dashboard. **HELD:** The impact of the plain view doctrine was not altered by the use of the flashlight.

State v. Gibbs, 600 S.W.2d 594 (Mo. App. W.D. 1980). A trooper pulled over a car for a traffic offense. He shined his flashlight into the car from the passenger side and saw a handgun partially hidden under the seat. "The use of a flashlight to see what would be in plain view in the daytime does not convert that which would not be a search in daylight into a search in the constitutional sense at nighttime."

3. Binoculars & Telescopes – Defendant in Public Place.

But where the person is when the police are looking at him and the strength of the visual aid used can be of constitutional significance since both of these factors can affect the defendant's reasonable expectation of privacy. There will virtually never be a legitimate expectation of privacy from observation when a person is outside upon a public street.

State v. Armstrong, 609 S.W.2d 717 (Mo. App. 1980). Police doing surveillance with binoculars from a distance of 50 yards saw defendant conceal a gun on his person on a parking lot outside a public store. He was convicted of CCW. Defendant's argument that binoculars took the ordinary observation of him out of the plain view doctrine failed.

State v. Speed, 458 S.W.2d 301 (Mo. 1970). Police made observations of drug dealing going on in the street about 60 to 70 yards away, using a telescope. **HELD:** Okay.

State v. Collins, 816 S.W.2d 257 (Mo. App. E.D. 1991). Police used binoculars from half a block away to observe drug dealing on street. **HELD:** Okay.

4. Binoculars & Telescopes – Looking Into Building.

United States v. Taborda, 635 F.2d 131 (2nd Cir. 1980). Police did surveillance of a drug suspect's home using a high-powered telescope. They saw people inside cutting the ends off plastic baggies and messing around with white powder. They could read the labels on jars of chemicals used in drug manufacture. They put this info into a search warrant affidavit and got a search warrant. They found lots of drugs and money. The observations had been made from an apartment across the street over a period of several days. **HELD:** Citing *Katz* that what a person knowingly exposes to the public is not private, the Court says the analysis is two-fold: (1) that the person has an actual, subjective expectation of privacy; and (2) that the expectation is one that society is prepared to recognize as reasonable. The fact this was defendant's home was significant. But placing items so they can be seen by people outside the home by unaided viewing often does away with an expectation of privacy. Any enhanced viewing may violate the Fourth Amendment depending upon the power of the binoculars or telescope used. Remanded for an additional hearing as to what could be seen by the naked eye and whether that information would have been sufficient to uphold the search warrant.

United States v. Van Damme, 48 F.3d 461 (9th Cir. 1995). No search where officer in helicopter looked through 600 mm telephoto lens on normal video camera to see marijuana through an open door of a greenhouse which was outside the curtilage of the home.

United States v. Whaley, 779 F.2d 585 (11th Cir. 1986). No search to observe with binoculars operation of drug lab in basement with large, uncurtained windows while lights on within, especially because the activity was visible by naked eye from neighboring property.

United States v. Kim, 415 F. Supp. 1252, 1255-56 (D. Haw. 1976). The FBI violated the Fourth Amendment by using an 800 mm telescope with a 6 mm opening to observe activities within the defendant's apartment. Agents watched him from a building 1/4 mile away, with equipment so powerful they could read the magazines in defendant's hands as he sat on his couch in his fourth floor apartment. "The sophisticated visual aids available to the government can intrude on individual privacy as severely as the electronic surveillance in *Katz* . . . It is inconceivable that the government can intrude so far into an individual's home that it can detect the material he is reading and still not be considered to have engaged in a search . . . If government agents have probable cause to suspect criminal activity and feel the need for telescopic surveillance, they may apply for a warrant; otherwise, they have no right to peer into people's windows

with special equipment not generally in use. The quest for evidence directed at Kim's apartment is not exempted from Fourth Amendment regulation by the plain view doctrine . . . A plain view of Kim's apartment was impossible; only an aided view could penetrate. In view of the powerful technology used by the law enforcement officers in this case, the 'plain' in plain view must be interpreted as permitting only an unaided plain view."

Kyllo v. United States, 533 U.S. 27 (2001). In thermal imaging device case, Supreme Court points out that where the Government uses a device not in general public use to explore details of a home previously unknowable without physical intrusion, the surveillance is a "search" and is presumptively unreasonable without a warrant.

5. Nightscopes

United States v. Ward, 546 F. Supp. 300, aff'd in part & rev'd in part 703 F.2d 1058 (8th Cir. 1982). Police used a nightscope to watch the home of a person suspected of growing marijuana in a barn. They spotted the defendant, a known drug dealer, arrive and go into the barn. The ID was made using the nightscope and the information was used to get a search warrant. **HELD:** The use of the nightscope was upheld to observe defendant's outdoor activities. Defendant had no expectation of privacy in his conduct outdoors, even when carried on after dark.

Commonwealth v. Williams, 494 Pa. 496, 431 A.2d 964 (1981). Police were stationed within 40 feet of defendant's apartment and maintained almost constant surveillance with binoculars by day and nightscope by night for nine days. The surveillance revealed intimate details about defendant and others who visited the apartment. **HELD:** The use of the nightscope in such an extensive and far-reaching surveillance violated the defendant's reasonable expectation of privacy.

6. Pen Registers

Smith v. Maryland, 442 U.S. 735 (1979). A victim in a robbery started getting frightening and harassing calls from a man who said he had been her robber, once even telling her to step outside when he drove past her house. She got the license plate of his car and gave it to the police, who had a pen register put on his phone. When he called her again they confirmed it came from his telephone. They used the pen register information to get a search warrant for his home, where they found a phone book with the page containing victim's phone number turned down. **HELD:** A pen register is something the phone company can use to

keep track of the phone numbers a particular telephone is calling. It is not the same thing as electronic eavesdropping since the content of the conversations is not being monitored. A person does not have an actual legitimate expectation of privacy in the phone numbers being called by his telephone.

NOTE: This result was changed by statute in 1986 by 18 U.S.C. Sections 3121-27. Judicial approval is now required for pen registers or tracing devices, absent the consent of the subscriber.

7. Beepers

A beeper is an electronic device that can be placed on something and allows police to follow that item without maintaining visual surveillance.

United States v. Jones, 132 S.Ct. 945 (2012). The attachment of a GPS tracking device to a person's vehicle to monitor its movements constitutes a search under the Fourth Amendment. In this drug conspiracy case, the GPS device had been in place for four weeks and located the vehicle's position within 50 to 100 feet during that time, producing 2,000 pages of data. The lower court had allowed the warrantless use of the GPS for times when the car had been on public roads, citing *Knotts* for the theory that a person has no reasonable expectation of privacy in his movements in a car from one place to another in public. The Supreme Court says this was a search, and the GPS device occupied private property in order to send its data. This was a common law trespass by the government, not sanctioned by the Fourth Amendment, and would be an unreasonable search. *Knotts* is distinguishable since the beeper was put in the barrel before it came into the suspect's possession, so no trespass had been involved. **This is a landmark case because it holds that the Fourth Amendment may be violated in two ways: (1) by police physically intruding onto a person's property without license to do so to conduct the search; or (2) by police violating a person's reasonable expectation of privacy.**

United States v. Knotts, 460 U.S. 276 (1983). Police put a beeper into a 5-gallon drum at a chemical company for a chemical used in the manufacture of methamphetamine. The company agreed to sell that drum to defendant if he came in. Defendant Armstrong made the purchase and went to Defendant Petchin's house, where the drum was transferred to Petchin's car, which police followed to Wisconsin. Police lost contact with the car but a helicopter picked up the signal again at a cabin in the boondocks. Police got a search warrant and found a meth lab in the cabin. **HELD:** Defendant had no expectation of privacy in the use of this beeper to track the drug while it was in public places or the fact that it went to a particular location.

United States v. Karo, 468 U.S. 705 (1984). Although it does not violate the Fourth Amendment for police to put a beeper into a container of chemicals expected to be sold to a drug dealer, and then monitor it, a Fourth Amendment violation arises from continued monitoring of the beeper after it goes into the privacy of someone's home. In *Karo*, DEA agents put a beeper into a container of ether to be sold to a suspected drug manufacturer. They traced it over a period of days from one home to another, then continued a sustained monitoring of it after it went into a person's home. Ultimately they got a search warrant for the home. **HELD:** The initial placement of the beeper in the container did not violate the Fourth Amendment, but the monitoring of it once defendant went inside his home was improper. Warrants for installation and monitoring of beepers are desirable and could end up being critical if the beeper ends up going into someone's home.

8. Cordless Telephone Transmissions

State v. King, 873 S.W.2d 905 (Mo. App. S.D. 1994). A neighbor overheard defendant, who was using a cordless telephone, arranging to buy some marijuana for resale. She recognized defendant's voice and reported it to the Highway Patrol. She heard the details of where the defendant and the seller were going to meet for the delivery. The Patrol nabbed defendant at the place of the meeting. They approached him and told him the information they had received and asked for consent to search the vehicle. Defendant said: "Go ahead." As officers searched, one started unzipping a pocket on the rear of the front passenger seat and defendant called out, "Stop!" At that time, the officer found a syringe with clear liquid and a spoon inside the pocket. The liquid turned out to be methamphetamine. **HELD:** (1) A cordless telephone communication is not a "wire communication" that would require a prosecutor to get a warrant under the Missouri "wiretapping" statute; (2) defendant had no reasonable expectation of privacy in the conversations on cordless telephones; and (3) since officers had probable cause to search the car based on information from the neighbor and the fact defendant arrived at the prearranged time and place, no consent was necessary for the search.

NOTE: Effective 10/25/94, 18 U.S.C. Section 2511 was amended so that cellular telephones and cordless telephones would now be protected from eavesdropping without a warrant.

9. Secret Tape-Recording of Telephone Calls or Use of Body-Wires

As long as one party to the conversation knows it is being recorded, it is legal to

secretly tape a conversation in Missouri. The defendant has simply misplaced his confidence in that particular person. Missouri and Federal eavesdropping statutes specifically do not apply as long as one party to the conversation knows it is being recorded. **WARNING:** About a dozen states prohibit tape-recording any conversation without the other person's knowledge or a search warrant. Illinois is one of those states.

On-Lee v. United States, 343 U.S. 747 (1952). A person does not have an expectation of privacy in his conversation with another person even if that person is secretly taping him or allowing someone else to eavesdrop; rather, his confidence has simply been misplaced. Thus, the overheard conversation between defendant and a confidential informant was admissible.

State v. Barrett, 41 S.W.3d 561 (Mo. App. S.D. 2001). After a 13-year-old girl reported sexual abuse by her stepfather, the investigators had her make a "cool call" to the suspect. With her consent, the call was tape-recorded by police. She got him to discuss the abuse over the telephone, which ended up being devastating admissions. **HELD:** It does not violate the Constitution or wiretapping laws to secretly tape-record a conversation as long as one party to the conversation knows it is being recorded. Also, no *Miranda* warnings are necessary since the defendant is not in custody.

State v. Spica, 389 S.W.2d 35 (Mo. 1965). Sets out 7-prong test for admissibility of a surreptitious tape-recording: (1) showing the recording device was capable of taking testimony; (2) showing the operator of device was competent; (3) establishing authenticity and correctness of the recording; (4) showing that no changes, additions or deletions have been made; (5) showing manner of preservation of the recording; (6) ID of speakers; (7) showing the testimony elicited was voluntarily made without any kind of inducement. *See also: State v. Wahby*, 775 S.W.2d 147 (Mo. banc. 1989) (transcripts of the tape may be used).

10. Plain View: Officers in Airspace Looking Down Upon Defendant's Property.

California v. Ciraolo, 476 U.S. 207 (1986). Airplane flyover after anonymous tip showed marijuana plants growing within fenced yard. They were seen with the naked eye from 1000 feet. **HELD:** Plain view. No reasonable expectation of privacy.

Florida v. Riley, 488 U.S. 445 (1989). Defendant lived in a mobile home on five acres of rural property. He had an enclosed greenhouse, covered with corrugated roofing panels, but the roof had a 10-foot gap. Police officer flew in helicopter 400 feet over greenhouse and with naked eye saw the marijuana plants and used

those observations to get a search warrant. The 400 feet was a height at which helicopters commonly and lawfully fly. **HELD:** Defendant did not have a reasonable expectation of privacy that his greenhouse was not subject to observation from that altitude.

Dow Chemical v. U.S., 476 U.S. 226 (1986). EPA was investigating Dow Chemical Co. and used an airplane commonly used for map-making photos to take aerial-map type photos from 1,200 to 12,000 feet, at all times within navigable airspace. **HELD:** Although the things seen could not have been seen with the naked eye, the aerial photos were taken with common technology generally available to the public from navigable airspace. No violation of Fourth Amendment.

(G) “Plain Feel” Doctrine

Minnesota v. Dickerson, 508 U.S. 366, 375 (1993). The Court officially adopted a “plain feel” exception to the search warrant requirement. In other words, a police officer conducting a *Terry* frisk of a suspect based upon reasonable suspicion that he is armed and dangerous may seize evidence other than a weapon, if, in conducting the frisk, the contraband nature of the evidence is “immediately apparent” to the officer based upon his feel of the object through the suspect’s clothing. The Court noted: “We think that this doctrine [plain view] has an obvious application by analogy to the sense of touch during an otherwise lawful search.” The Court held that the particular seizure in this case was invalid. The officer saw the suspect coming out of a crack house and frisked him, and squeezed and manipulated a plastic baggie he felt in the suspect’s clothing until he determined that it contained a lump of cocaine. The officer testified: “As I pat-searched the front of his body . . . I felt a lump, a small lump, in the front pocket. I examined it with my fingers and it slid and it felt to be a lump of crack cocaine in cellophane.” Thus, it was clear that the contraband nature of the lump was not “immediately apparent.” The officer continued the exploration of the baggie after having concluded that it was no weapon, and thus his continued feel of it lost its justification under *Terry*. Because the further search of the pocket was constitutionally invalid, the seizure of the cocaine was likewise unconstitutional.

State v. Rushing, 935 S.W.2d 30 (Mo. banc. 1996). Defendant was convicted of possession of a controlled substance with intent to distribute based upon crack cocaine found in his pocket. A juvenile officer had seen defendant furtively handing something to a person in an area known to be a place where drugs are frequently sold. He reported it to the police, and accompanied the responding officer to the scene where they found defendant (whom the juvenile officer recognized as the person he’d seen in the suspected drug deal) on the porch of house where the officer had previously executed two drug-related search warrants. The officer approached defendant and said he had received information that defendant was dealing drugs. The officer was concerned for

his safety because of gang graffiti in the neighborhood, so he did a pat-down of defendant. The officer felt a tubular item in defendant's front pants pocket. The officer immediately thought it was a tubular plastic "Life Saver Hole candy container, which is a common container used by crack dealers to carry their crack cocaine in." This was based upon the information he had from the juvenile officer, his knowledge of the neighborhood, and his previous training and experience as a drug officer (including a list of his cocaine arrests and seizures with references to the types of containers). The officer removed the tubular object and found it to be a cylindrical plastic medicine bottle, 2 and 3/4 inches long, with a one inch diameter. It contained 10 rocks of crack cocaine. **HELD:** The investigative stop was permissible since the officer was able to point to specific and articulable facts which, taken with rational inference from those facts, created a reasonable suspicion that a person has committed or is about to commit a crime. Once a valid stop is made, police may pat a suspect's outer clothing if they have a reasonable, particularized suspicion that the suspect is armed. The "plain feel" exception to the warrant requirement is that "if a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified." In this case, it was immediately apparent to the police officer that the object was probably a tube commonly used to transport crack cocaine. The court points out that in order to justify a seizure under the plain feel doctrine, the officer must have only probable cause to believe the item felt is contraband. This was supplied by: (1) the officer's feel of the object; (2) his knowledge of the suspicious transaction observed by the juvenile officer; (3) the reputation of the neighborhood as a drug trafficking area; and (4) his knowledge of commonly used drug containers. Conviction affirmed.

State v. Kelley, 227 S.W.3d 543 (Mo. App. S.D. 2007). A police officer went to defendant's home to do a "knock and talk" because of a tip that defendant was spending a lot of time in the garage so a neighbor suspected he might be cooking meth. Defendant was in his yard when the officer arrived. He wore a large hunting knife and seemed to be intoxicated. The officer asked for permission to search the premises, which was granted. He patted defendant down for weapons, because of the knife. He felt a cylinder in defendant's pocket and took it out. It turned to be a metal, military-style match holder. The officer opened it and found methamphetamine. He did not ask defendant's permission to open the cylinder. **HELD:** The trial court properly suppressed the evidence. Unlike *State v. Rushing*, it was not "immediately apparent" to the officer that probable cause existed to believe the container contained contraband. The officer in *Rushing* was acting on eye-witness testimony from a juvenile officer who reported seeing a drug deal taking place. In this case, the officer had insufficient facts to reasonably conclude it was "immediately apparent" drugs were in the container.

United States v. Bustos-Torres, 396 F.3d 935 (8th Cir. 2005). Experienced drug officers watched as defendant appeared to conduct drug sales. They approached him and patted him down for weapons. The officer felt a wad of cash (\$4,000) that he immediately recognized as being cash that must have come from the drug sales. **HELD:** It was proper to pat down a drug suspect for a weapon, and it was immediately apparent to the officer that under these circumstances the wad of cash was evidence.

(H) Plain “Sniffs” & Drug Dogs

When an officer or dog is in a place he has a right to be, the odors he detects can also be used to form probable cause for a search. A person does not have a reasonable and legitimate expectation of privacy in the odors of drugs emanating from his car, suitcase or other property, so long as the dog is not unlawfully within the curtilage of a person’s home at the time of the sniff.

United States v. Place, 462 U.S. 696 (1985). Ruling that police armed with reasonable suspicion may detain luggage for a brief time to await the arrival of a drug dog to sniff it, the Court said of drug dogs: “We are aware of no other investigative procedure that is so limited, both in the manner in which the information is obtained and in the content of the information revealed by the procedure.” Although it was reasonable to detain the luggage on reasonable suspicion, 90 minutes was too long to be reasonable.

Illinois v. Caballes, 543 U.S. 405 (2005). An officer stopped defendant for speeding. The canine officer overheard the radio traffic and responded immediately, arriving while the first officer had defendant in his patrol car, writing out a warning ticket. The canine officer immediately walked his dog around the car. It alerted for drugs in the trunk. Based on that alert, the officers found marijuana in the trunk. The entire incident lasted less than 10 minutes. The Illinois Supreme Court held that because the canine sniff was performed without any “specific and articulable facts” to suggest drug activity, it was unreasonable in that it had “unjustifiably enlarged the scope of a traffic stop into a drug investigation.” **HELD:** “he Fourth Amendment does not require reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop. A canine sniff by a well-trained narcotics dog is “*sui generis*” because “it discloses only the presence or absence of narcotics, a contraband item.” *Id.* at 409. It does not infringe upon any legitimate privacy interests. “A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.” *Id.* at 410. It is important to note that this case did not involve a situation where the suspect was being detained beyond the time needed for the traffic ticket. Nor did it involve a situation where the suspect was being detained upon reasonable suspicion while awaiting a drug dogs. In those cases, a detention of 90 minutes has been held to be too long to be reasonable, *United States v. Place*, 462 U.S. 696 (1983), while a

detention of 32 minutes has been held to be reasonable. *State v. Logan*, 914 S.W.2d 806 (Mo. App. W.D. 1995).

Rodriguez v. United States, 135 S. Ct. 1609 (2015). At 12:06 a.m., the defendant was pulled over for a traffic offense by a K-9 officer. The officer went to the car and got defendant's license, registration, and proof of insurance. He asked the driver to come back to his car. The driver asked whether he was required to do so, and the officer said no and let him stay in the car with the passenger. While waiting for the records check, the officer went back to the car and got the passenger's name and ran a records check on him. At 12:27, the officer issued a written warning to the driver, 21 minutes after the stop. At that time he asked for permission to walk his dog around the car, but the driver refused consent. The officer ordered him out of the vehicle and had him stand in front of the patrol car while they awaited the arrival of another officer. Minutes later the second officer arrived, and at 12:33 the K-9 sniff was done. The dog alerted to the presence of drugs 10 minutes after the warning ticket was issued. The car search revealed a large bag of meth. **HELD:** A dog sniff made after a traffic stop has become prolonged beyond the time reasonably required to complete the mission of issuing a traffic ticket, when there is no reasonable suspicion to detain the person, is an unreasonable seizure under the Fourth Amendment. The traffic stop may last no longer than is necessary to check the driver's license, registration, and proof of insurance, and to determine whether there are outstanding warrants against the driver. The officer may ask questions unrelated to the purpose of the stop so long as they do not measurably extend the duration of the stop. In this case, even the sort 10-minute detention beyond the purpose of the stop was an unconstitutional seizure, not supported by reasonable suspicion, so the driver was being illegally detained at the time of the dog sniff.

United States v. Riley, 684 F.3d 758 (8th Cir. 2012). Officer pulled defendant over for a traffic violation and developed reasonable suspicion that he had drugs in the car based on his nervousness, his confusion about his trip, and his lies about his criminal history related to drugs. After 11 minutes, the officer called for a drug dog. Since the dog handler was off duty, he did not arrive until 54 minutes after the stop. **HELD:** Unlike the airport situation, where a 90-minute detention of luggage was unreasonable because officials should have known that luggage may need to be sniffed and should have a dog available on short notice, this officer acted reasonably and the delay was caused only by the remote location of the stop and the time it took for the dog to respond. The Eighth Circuit has held that even an 80-minute delay is not too long in the traffic stop situation. *United States v. White*, 42 F.3d 457 (8th Cir. 1994). See also *State v. Joyce*, 885 S.W.2d 751 (Mo. App. 1994); *State v. Logan*, 914 S.W.2d 806 (Mo. App. W.D. 1995) (32-minutes).

Florida v. Jardines, 133 S. Ct. 1409, 1414 (2013). Police took a drug dog to defendant's front porch, where the dog gave a positive alert for drugs within two minutes. Based on the alert, the officers got a search warrant for the house and found growing marijuana

plants. **HELD:** Even though an officer could have walked up to the door and knocked on it, the use of the drug dog within the cartilage of the home was a “search” within the meaning of the Fourth Amendment, thus requiring a warrant. “[W]hen it comes to the Fourth Amendment, the home is first among equals.” Officers cannot search the area “immediately surrounding and associated with the home” without probable cause and a warrant, and the use of the dog as a forensic tool amounted to a search. **Once again, the Supreme Court says the Fourth Amendment can be violated in two ways: (1) by police physically intruding onto someone’s property without license to do so to conduct a search; or (2) by police violating a person’s reasonable expectation of privacy.**

See Lane P. Thomasson, “Florida v. Jardines: Dogs, Katz, Trespass and the Fourth Amendment,” 69 *J. Mo. Bar* 336 (2013).

Florida v. Harris, 133 S. Ct. 1050 (2013). Defendant was pulled over on a traffic stop and Aldo, the drug dog, alerted positive for drugs. The ensuing search of the truck revealed pseudoephedrine, which was not one of the drugs the dog was trained to detect, but it was found in places where heroin, cocaine, marijuana, meth or ecstasy could have been. The defense challenges Aldo’s credentials, based upon his handler not keeping “complete” records of Aldo’s performance in the field. **HELD:** Testimony that Aldo had satisfactorily completed training in detecting drugs provided sufficient reason to trust his alert. The test is merely probable cause as to whether this dog’s training and alert creates a fair probability that drugs will be found. The officer does not need to present a complete history of the dog’s performance in the field.

United States v. Peralez, 526 F.3d 1115 (8th Cir. 2012). The defendant was a passenger in a van pulled over for a traffic offense. The driver went back to the patrol car. Three minutes into the stop, the officer said he was just going to issue a warning. As he started writing the ticket, he asked whether drugs were in the car and said he was going to walk his dog around the car. He asked if his dog would alert, and the driver said no. Eight minutes later he went to the passenger window and asked the passenger the same thing, and the passenger said the dog would not alert. He returned to the patrol car and had dispatch run the criminal histories of the driver and passenger, which is a routine part of the stop, but he did this 10 minutes after saying he was just giving a warning. Before dispatch responded, he took his drug dog to the car, and the dog alerted immediately. **HELD:** The proper test to apply is: (1) was the stop lawful at its inception? (2) was the stop unjustifiably prolonged, making it inconsistent with the Fourth Amendment? and (3) was any constitutional violation a “but-for” cause of obtaining the challenged evidence? A traffic stop may be extended if it becomes consensual or if reasonable suspicion develops that other criminal activity is afoot. Here, although the stop was prolonged by the questioning, the sniff by the drug dog was not a “but-for” result, because the officer already had the dog at the scene and had already decided to do the sniff, so the unconstitutional delay did not cause the drugs to be found.

United States v. Morales-Zamora, 914 F.2d 200 (10th Cir. 1990). Defendant was traveling in a car and came to a police roadblock, the purpose of which was a routine check of drivers' licenses, vehicle registration, and proof of insurance. During the short check, before the officer finished the check, another officer walked a drug-sniffing dog around the vehicle, and the dog alerted to the trunk of the car. The car was then searched without consent under the automobile exception to the search warrant requirement. Officers found 126 pounds of marijuana. **HELD:** A brief roadblock detention to check for valid driver's licenses, vehicle registrations and proofs of insurance is reasonable under the 4th Amendment. The dog sniff was not a "search" within the meaning of the 4th Amendment, and thus individualized reasonable suspicion of drug-related criminal activity was not required before the dog could sniff the air around the car. There is "a lesser expectation of privacy in a vehicle than in a home" and "when the odor of narcotics escapes from the interior of a vehicle, society does not recognize a reasonable privacy interest in the public airspace containing the incriminating odor. A search warrant was not necessary. Neither was consent. The dog established probable cause, and the automobile exception to the warrant requirement applied. **NOTE:** If the primary purpose of the checkpoint is for drug detection, the stop would be unconstitutional under *City of Indianapolis v. Edmond*, 531 U.S. 32 (2001).

NOTE: YOU MUST HAVE REASONABLE SUSPICION TO DETAIN WHILE AWAITING DRUG DOG.

State v. Slavin, 944 S.W.2d 314 (Mo. App. W.D. 1997). Trooper pulled over defendant for a traffic offense on I-70. Defendant was cooperative, but nervous. At the conclusion of the traffic stop (8 minutes), the officer told defendant he would only receive a warning. Trooper then asked for consent to search the vehicle. Defendant refused, saying that his brother, an attorney, said he should never consent. The Trooper detained the defendant for an additional 12 minutes beyond the end of the traffic stop while they awaited a drug dog. Defendant claims the officer did not have reasonable suspicion to justify the additional detention. **HELD:** The officer did not have reasonable suspicion and the additional detention violated the Fourth Amendment. Unlike other cases, the totality of the circumstances here did not create a reasonable suspicion of criminal activity. Nervousness is not enough. Refusal to consent is not enough.

7. Consent as Exception

When the prosecution seeks to justify a warrantless search under the consent exception, the burden of proof falls upon the prosecution to show by a preponderance of the evidence that the consent was freely and voluntarily given under the totality of the circumstances.

Three Big Issues:

- 1) Was consent voluntarily given under totality of the circumstances?
- 2) Did the scope of the search exceed the consent given?
- 3) Did the person consenting have authority or apparent authority to give the consent?

A. Totality of the Circumstances Test

The prosecution has the burden of proving that, considering the totality of all the circumstances, the consent was voluntarily given. The prosecution must prove this by a preponderance of evidence.

Although it is impossible to list all possible factors, those traditionally considered can be culled from the leading cases of *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); *State v. Blair*, 638 S.W.2d 750 (Mo. banc 1982); and *State v. Berry*, 526 S.W.2d 92 (Mo. App. 1975). They include:

- 1) Whether the person was in custody when the request was made; (*Blair*)
- 2) The number of officers present; (*Blair*)
- 3) The degree to which the officers emphasized their authority; (*Blair*)
- 4) Whether weapons were displayed; (*Blair*)
- 5) Whether there was any fraud on the part of the officers; (*Blair*)
- 6) The acts and statements of the person consenting, (*Blair*) including his state of intoxication; (*Berry*)
- 7) The age, intelligence and education of the person; (*Schneckloth*)
- 8) The length of the questioning; (*Schneckloth*)
- 9) The use of physical punishment such as deprivation of food or sleep; (*Schneckloth*)
- 10) Whether the person was advised of his right to refuse consent. (*Schneckloth*)

NOTE: No single factor will control the finding of voluntariness; rather, the Court looks at the totality of the circumstances.

Schneckloth v. Bustamonte, 412 U.S. 218 (1973). Defendant was convicted of possessing a check with intent to defraud. The check was found in a car in which defendant was a passenger. Defendant claims the consent was invalid since he had not realized he had the right to refuse consent. **HELD:** Supreme Court adopts the totality of the circumstances test and finds that the consent was voluntary.

United States v. Chaidez, 906 F.2d 377, 381 (8th Cir. 1990). Defendant was pulled over on a traffic offense and the issue is whether he voluntarily consented to the search under the totality of the circumstances. **HELD:** The characteristics of the person giving consent are valid considerations, as are the characteristics of the environment where the consent was obtained. Relevant characteristics of the person include: (1) age; (2) general

intelligence and education; (3) whether intoxicated or under influence of drugs; (4) whether informed of right to withhold consent or *Miranda* warnings; and (5) whether he or she had previously been arrested or otherwise made aware of the protections available through the legal system. Relevant environmental factors include: (1) length of detention and questioning; (2) whether threats, intimidation or physical force was used; (3) whether promises or misrepresentations by police were made; (4) whether defendant was in custody or under arrest; (5) whether in a public or secluded place; and (6) whether defendant either objected or stood by silently during search. “These factors should not be applied mechanically” but rather as a valuable guide to the totality of circumstances analysis.

State v. Hernandez, 776 S.W.2d 34 (Mo. App. S.D. 1989). Fact that gun was drawn by officer does not necessarily invalidate the consent under totality of circumstances. *See also: State v. Apel*, 156 S.W.3d 461 (Mo. App. W.D. 2005).

State v. Berry, 526 S.W.2d 92 (Mo. App. S.D. 1975). Fact defendant was intoxicated does not necessarily invalidate the consent under totality of circumstances.

State v. Pierce, ___ S.W.3d ___ (Mo. App. W.D. 10/18/2016). Emotionally disturbed man, agitated and talking about hearing voices encouraging him to stab himself, gave consent to officers to go inside his house to make sure it was safe. Once inside, they found child porn. **HELD:** The consent was voluntary. A person’s mental illness is just one of many factors to consider when determining whether consent was valid.

B. Consent Waives the Need for Probable Cause

It is IMPORTANT to remember that consent is not just an exception to the warrant requirement, but is also a waiver of the need for probable cause.

United States v. Chaidez, 906 F.2d 377, 380 (8th Cir. 1990) “Even when police officers have neither probable cause nor a warrant, they may search an area if they obtain a voluntary consent from someone possessing adequate authority over the area.”

Thus, police may approach someone in a public place (without probable cause or reasonable suspicion) and request consent to search, so long as a reasonable person would realize that he could refuse to cooperate; but he may not be detained, even momentarily, without reasonable grounds for doing so.

C. No Reasonable Suspicion Needed to Ask

Florida v. Bostick, 501 U.S. 429 (1991). As a part of a routine drug interdiction effort, two police officers with badges boarded a bus during a stopover and asked to inspect the

ticket and ID of one of the passengers. They had no reasonable suspicion for a detention or search. They explained that they were looking for drugs and asked for his permission to search his luggage. They clearly advised him that he had the right to refuse. He consented and they found cocaine. **HELD:** Consent search was valid. The Fourth Amendment permits police to approach individuals at random in airport lobbies and other public places (in this case on a bus) to ask questions request consent to search their luggage, so long as a reasonable person would understand that he or she could refuse to cooperate.

United States v. Drayton, 536 U.S. 194 (2002). Officers boarded a bus during a stop and went down the aisle, asking passengers for consent to search their luggage and person. The officers did not specifically tell passengers that they were free to refuse to cooperate, but were polite and explained what they were doing. They found packages of drugs taped to the inside of defendant's thighs. **HELD:** The officers were not required to specifically tell the passengers they had the right to refuse consent. Rather, the validity of the consent is determined by voluntariness based upon the totality of the circumstances. The Court refused to adopt a per se requirement that individuals be specifically informed of their right to refuse consent.

State v. Talbert, 873 S.W.2d 321 (Mo. App. S.D. 1994). Police officers approached defendant in a bus station after noticing that he had gotten off a bus, had a day's growth of beard, and was carrying a large travel bag. An officer identified himself and asked defendant questions about where he had been and where he was going. He looked at defendant's ticket. Another officer obtained defendant's claim check for his other luggage and took it to the luggage area of the bus station, leaving defendant with the first officer. The first officer asked if he could look in the travel bag for drugs. Defendant said he could do so and opened the bag and shuffled the contents around. The officer asked if he could look for himself. Defendant agreed. The officer found a pound of marijuana. Two minutes had passed from the time officers had first approached defendant. The officers had not told defendant he was free to leave, or that he did not have to answer questions, or that he could deny consent to the search. **HELD:** Although the Court reaffirms the law that officers have the right to initiate a "police-citizen" encounter without reasonable suspicion or probable cause, to ask them questions and to request permission for a search [*Florida v. Bostick*, 501 U.S. 429 (1991); *Florida v. Rodriguez*, 469 U.S. 1 (1984); *Florida v. Royer*, 460 U.S. 491 (1983)], the manner in which the officers do so must make it clear to a reasonable person that he would have the right to refuse to cooperate or to discontinue the encounter. Also, this does not give the officers the right to detain the person even momentarily without that person's voluntary consent unless the officer has reasonable suspicion for a *Terry* stop. In this case, the trial court believed the officers had not made it sufficiently clear to the defendant that he did not have to let the officer look into his bag. There was evidence that the officers conveyed the message that compliance with their requests was required, and it changed

this encounter from consensual to non-consensual. Under totality of circumstances, the Court felt the consent had not been given freely and voluntarily. The trial court sustained the motion to suppress; the appellate court said the decision was not “clearly erroneous.”

BOTTOM LINE TO OFFICERS: BE SURE TO MAKE IT CLEAR TO THE PERSON GIVING CONSENT TO SEARCH THAT HE HAS THE RIGHT TO REFUSE.

D. Reasonable Suspicion Needed to Detain

Florida v. Royer, 460 U.S. 491 (1983). Police can be too intrusive in detaining a suspect, even when they have reasonable suspicion, thus rendering consent involuntary. Officers approached defendant at airport. He fit the drug courier profile. They asked him to speak with them. He produced his ticket and driver’s license, which an officer took from him without consent. The ticket bore a different name. Two officers asked him to accompany them to a closet-sized room. Another officer went and got defendant’s luggage, without defendant’s consent, using defendant’s ticket stub. Officers still had not returned defendant’s driver’s license and ticket, and never told him he was free to leave. Officers asked for consent to search. Defendant said nothing but produced his key. His suitcase was opened and drugs were found. Officer asked for the key to the other suitcase. Defendant said he did not have one. Officer said he might have to damage the suitcase. Defendant said to go ahead. **HELD:** Defendant was being unlawfully detained at the time the consent was sought. Defendant had been seized and the bounds of a *Terry* investigative stop exceeded by the time consent was sought. The officers’ conduct was more intrusive than necessary for an investigative stop.

E. Traffic Stops and Consent

During a traffic stop, an officer may ask for consent to search. It is not necessary to have probable cause to ask for consent, and police may ask a citizen if he has contraband on his person or in his car and may ask for permission to search so long as the person is not being illegally detained at the time the consent of obtained.

State v. Scott, 926 S.W.2d 864 (Mo. App. S.D. 1996). Trooper stopped defendant for traffic violation and had defendant come back to the patrol car. The entire stop lasted no more than 7 minutes. After 5 minutes, the Trooper finished running radio checks on defendant’s driver’s license, and wrote a warning ticket. The Trooper gave everything back to the defendant, and asked if defendant had any drugs or guns or anything illegal in his truck. The defendant said no. The Trooper asked for permission to search the truck, and defendant said he could. The search revealed marijuana hidden in the gas tank. Defendant claims that the consent was the product of an unlawful detention of the defendant, since the

traffic stop had been concluded before the Trooper asked for consent. **HELD:** Consent is freely and voluntarily given to a search when, considering the totality of all the surrounding circumstances, an objective observer would conclude that the person giving consent made a free and unconstrained choice to do so. It is not necessary for there to be probable cause before an officer requests permission to search. "Police may at any time ask a citizen if he has contraband on his person or in his car and may ask for permission to search." There is no "litmus paper test" for determining when a seizure has exceeded the bounds of an investigative stop. "In traffic violation encounters there are endless variations in facts and circumstances." Here, the Court looked at factors like whether there was the threatening presence of several officers, a display of weapons, any physical touching, the use of language or tone of voice compelling compliance, and found that the record did not indicate that a reasonable person would not have felt free to leave after getting the ticket. The trial court did not err when it found "no indicia of coercion" and found the consent freely and voluntarily given. *See also: State v. Burkhart*, 795 S.W.2d 399 (Mo. banc. 1990).

State v. Shoults, 159 S.W.3d 441 (Mo. App. E.D. 2005). Defendant was one of two passengers in driver's car. Driver was pulled over for an expired temporary tag. The officer asked the occupants to step out of the car while she looked into the matter. After three or four minutes, she had checked the driver's ID but decided to just give him a warning and told him to make sure to get the car properly registered. The officer felt the driver was free to leave at that point, although she did not specifically say the magic words. She then asked for consent to search the car. The driver was calm and cooperative and said, "Sure, go ahead." Two other officers arrived. The officer found a red tank with a valve of the type used to carry anhydrous ammonia. The driver said it was not his. The officer asked for consent to search the trunk. The driver consented. The officer found a padlocked leather bag containing some methamphetamine in the trunk. Defendant had the key to the bag. **HELD:** "A routine traffic stop based on the violation of state traffic laws is a justifiable seizure under the Fourth Amendment. So long as the police are doing no more than they are legally permitted and objectively authorized to do, the resulting stop or arrest is constitutional. However, the fact that police may detain a person for a routine traffic stop does not justify an indefinite detention. The detention may only last for the time necessary to conduct a reasonable investigation of the traffic offense." This includes asking for the driver's license and registration; requesting the driver to sit in the patrol car; and asking the driver about his destination and purpose. Once the traffic stop is over, the driver is free to leave. "Further questioning following the conclusion of the traffic stop is allowed if the encounter has become consensual. "So long as the person is free to leave, the officer can talk to him, and is free to ask whether he has contraband on his person, or in his car, or in his residence. Although no

litmus test exists for determining whether continued questioning is consensual or constitutes a seizure of the person questioned, our courts have found guidance in *United States v. Mendenhall*, 446 U.S. 54 (1980). *Mendenhall* held there may be a seizure of the person when there is the threatening presence of multiple officers, if the officer displayed a weapon, whether the officer touched the suspect, or if the officer used language or tone of voice indicating that compliance with the officer's request might be compelled. An officer does not need to inform a suspect that he or she is free to leave the scene in order for the encounter to become consensual. However, that option must be apparent from the circumstances." In this case, the continued conversation was consensual. "If the person has not been lawfully seized, the officer may ask for permission to search." Consent is voluntary when considering the totality of the circumstances an objective observer would conclude that the person giving consent made a free and unconstrained choice to do so. Factors include the number of officers present, the degree to which they emphasized their authority, whether weapons were displayed, whether the person was already in custody, whether there was any fraud on the part of the officers, and the evidence of what was said by the person consenting. "The officer is not required to tell the suspect he or she can refuse to give consent to search." In this case, the consent to search was voluntarily given.

3. Drugs and Contraband Questions

An officer conducting a traffic stop may question the driver about weapons and contraband, as long as doing so does not prolong the traffic stop beyond the time it would normally take.

United States v. Stewart, 473 F.3d 1265 (10th Cir. 2007). A police officer was alerted by an informant that a Chevy Tahoe had drugs in it. The officer noticed it was missing its front license plate, a traffic violation, so he pulled it over. He approached the driver's window and asked to see the driver's license and registration. The driver, obviously nervous, delayed giving a response and started to reach for the back seat. The officer told him not to reach back and asked if he could better reach his driver's license if he got out of the car. The driver said he could. Before opening the door and letting him out, the officer "asked Mr. Stewart if he had any weapons or contraband in his vehicle that I [the officer] should be concerned about." The driver responded that he had a gun under the driver's seat. The officer checked under the seat and found a handgun, loaded, with the safety off. He arrested the driver. The defense claims the questioning about weapons and contraband was improper at a traffic stop. **HELD:** "As long as police questioning did not extend the length of detention, there is no Fourth Amendment issue with respect to the content of the questions. The correct

Fourth Amendment inquiry (assuming the detention is legitimate) is whether an officer's traffic stop questions 'extended the time' that a driver was detained, regardless of the questions' content. Mr. Stewart concedes that 'it certainly can't be said that Sergeant Winterton's question in and of itself appreciably extended the duration of the stop.' This admission ends our inquiry." The question was proper, so the finding of the gun was proper, so the arrest was proper, so a subsequent sniff of the car by a drug dog was proper and the search of the Tahoe based upon the automobile exception was proper. NOTE: The court cites *Muehler v. Mena*, 544 U.S. 93 (2005) (where questioning of occupants of premises during the execution of a search warrant was held proper.)

United States v. Coleman, 700 F.3d 329 (8th Cir. 2012). Officer pulled the driver of a motor home over for traffic offense. While questioning him about the traffic matter, he added a couple of questions about drug use, and the defendant admitted using marijuana and having some in the motor home. **HELD:** The questions about drug use did not prolong the stop. A traffic stop can become unconstitutional if prolonged beyond the time reasonably required to complete its purpose, but these two questions about drug use were "de minimus" because they were "brief, lasting only a couple of minutes."

United States v. Olivera-Mendez, 484 F.3d 505 (8th Cir. 2007). Defendant was pulled over for speeding. As the officer investigated the traffic matter, he asked whether defendant was carrying illegal drugs. This part of the conversation lasted about 25 seconds. While awaiting a response from dispatch on the driver's license check, the officer took his drug dog around the car and it alerted for drugs. **HELD:** "When police stop a motorist for a traffic violation, an officer may detain the occupants of the vehicle while the officer completes a number of routine but time-consuming tasks related to the traffic violation. These may include a check of driver's license, vehicle registration, and criminal history, and the writing of a citation or warning. While the officer performs these tasks, he may ask the occupants questions, such as the destination and purpose of the trip, and the officer may act on whatever information the occupants volunteer." *Id.* at 509. "Some of our cases appear to say that merely asking an off-topic question during an otherwise lawful traffic stop violates the Fourth Amendment, but this view does not survive *Muehler v. Mena*, 544 U.S. 93 (2005)." *Id.* at 510. "The police here had probable cause to seize defendant for driving at an excessive speed, and we do not think the officer effected an unreasonable seizure simply by asking three brief questions related to possible drug trafficking amidst his other traffic-related inquiries and tasks." *Id.* at 511.

State v. Jones, 204 S.W.3d 287 (Mo. App. S.D. 2006). Drugs were found in defendant's truck after he was stopped for a traffic offense. He claims they were

found at a time when he was being detained longer than necessary for a reasonable investigation of a routine traffic stop and in the absence of any specific or articulable facts supporting a detention for criminal activity. When the defendant was pulled over, the officer had him come back to the patrol car. He passed a portable breath test. The officer requested a full check on defendant and his driving record, which would impact whether the officer would give him a ticket or a warning. While awaiting the response from the dispatcher, the officer filled out the racial profiling form required for each traffic stop. Still not having heard from the dispatcher, he asked if defendant had any weapons, drugs or anything illegal in his truck. Defendant said that he did not, but refused consent, claiming his attorney said to never let anyone search his car. At this point, the dispatcher reported that defendant had several traffic offenses, and added that she would have more information soon. By this time, the stop had lasted six minutes. The officer and the defendant continued their conversation. Less than two minutes later, the dispatcher radioed the last bit of information. Thirty seconds later the defendant consented to a search of the vehicle, a total of eight minutes since the initial stop. **HELD:** “As long as the officer is investigating [the traffic offense], running the records check, and issuing the citation, the officer may continue to conduct a reasonable investigation of the traffic violation by conversing with the driver.” The consent was valid. The traffic stop had not yet concluded at the time the defendant consented to the search. The officer, who had just received the last bit of information he needed 30 seconds before, had not yet finished filling out the ticket.

4. Extending Traffic Stop Detention by Unrelated Questioning Can Make Search Invalid

Extending the traffic stop detention by unrelated questioning aimed only at making a drug case makes the continued detention improper and the subsequent probable cause established by the drug dog’s sniff invalid.

State v. Maginnis, 150 S.W.3d 117 (Mo. App. W.D. 2004). A trooper stopped defendant and his passenger for speeding (three miles over limit) and changing lanes without a turn signal. When the trooper began talking with the driver, his focus was on things like where he was going, the identity of his passenger, their occupations, and how long they’d known each other. It was a full four minutes (the conversation was taped) before the officer even got around to asking for registration papers for the vehicle, and he never once called in to verify defendant’s driver’s license. A different officer only did so later after the search for drugs. After getting inconsistent stories as to where they were going (the driver said they were going from Nebraska to Florida to help sort some things of his recently-deceased brother, but the passenger said he did not know where they were going, that they were just headed “up the road”) the officer decided he

had reasonable suspicion for his drug dog do a sniff. The dog alerted for drugs. **HELD:** “During a traffic stop, an officer may request a driver’s license and vehicle registration, run a computer check, and issue a citation.” *Id.* at 120. As long as the officer is doing these things, “he may continue to conduct a reasonable investigation of the traffic violation by conversing with the driver. The evidence here shows that even if the initial stop was about infringement of traffic laws, the interrogation of the two travelers was not at all about traffic violations, but rather was about the officer’s desire to obtain the opportunity to flush out any possible drug activity.” *Id.* at 120-21. The officer’s questions “delayed the resolution of the traffic violation and impermissibly detained defendant beyond what was reasonable in view of the nature of the stop.” *Id.* at 122. The evidence was thus improperly seized. NOTE: The Court’s comment at one point that “Missouri law allows only limited questioning during a traffic stop” is too broad to be 100% accurate. Certainly, while awaiting a response on the computer check of the driver’s license, the officer could talk with the driver about anything he wished. The real issue is whether he is being impermissibly detained. See *Stewart, Jones and Olivera-Mendez* above.

5. Consent Given After Detention Has Become Illegal is Invalid

A consent obtained after a detention not supported by reasonable suspicion is fruit of the poisonous tree and is not voluntary.

State v. Woolfolk, 3 S.W.3d 823 (Mo. App. W.D. 1999). Police pulled over defendant for an improper rear light. After giving a warning, the officer noticed that the defendant was nervous and had lied about not having any prior arrests (a radio check had confirmed defendant’s prior drug arrest). The officer asked for consent to search, which was denied. The officer said he would detain defendant to await the drug dog. Defendant then consented. Defendant does not contest the legality of the initial stop, but claims his consent was not voluntary because his continued detention was illegal since not based upon reasonable suspicion. **HELD:** Defendant is correct. Although police may detain a person for a routine traffic stop, “the detention may only last for the time necessary for the officer to conduct a reasonable investigation of the traffic stop.” This would include: (1) asking for the subject’s driver’s license and registration; (2) requesting that the subject sit in the patrol car; and (3) asking the driver about his or her destination and purpose. Once these steps are completed and the officer has checked the driver’s record, the officer must then allow the driver to proceed without further questioning unless “specific, articulable facts create an objectively reasonable suspicion that the individual is involved in criminal activity.” In this case, nervousness and failure to mention a prior arrest was not enough to continue detaining the defendant. His detention was unlawful; thus, his consent to search

was not freely and voluntarily given, but was only a “submission to a claim of lawful authority.” *Same result: State v. Weddle*, 18 S.W.3d 389 (Mo. App. E.D. 2000); *State v. Selvy*, 462 S.W.3d 756 (Mo. App. E.D. 2015).

State v. Granado, 148 S.W.3d 309 (Mo. banc 2004). Defendant was pulled over on a cold January night for weaving upon an interstate highway. The officer noticed he was nervous. The driver and passenger had discrepancies about their trip. The driver said they were going to Memphis, Michigan and that the driver would be coming back alone. The passenger said they were going to Capac, Michigan, and would come back together. The officer checked the driver’s license and registration, checked his driving record, then gave him a written warning and told him he was free to go. The officer then asked for consent to search, but defendant refused. The officer detained him for the arrival of the drug dog, which alerted to 36 pounds of marijuana. **HELD:** The marijuana should have been suppressed. The detention went beyond the time reasonably necessary to effect its initial purpose. No new factual predicate existed for reasonable suspicion to justify the additional detention while awaiting the drug dog. Whereas an officer “may question the driver [further] if the encounter has turned into a consensual one” and the person realizes he is free to leave, the record in this case did not support the idea that a reasonable person would have felt free to leave. Conviction reversed. **WARNING:** This *per curiam* decision contains careless wording that amounts to a misstatement of law. After correctly stating that “the basis for the reasonable suspicion must arise within the perimeters of the traffic stop itself” the opinion seems to incorrectly suggest that none of the information the officer learned during the traffic stop could be considered in determining whether reasonable suspicion existed. The opinion seems to say the court should only consider what occurred (nothing) after defendant was told he was free to leave. The court says: “No specific, articulable facts developed between the time Granado got out of the patrol car and returned to his truck that justified detaining Granado to ask him further questions.” The court adds: “There is nothing in the record, after the traffic stop concluded, that would give the patrolman reasonable suspicion that Granado was engaged in criminal activity.” To the extent these comments suggest that information the officer gleaned during the traffic stop could not be considered, they are clearly incorrect. *See Muehler v. Mena*, 544 U.S. 93 (2005); *United States v. Stewart*, 473 F.3d 1265 (10th Cir. 2007).

6. Not Necessary to Say Free to Leave

It is not necessary for the officer at traffic stop to tell defendant he is free to leave before asking for consent to search.

Ohio v. Robinette, 519 U.S. 33 (1996). Defendant was pulled over for speeding.

The officer went up to defendant's car and asked for his driver's license, ran a computer check, then asked defendant to step out of his car, turned on a mounted video camera, issued a verbal warning, and returned defendant's license. The deputy then said, "One question before you get gone: Are you carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that?" Defendant said no. The deputy asked if he could search the car. Defendant consented. The deputy searched and found a small amount of marijuana and a methamphetamine pill. Defendant claims the search was invalid on the theory that a person who has been detained on a traffic stop must be told they are "free to go" before a consent given to a search would be considered voluntary. **HELD:** Consent to a search is determined from the totality of the circumstances. It does not make a constitutional difference whether defendant was told he was free to go. The consent here was voluntary. *Same result: State v. Scott*, 926 S.W.2d 864 (Mo. App. S.D. 1996); *State v. Shoults*, 159 S.W.3d 441 (Mo. App. E.D. 2005).

7. Reasonable Person Must Realize Free to Leave

But a continued detention is not consensual if a reasonable person would not have realized he was free to go about his business.

State v. Barks, 128 S.W.3d 513 (Mo. banc 2004). Defendant was pulled over for speeding. The officer got his driver's license and proof of registration, returned to the patrol car, ran an operator's check on the validity of the license, and wrote the speeding ticket. After giving the ticket, with red lights still flashing, he kept questioning the defendant. He told defendant he seemed nervous, and asked why. Defendant claimed he had a small child at home. The additional questioning eventually produced a consent search, which revealed methamphetamine. **HELD:** This traffic detention lasted beyond the time necessary to conduct the reasonable investigation of the traffic violation, and it would not have been clear to a reasonable person in that situation that he was free to go. The evidence should have been suppressed. *Same result: State v. Vogler*, 297 S.W.3d 116 (Mo. App. S.D. 2009).

State v. Taber, 73 S.W.3d 699 (Mo. App. W.D. 2002). An officer pulled over the defendant for not having a front license plate, but quickly determined that he had been mistaken. Instead of letting her go immediately, he explained his mistake, but still asked to see her driver's license. He never told her she was free to leave. She didn't have her license with her, but did have an identification card, which he seized and took back to his patrol car and used to run a license check, thereby learning of an outstanding warrant for her arrest. Upon her arrest he found marijuana in her purse. **HELD:** Although the original stop was valid because the

officer had a reasonable suspicion that a traffic offense had occurred, the detention extended beyond the time reasonably necessary to effect its initial purpose. Such a stop can become consensual, “so long as a reasonable person would feel free to disregard the police and go about his business. A court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers’ requests or otherwise terminate the encounter.” In this case, the officer’s request to see her license was made after he had already determined she had done nothing wrong. He did not make it clear enough to her that she did not need to comply. “In our view, [simply admitting he had been wrong about pulling her over] was insufficient to convey to a reasonable person, who had been stopped for an apparent traffic violation, that he or she was free to go without complying with [his] request to produce her license and vehicle registration.” Thus, the evidence should have been suppressed. *Same result: State v. Martin*, 79 S.W.3d 912 (Mo. App. E.D. 2002). *See also State v. Johnson*, 148 S.W.3d 338 (Mo. App. W.D. 2004) (pulling away from a curb without use of a blinker did not amount to a traffic violation justifying a stop and request for consent search).

F. Attenuation Doctrine

When a consent comes after an unlawful detention, the state meet the dual requirement of showing the consent was voluntary AND that it was sufficiently independent from the primary illegality to purge the taint.

State v. Gabbert, 213 S.W.3d 713 (Mo. App. W.D. 2007). Police were conducting a “well-being” check in an effort to help a parent find her runaway teenage daughter. The police went to the front door of the house where the girl was believed to be, but no exigent circumstances existed for a warrantless entry. They knocked but got no answer. Officers in the back radioed that someone went out the back door. When police went to the backyard, this defendant was leaning against the house with his hands in his pockets. Police ordered him to take his hands out of his pockets. He did so. He was not free to leave. The police asked for consent to pat him down and he put his hands on the wall. The pat-down revealed a knife in his pocket. He voluntarily told them about another knife concealed in his boot. **HELD:** The search was unlawful. Ordering defendant to remove his hands from his pockets was a seizure. In dealing with the State’s claim that the encounter became consensual, “the question is whether the evidence to which objection is made has been come to by exploitation of the illegality or instead by means sufficiently distinguishable to be purged of the primary taint. . . Under the attenuation doctrine, the State must meet the “dual requirement” of proving that the consent is voluntary and that it is sufficiently independent from the primary illegality to purge the taint of that illegality.” In making that determination, the court “should consider the

following factors: (1) the temporal proximity of the illegality and the consent; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct.” In this case, even if the consent was voluntary, the State failed to show that the search was sufficiently independent from the illegal stop to purge the taint of that illegality.

United States v. Smith, 715 F.3d 1110 (8th Cir. 2013). Officers investigating someone who posed as an Ameren UE employee online to defraud a bank learned that a similar scheme was used in Los Angeles by this defendant, who since moved to St. Louis. No charges were filed in Los Angeles due to an allegedly unlawful search. Defendant claims this information about his prior involvement could not be considered as part of the probable cause for his arrest in this new case. **HELD:** “The attenuation doctrine is a well-established exception to the exclusionary rule. . . The mere fact that information gained during an illegal search gives rise to a subsequent separate investigation of an individual does not necessarily taint the later investigation.” To rule otherwise would give the suspect “life-long immunity for investigation and prosecution.”

G. General Consent Includes Closed Containers

An officer who has been given consent to search a car may also search closed containers in the car unless the subject explicitly limited his consent. The scope of a search is determined by **objective reasonableness**: What would a reasonable person have understood by the exchange between the officer and the person.

Florida v. Jimeno, 500 U.S. 248 (1991). Consent to search a car includes consent to search a closed bag on the floor. The officer does not need a separate consent to look inside closed containers. Jimeno’s car was stopped after a traffic violation. The officer told Jimeno he believed drugs were in the car and asked for permission to search. Jimeno agreed. Cocaine was found in a folded paper bag on the car’s floorboard. **HELD:** If a suspect gives consent to search a vehicle, it includes closed containers within the vehicle that might contain contraband, unless the suspect explicitly objects to or limits the scope of the search. Court uses the objective reasonableness standard.

State v. Hyland, 840 S.W.2d 219 (Mo. banc. 1992). An officer pulled defendant over for speeding. While writing the ticket, and before returning defendant’s driver’s license, the officer became suspicious of defendant and asked for permission to look in the trunk. Defendant agreed and opened the trunk. The officer saw a suitcase sealed with duct tape, and asked for permission to “look inside the suitcase.” Defendant removed the tape and opened the suitcase, revealing articles of clothing. The officer reached under the clothes and found a brick of marijuana. **HELD:** The search of the suitcase was valid as the product of a

voluntary consent. The scope of the search was reasonable, since a reasonable person would conclude that consent to look inside the suitcase included consent to look under the clothes. Defendant's consent to the search was obtained during the time reasonably necessary to carry out the purposes of the traffic stop. The additional time for the search was simply due to the search, which had been consented to.

H. Scope of Search is Determined by Objective Reasonableness

THE SCOPE OF THE SEARCH IS DETERMINED BY OBJECTIVE REASONABLENESS – What would the typical reasonable person have understood by the exchange between the officer and the person. *State v. Hyland, supra*.

United States v. Siwek, 453 F.3d 1079, 1085 (8th Cir. 2006). After asking the defendant if he had weapons, stolen property or illegal drugs in his truck, and the defendant denied having those items, the officer asked, "Do you have any problem if I were to search to make sure that is okay?" Defendant said no problem. **HELD:** This exchange allowed a full search of the truck, including looking under the truck bed and probing drain holes behind the driver's seat, where he spotted marijuana wrapped in plastic. "We measure the scope of a consent to search by an objective standard of reasonableness. The issue is what the typical reasonable person would have understood by the exchange between the officer and the suspect."

United States v. Dinwiddie, 618 F.3d 821 (8th Cir. 2010). Officers were supervising a controlled buy when defendant came out of the house. The approached him and asked if he had drugs or guns on him. He said no. They asked for permission to search his car and his person. He consented. In a pocket, they found a packing slip that was evidence of the delivery of the drugs. **HELD:** The scope of a consent to search is limited to what a reasonable person would have understood from the exchange between the officer and the person to be searched. This consent was to search his "person" and was not limited to a search for drugs or weapons.

State v. Law, 847 S.W.2d 134 (Mo. App. 1993). An officer stopped defendant for speeding. While writing out the ticket, the officer became suspicious of defendant (who was on probation for drug possession and who seemed much more nervous than a person getting a traffic ticket should be) and after he completed writing the ticket, asked: "Do you have anything illegal in you car?" Defendant said, "No." Officer: "Any illegal guns or knives?" Defendant said, "No." Officer: "Would you mind if I searched your car?" Defendant said he did not mind, got his keys from the ignition and opened the trunk. The officer found marijuana hidden in a shaving kit and marijuana seeds in a prescription bottle. **HELD:** The

search was valid. “The standard for measuring the scope of a suspect’s consent is that of ‘objective reasonableness’ – what would the typical reasonable person have understood by the exchange between the officer and the suspect? A reasonable person would have concluded that consent to search a vehicle included bags and containers in the trunk. The Court notes that a person, when giving consent, can expressly limit it to certain areas, but that this was not done here. Thirty-nine minutes passed from the time the ticket was written until the marijuana was found, but this was not due to an arrest, but due to the search, which had been consented to.

State v. Haldiman, 106 S.W.3d 529, 535 (Mo. App. W.D. 2003). An officer obtained consent to search a car after a traffic stop. Before searching the car, he told the driver to stand outside the car and patted him down, finding a golfball-sized baggie of meth inside the driver’s boot. **HELD:** “Consent to search a vehicle does not automatically equate consent to a pat-down search.” The consent was for a search of the car, and nothing was said at all about consent to search the person. Thus, the pat-down exceeded the scope of the consent.

I. Limiting Consent to Search

Even without an explicit limitation, the surrounding circumstances might reasonably imply a limit on the scope of the consent.

“For example, if an officer links a request to search an area with a desire to find a particular item, it may be reasonable to presume that a generalized consent to search is limited to areas in which the target object might be.” Paul R. Joseph, *Warrantless Search Law Deskbook*, Section 16.5 (1997) (citing *Florida v. Jimeno*: “The scope of a search is generally defined by its expressed object.”).

United States v. Carey, 172 F.3d 1268 (10th Cir. 1999). An officer investigating a drug case asked for consent to search the defendant’s apartment. Earlier, when the defendant mentioned he had a pornographic videotape, the officer had said, “I’m not a bit interested in that.” The written consent was for a search of “the premises and property under my control.” The officers seized his computer and got a search warrant for drug records. The officer stumbled across one child pornography picture, but instead of stopping to get another search warrant aimed at child pornography, kept looking at lots and lots of child pornography files, which ended up being the basis for the child pornography charges against the defendant. **HELD:** The consent for the search of the apartment did not include the contents of the computer files, especially since the scope of the consent by its own terms talked about the apartment and the officer had given the impression he was not looking for anything related to pornography.

United States v. Gleason, 25 F.3d 605 (8th Cir. 1994). Bank was robbed. Broadcast went out to look for a green pickup. An officer pulled over a green pickup and asked, "Do you have any weapons in there, mind if I look?" Defendant answered no and assisted with the search. Defendant later claimed it was not valid consent, and that it only applied to a search for weapons, and thus the bag of money found during the search should be suppressed. **HELD:** The word choice, plus defendant's friendly demeanor and actions in assisting with the search rendered the consent voluntary.

J. Revoking Consent to Search

A suspect may revoke the consent.

United States v. Dichiarinte, 445 F.2d 126 (7th Cir. 1971). Police told defendant they wanted to search his home for drugs, but really wanted to look at certain documents. As the search progressed and officers were opening file cabinets, defendant said, "Does that look like narcotics! The search is over. I'm calling off the search." The officer said, "Sorry, Pal, we are here now and this is what we are going to do." **HELD:** Consent invalid. A search pursuant to consent may not be more intensive than was contemplated by the giving of the consent; a search for narcotics does not require an examination of documents. Papers seized after the consent was withdrawn should be suppressed.

State v. Howes, 150 S.W.3d 139, 143 (Mo. App. E.D. 2004). Defendant was a passenger in a motorboat. A Water Patrol officer stopped them for illegally sitting on top of the back of the seat. While he was talking with defendant, he asked if he could look in her purse. She first said okay, and opened it, but then turned around with it and began to walk away. The officer had not noticed anything illegal during his brief glimpse, nor was she under arrest. He followed her and grabbed the purse. He found drugs inside. **HELD:** Defendant's "consent to a search of her purse was clearly withdrawn when she turned with her purse and walked away." Exigent circumstances did not save this search because the officer admittedly did not have probable cause to believe anything illegal was in the purse.

United States v. Sanders, 424 F.3d 768, 774 (8th Cir. 2005). Police knocked on motel room door and asked for permission to come inside. Defendant consented. They then asked for permission to search his person. He consented and allowed a pat-down (which revealed no weapons), but when the officer tried to put a hand inside the front pocket of his pants, the defendant lowered his arm and blocked the hand. This occurred five times until the officer ordered him to keep his hands

up. The defendant never verbally withdrew the consent. **HELD:** Once given, consent may be withdrawn, and does not require any “magic words.” Here, under the objective reasonableness standard, a reasonable officer would have realized that the defendant by his conduct was unequivocally withdrawing his consent to a search of that particular pocket.

K. False Statements or Misrepresentations by Officers

False statements or misrepresentations by officers may or may not affect the voluntariness of the consent. Use of deceptions by officers is only one factor to consider in the totality of circumstances test.

* False statements as to the identity of the officers will not affect the consent.

Lewis v. United States, 385 U.S. 206 (1966). Officer posed as drug customer and was invited into defendant’s home for purpose of buying drugs. Defendant had consented to anything the officer would see as a drug customer, in spite of the lies of the officer pretending to be a drug customer. *Same result: State v. Allison*, 326 S.W.3d 81 (Mo. App. W.D. 2010); *United States v. Raines*, 536 F.2d 796 (8th Cir. 1976) (undercover officer claimed to be a mutual friend of a drug dealer who had just been arrested, so drug dealer let him inside his home to talk).

On Lee v. United States, 343 U.S. 747 (1952). No different result when informant wore a body wire to tape-record conversations in defendant’s home. The consent to enter the home was not rendered unlawful by the deception as to the purpose of the entry.

People v. Catania, 398 N.W.2d 343 (Mich. 1986), rev’g 366 N.W.2d 38 (Mich. App. 1985). A young female officer got into defendant’s home by falsely claiming car trouble and saying she needed to use the telephone, when her real purpose was to investigate alleged drug activity. When she chatted with defendant about being on the way to a party, he whipped out some marijuana. The consent to enter was valid.

*False statements as to the scope, nature or purpose of the search may render the consent invalid.

L. Cases Holding Consent Invalid

Gouled v. United States, 255 U.S. 298 (1921). An acquaintance of defendant, working with and acting under orders of police, pretended to visit defendant as a social guest, but ransacked private areas of defendant’s home when defendant left the room. **HELD:** In

spite of the fact the initial intrusion was consensual, the search was invalid since the scope so greatly exceeded the consent given a social guest to enter a home.

United States v. Quintero, 648 F.3d 660 (8th Cir. 2011). Police officers suspected that a couple in a motel room had drugs in the room. They knocked on the door in the middle of the night, falsely claiming they were “security” rather than law enforcement. When they asked for consent to search, they said they just wanted to “peek around.” They did a full-scale search of the room. **HELD:** The misrepresentations were important factors rendering this consent involuntary under totality of circumstances.

State v. Lorenzo, 743 S.W.2d 529 (Mo. App. W.D. 1987). Officer misled motorist when he asked to “peek inside the vehicle” when he ended up doing a full search and found a backpack under a seat containing a film canister of marijuana. Consent held invalid.

State v. Earl, 140 S.W.3d 639 (Mo. App. W.D. 2004). Police responded to investigate “suspicious circumstances, possible a domestic assault.” The officer spoke to a man and woman and smelled alcohol, but the man passed field sobriety tests. The officer asked the man (defendant) for permission to search him. Defendant asked why he wanted to search him. The officer, knowing he did not have probable cause, said, “Because I have probable cause.” Defendant responded, “If you’ve got that then go ahead.” Small amounts of meth and marijuana were found in his pocket. **HELD:** The search was invalid because it was not voluntary. “We agree that deceitfulness will not necessarily vitiate consent, but the state overlooks that defendant conditioned his consent on a fact that the officer knew to be false.” An officer “is not free to conduct a warrantless search on the basis of consent if he had reason to know that the consent was not knowingly granted.”

United States v. Bosse, 898 F.2d 113 (9th Cir. 1990). Officer claimed he was present to assist in a state licensing inspection of firearms dealer being conducted by another agent, but was really there to obtain information to be used in preparing search warrant in connection with criminal investigation. Consent not voluntary under totality of circumstances. “Special limitations apply when a government agent obtains entry by misrepresenting the scope, nature or purpose of a governmental investigation.”

People v. Jefferson, 43 A.D.2d 112, 350 N.Y.S.2d 3 (1973). Police obtained entry to defendant’s apartment on the false claim that they were investigating a gas leak. A critical fact in holding Fourth Amendment violated was that it could falsely appear to defendant that a failure to permit entry might result in injury to himself or other persons and property.

M. Cases Holding Consent Valid

United States v. Turpin, 707 F.2d 332 (8th Cir. 1983). Defendant killed his friend and put the body in a car on railroad tracks to make it look like a train-car collision. Officers, already knowing it was no accident, went to defendant's home and falsely told him that his friend had been killed in a train accident, but did not tell him he was a suspect in a homicide investigation. **HELD:** The failure to tell defendant that his friend had been murdered and that he was a potential suspect did not invalidate defendant's consent to police entry and search of his home.

United States v. Andrews, 746 F.2d 247 (5th Cir. 1984). Officers asked to see shotgun on ruse that they were trying to connect it with a robbery, when their actual purpose was to charge defendant with illegal possession of a firearm by a convicted felon. Court says deceit only one factor to consider under totality of circumstances and holds consent voluntary.

United States v. White, 706 F.2d 806 (7th Cir. 1983). Consent to search flight bag valid, where given to permit search for drugs, even though police were really looking for money and jewelry.

State v. Stevens, 367 N.W.2d 788 (Wis. 1985). Garbage collector was really acting as sheriff's agent, but this did not vitiate defendant's consent for him to enter garage to pick up garbage. Consent valid. No different from undercover officer or confidential informant situation.

N. Threat to Seek a Search Warrant if Consent is Not Given.

The courts have experienced considerable difficulty in dealing with those cases where the police have obtained consent to search after threatening that if consent is not given they will proceed to seek or obtain a search warrant.

Consents given in response to a threat to seek a warrant have been upheld as voluntary. *United States v. Raines*, 536 F.2d 796 (8th Cir. 1976); *United States v. Larson*, 978 F.2d 1021 (8th Cir. 1992).

Some courts have said consent is NOT voluntary if the officers make no distinction between seeking a warrant and obtaining one. *United States v. Boukater*, 409 F.2d 537 (5th Cir. 1969); *United States v. Faruolo*, 506 F.2d 490 (2nd Cir. 1974). The *Faruolo* case says the officer should not give the impression that the warrant would automatically be issued. "The agent can always be on the safe side of the line by plainly indicating that he will apply for a warrant and believes one will be issued, but that the decision whether to issue the warrant rests with the judge or magistrate to whom the agent will apply."

The 8th Circuit holds that a threat to obtain a search warrant is “only one factor in the totality of the circumstances inquiry.” *United States v. Severe*, 29 F.3d 444 (8th Cir. 1994).

Needless to say, a false claim by police that they have a search warrant when they really don't makes the consent involuntary. *Bumper v. North Carolina*, 391 U.S. 543 (1968).

O. Oral Consent Followed by a Subsequent Refusal to Put Consent into Writing.

The police obtain what appears to be a voluntary oral consent, after which they attempt to have the person sign a consent-to-search form, which the person declines to do. The police make the search on the basis of the oral consent. The claim that the subsequent refusal to sign a consent form operates to make the prior oral consent a nullity has been rejected by the courts. *United States v. Thompson*, 876 F.2d 1381 (8th Cir. 1989).

Likewise, a written consent is not essential to establish a valid consensual search. *United States v. Chaidez*, 906 F.2d 377 (8th Cir. 1990).

P. Knock and Talk Searches

A “knock and talk” of a person's home is nothing more than the usual consent search, but it is a good idea to use a written consent form or to tape record the conversation since a person has such a high expectation of privacy in his home.

United States v. Spotted Elk, 548 F.3d 641 (8th Cir. 2008). A knock-and-talk is simply a form of consent search. It does not violate the Fourth Amendment for police to knock on the door and request permission to come inside and talk, even without probable cause. If consent to search is obtained, it is valid if voluntary. It can become coercive if the officers assert their authority, refuse to leave or otherwise make the person feel he cannot refuse to open up.

State v. Nesbitt, 455 S.W.3d 79 (Mo. App. E.D. 2014). Knock and talk does not require reasonable suspicion.

State v. Kriley, 976 S.W.2d 16 (Mo. App. W.D. 1998). Officers planned to do a “knock and talk” at defendant's home, but a mean-looking dog was on a chain near the front door, so they went around to the back, but there was no normal back door. Instead, there was a shed attached to the building. The shed had an open door to the yard, with a closed door to the house. Officers went inside the shed to knock on the back door and noticed a jar with drug residue on a shelf inside the shed. **HELD:** Although an officer who approaches a common access route to a house may do so with his eyes open, if a side or back door is set up in such a way so as not to be generally open to the public, it is improper for the

officers to go to that particular door, and the items spotted are not considered to have been in plain view.

State v. Apel, 156 S.W.3d 461 (Mo. App. W.D. 2005). A state trooper received an anonymous tip that an active meth lab was in a particular house. He visited the house the next day and noticed a strong chemical odor. He saw a truck pull into the residence. He approached the driver (defendant), who identified himself as a resident of the premises. The officer asked who was in the residence. The defendant said he didn't know. The officer asked he if could go inside to identify the occupants. Defendant initially hesitated, but then agreed. The officer pulled his gun as he entered for safety reasons. Once inside, he spotted items in plain view, which he later seized without a search warrant. **HELD:** "Defendant fails to recognize that [the officer] did not need probable cause to go to the residence. The police, in the course of a criminal investigation, may enter the curtilage around a home and knock on the door to seek admittance or to converse with the resident." The consent was voluntary under the totality of the circumstances. "The drawing of the gun, under the circumstances, was not unreasonable. Entry of the house could have been perceived as a significant safety risk in view of the apparent methamphetamine production in progress." Once inside, he could seize items in plain view "so long as there is probable cause that the object is connected to a crime."

For an extensive look at the law on "knock & talk" searches see: H. M. Swingle & K. M. Zoellner, "Knock and Talk' Consent Searches: If Called By a Panther, Don't Anther," 55 *J. Mo. Bar* 25 (1999).

Q. Miranda Warnings Not Necessary

A request for consent is not interrogation and does not require *Miranda* warnings, especially if defendant is not in custody.

United States v. Beasley, 688 F.3d 523, 531 (8th Cir. 2012). Defendant was under arrest at the police station. Police officers had seized his duffel bag and digital camera and a lock-box from his mother's home. They confronted him with these items and requested consent to search. Defendant signed a consent form. Afterward, they read him *Miranda* rights and he requested a lawyer. Subsequently, they conducted the search and found child pornography in these items. **HELD:** "We have not required an officer to provide *Miranda* warnings before requesting consent to search or held that an absence of *Miranda* warnings would make an otherwise voluntary consent involuntary."

State v. Pena, 784 S.W.2d 883 (Mo. App. 1990). Defendant was pulled over for

speeding. The officer noticed white powder on the dashboard, but did not say anything about it. Back in the patrol car, the officer asked defendant for consent to search, which was given. The officer seized the white powder. Defendant moved to suppress, claiming he should have been given *Miranda* warnings.

HELD: Warnings not needed. Defendant was not in custody, nor was there interrogation. Consent is not an incriminating statement. *Miranda* warnings do not need to be given before requesting consent to search. *Same holding with detailed discussion: State v. Metz*, 43 S.W.3d 374 (Mo. App. W.D. 2001).

Berkemer v. McCarty, 468 U.S. 420 (1984). Roadside questioning in traffic stops is not custodial interrogation and does not call for *Miranda* warnings unless and until defendant has been placed under arrest.

R. Consent to Search After Invocation of Right to Remain Silent

A defendant may be asked for consent to search even after he has invoked his right to remain silent, since search and seizure law is governed by the Fourth Amendment, not the Fifth Amendment.

State v. White, 770 S.W.2d 357 (Mo. App. E.D. 1989). Even after defendant invoked his right to remain silent he may still be asked to give consent to a search if officer asks him and he gives voluntary consent. In *White*, defendant was the suspect in the theft of a red toolbox and a new bed. The police went to his apartment and knocked. He said, "Come in." They noticed a new bed matching the generic description of stolen one. Defendant was painting his apartment white. They asked him to voluntarily come to station. He agreed. At the station he was advised of rights and said he bought the bed from two guys he did not know, who had it in a van. He refused to answer other questions and asked for lawyer. He was arrested. A police officer asked for and received written consent to search the apartment and found a red toolbox recently painted white containing some of victim's tools. **HELD:** The consent was voluntarily given under totality of circumstances. Invocation of Fifth Amendment *Miranda* warnings only applies to interrogation. Not same test as Fourth Amendment search and seizure.

State v. Williams, 159 S.W.3d 480 (Mo. App. S.D. 2005). Defendant was arrested for rape. He invoked his *Miranda* rights and questioning ceased. The next day an officer asked him for consent for a blood sample. Defendant gave written consent. **HELD:** "Under *Miranda*, once an individual requests to speak to an attorney, all interrogation must cease until an attorney has been provided. A violation of *Miranda* does not, however, vitiate consent to search if the consent was otherwise voluntarily given. A request for consent to search is not an interrogation for purposes of *Miranda* because consent is not an incriminating

statement. A *Miranda* violation, however, is a factor to be considered in determining whether the consent was voluntary. Factors in addition to the *Miranda* violation include the number of officers present when consent was given, the degree to which the officers emphasized their authority, whether any weapons were displayed, whether the person was in custody, whether any fraud was committed by officers, and the acts and statements of the person who consented to the search.” This consent was voluntary.

State v. Baldwin, 290 S.W.3d 139 (Mo. App. W.D. 2009). Defendant was brought in for questioning concerning the rape and assault of a prostitute. He invoked his right to a lawyer, but still agreed to give a sample of his DNA. The consent was voluntary since requesting consent is not interrogation and the response was non-testimonial.

United States v. Cherry, 794 F.2d 201 (5th Cir. 1986). Defendant who was murder suspect invoked rights and asked for lawyer. Interrogation continued and defendant eventually confessed. He also gave written consent to search his office. The murder weapon, a gun, was found above his ceiling. **HELD:** The confession was not admissible because of Fifth Amendment violation, but the gun was admissible since the consent to search was voluntarily under the Fourth Amendment totality of the circumstances test.

S. Authority or Apparent Authority to Consent.

Consent by third persons has generally been upheld when the third party had the right to access or control for most purposes over the place searched or the thing seized. It is necessary to consider the consenting party’s authority over the particular area searched. It is also important whether or not the defendant is present and objecting to the search.

1. Co-Tenants May Consent to a Search of Common Areas of Control

United States v. Matlock, 415 U.S. 164 (1974). Defendant was a suspect in a bank robbery. He had been living in a house with his girlfriend and her parents, in her parents’ home. Defendant and girlfriend shared one bedroom in the house. After defendant was arrested outside the house, and placed in a patrol car, his girlfriend gave consent for police to search the house. **HELD:** Girlfriend’s consent was sufficient because it was obtained from a third party “who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.” The Court explained that joint tenants each have the right to permit inspection and that the others have assumed the risk that one of them might permit the common area to be searched. **NOTE:** The *Matlock* case is also important because it holds that the prosecutor may offer the hearsay

testimony of police that the co-tenant had said she shared the bedroom with defendant and gave her consent. This becomes important where, as here, the girlfriend has changed her mind and become a witness for her boyfriend.

State v. Woods, 861 S.W.2d 326 (Mo. App. S.D. 1993). Girlfriend gave consent to seize TV. Consent was valid since she had control over the apartment. *Same result: United States v. Nichols*, 574 F.3d 633 (8th Cir. 2009).

United States v. Wright, 564 F.2d 785 (8th Cir. 1977). Bank robber and his wife and child lived with the bank robber's mother. The mother gave consent for officers to search her house, and said that all of them had equal access to every room and every piece of furniture. **HELD:** The mother had authority to consent to a search of her adult son's room in her home because she had joint control over it.

Moore v. Andreno, 505 F.3d 203 (2d. Cir. 2007). Consenting girlfriend had no authority to consent to a search of a private padlocked room of the boyfriend's home because even though she lived with him and had a key to the house, she was not married to him, did not share ownership of the house, and had been specifically told that the locked room was "off limits" to her.

2. The Joint User of a Container May Consent to its Search.

3. A parent may consent to a search of a dependent child's room, although areas where the child has a particular expectation of privacy, such as a closed footlocker, may sometimes be treated otherwise.

State v. Blair, 638 S.W.2d 739 (Mo. 1982).

State v. Pinegar, 583 S.W.2d 217 (Mo. App. 1979). Defendant, an adult, still had a room in home of his parents and would often stay there. His mother never cleaned his room. Defendant had a footlocker at the foot of his bed and the family understood that it was his private personal footlocker. Police, with consent of parents, searched the footlocker. **HELD:** Invalid search since parents did not have authority to consent to the search of the private footlocker in the adult son's room.

Vandenberg v. Superior Court, 8 Cal. App.3d 1048, 1055, 87 Cal. Rptr. 876 (1970). Holds valid a father's consent to a police search of his 19-year-old son's room. Son had encouraged father: "Don't let them look, they don't have a search warrant!" Son did not have any area of the house where his father was not commonly allowed. "In his capacity as the owner with legal interest in the

property, a father can transfer to the police the limited right to enter and search the entire premises including that portion of the real property which has been designated by the parent for the use of his children . . . In his capacity as the head of the household, a father has the responsibility and authority for the discipline, training and control of his children. In the exercise of his parental authority, a father has full access to the room set aside for his son for purposes of fulfilling his right and duty to control his son's social behavior and to obtain obedience . . . Permitting an officer to search a bedroom in order to determine if his son is using or trafficking in narcotics appears to us to be a reasonable and necessary extension of a father's authority and control over his children's moral training, health and personal hygiene."

4. The owner of the premises in which he lives may consent to a search of his home even if a guest objects.

State v. Buckles, 495 F.2d 1377 (8th Cir. 1974). Defendant was overnight guest at home of Mrs. Utley. Police came with an arrest warrant for Mrs. Utley's husband, who was not home. Police asked for consent to search, which she gave. Police spotted defendant and arrested him. Police saw jacket and asked Mrs. Utley for permission to seize it. She said it wasn't hers, so they could seize it. Stolen money orders were found in the jacket. **HELD:** Owner could give consent for search of home, including guest's jacket, since she had use and control of the area where the jacket was found.

State v. Rollins, 882 S.W.2d 314 (Mo. App. 1994). Owner of home which defendant was painting could consent to police officer's search of defendant's duffel bag, which was located in the basement. Defendant assumed risk that owner might permit inspection of her home.

State v. White, 755 S.W.2d 363 (Mo. App. 1988). Defendant was a guest temporarily living with his friend. She was the one who signed the lease and lived there with two sons. She had authority to consent to a search of the apartment.

5. Ordinarily a guest may not consent to a search of the host's premises. The result will depend upon the amount of authority the guest has been given.

United States v. Turbyfill, 525 F.2d 57 (8th Cir. 1975). Guest was more than a casual visitor and had run of the house – consent was merely for police to enter into common area where visitors would normally be received. Thus, this limited consent was valid.

6. There is a rebuttable presumption that one spouse may consent to a search of any

area of a home where the married couple lives. A spouse may consent to a search of jointly occupied areas into which the person consenting is not allowed, if any.

United States v. Duran, 957 F.2d 499 (7th Cir. 1992). Separate building on a farm was used by husband as a gym. Wife consented to search of it. Her testimony that she could have entered the gym at any time established the requisite access.

United States v. Brannon, 898 F.2d 107 (9th Cir. 1990). Where wife had moved out of her home, charging husband with spousal abuse and husband changed the locks, the wife, who was still an owner of the home and who still had many possessions in the home, still had actual authority to consent to a search of the house.

7. Consent is implied to enter areas where a business normally holds itself open to the public.

8. A landlord may not consent to search of a tenant's apartment in spite of his authority under lease to enter to inspect or repair.

Chapman v. U.S., 365 U.S. 610 (1961). Landlord was suspicious that his tenant was operating a still and gave police permission to break a window and enter through a window. **HELD:** Invalid search.

People v. Sedrel, 540 N.E.2d 792 (Ill. App. 1989). Defendant was three days late paying rent so landlord entered to see if defendant still resided there and saw drugs and weighing scales. Did not seize them, but informed police and gave them permission to enter, which they did without a warrant. Since the lease was still pending, and the grace period had not yet run, it was not yet to the point where the defendant had abandoned his expectation of privacy.

People v. Brewer, 690 P.2d 860 (Colo. 1984). Defendant's landlord entered the premises to put things into a non-rented area, and found marijuana. Instead of seizing it and going to the police, she called the police and gave them consent to enter and search. The police found other marijuana. **HELD:** All of the marijuana was property suppressed. The landlord could not give consent to the police to search the tenant's home. If the police had not entered, but had simply used the information to get a search warrant, it would have been admissible since the actions of the landlord before involving the police were not governmental action.

9. Motel clerk may not consent to search of guest's room before guest has checked out or abandoned it.

Stoner v. California, 376 U.S. 483 (1964); *State v. Brasel*, 538 S.W.2d 325 (Mo. banc. 1976).

10. Motel may permit search of room after departure of guest.

Abel v. U.S., 362 U.S. 217 (1960); *State v. Mitchell*, 20 S.W.3d 546 (Mo. App. W.D. 2000) (or after checkout time had expired).

11. Minor child living at home – the scope of the minor child’s authority to consent should be determined by looking at two factors of particular importance: (1) the age of the child; and (2) the scope of the consent given.

The age is important because, as children grow older, they gradually acquire discretion to admit whom they will upon their own authority, and thus it is important to examine a child’s mental maturity, his ability to understand the circumstances in which he is placed, and the consequences of his actions. Annot. 99 A.L.R. 3d 598 (1980); Wayne R. LaFare, *Search and Seizure: A Treatise on the Fourth Amendment*, Vol. 4, p. 276 (Fifth Ed. 2012).

People v. Holmes, 536 N.E.2d 1005 (Ill. App. 1989). An 11-year old often left alone to babysit can consent to search.

State v. Griffin, 756 S.W.2d 475 (Mo. 1988). A 13-year old could consent to police entry of common areas of house for purpose of speaking to her mother.

12. Child, minor or otherwise, driving parents’ car may consent to search.

13. A driver of a car may consent, even when the owner is a passenger.

People v. Minor, 222 P.3d 952 (Colo. 2010).

14. The owner of the vehicle in which non-owner passengers are riding over the objections of the passenger, but this would not extend to closed containers belonging to passenger.

15. Consent by one co-tenant is not valid in the face of the refusal of another physically present co-tenant.

Georgia v. Randolph, 547 U.S. 103 (2006). The wife called 911 for a domestic dispute and officers responded to the home she shared with defendant. She ratted him out as a cocaine user and divulged that “items of drug evidence” were in the house. She consented to a search but the defendant showed up and

specifically refused to consent. Based on her consent, an officer went with her inside the house to a bedroom and retrieved a drinking straw with cocaine residue. When he left the house for an evidence bag the wife withdrew her consent. Based upon what he had already found, he obtained a search warrant. The issue was whether police can go ahead with a search of a house based on the consent of one co-tenant when the other co-tenant is present and specifically denying consent. **HELD:** “A warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident.” *Id.* at 120. Particularly interesting is the fine line the Court draws between the specifically-objecting co-tenant and a co-tenant who was not asked for his input. “The second loose end is the significance of *Matlock* and *Rodriguez* after today’s decision. Although the *Matlock* defendant was not present with the opportunity to object, he was in a squad car not far away; the *Rodriguez* defendant was actually asleep in the apartment, and the police might have roused him with a knock on the door before they entered with only the consent of an apparent co-tenant. If those cases are not to be undercut by today’s holding, we have to admit that we are drawing a fine line; if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant’s permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out. This is the line we draw, and we think the formalism is justified.” *Id.* at 121.

Fernandez v. California, 134 S. Ct. 1126 (2014). Police investigating a robbery saw a man run into an apartment and then heard a woman screaming. They knocked on the door and the woman answered. She had an injury to her face. The man told the officers to leave, saying, “I know my rights!” They arrested him for domestic assault. An hour later they came back to the house and asked for consent to search. The woman gave it. They found clothing worn in a robbery as well as a sawed-off shotgun. **HELD:** A person who shares a residence with another assumes the risk that any one of them may admit visitors. Either co-tenant may consent to a search. *Georgia v. Randolph* is the narrow exception where a consent search is not valid if a physically present co-tenant expresses refusal. Here, it was objectively reasonable for the officers to take the defendant away after arresting him. An abused woman may provide consent to search after her male partner has been removed from the apartment they share.

United States v. Hudspeth, 518 F.3d 954 (8th Cir. 2008). After child porn was found on defendant’s work computer, officers arrested him at work and before transporting him to jail they asked for permission to search his home computer. He refused to give consent. Officers then went to his home and asked

his wife for consent to seize the computer, without telling her that her husband had already refused to give consent. She consented. **HELD:** The husband's express prior refusal did not negate the co-tenant wife's later consent. Nor were officers required to inform her of her husband's prior refusal. The *Georgia v. Randolph* holding is limited to "physically present" co-tenants.

16. Apparent Authority Doctrine – Increasingly relied upon by lower courts in recent years in upholding third-party consent searches.

Illinois v. Rodriguez, 497 U.S. 177 (1990). Police were called to the home of Dorothy Jackson, the mother of Gail Fischer. Fischer was the girlfriend of defendant, who had just beat her up. She said defendant assaulted her at defendant's apartment, which she referred to repeatedly as "our" apartment. She had visible injuries. She said defendant was in the apartment asleep and she consented to take the police back to the apartment to let them in with her key. The police believed she was still living in the apartment with the defendant. They entered after she unlocked it. They found the defendant asleep and arrested him. They also found cocaine and drug paraphernalia in plain view and he was charged with drug possession. Fischer later testified for the defense that she had moved out of the apartment a month before the assault, had just been a visitor at the time of the assault, and had taken the key without defendant's knowledge. **HELD:** A warrantless search based upon a third party's consent is valid if the police reasonably believed the third party had common authority over the premises at the time of the consent, even if it later turns out she did not.

United States v. Amratiel, 622 F.3d 914 (8th Cir. 2010). Police responding to a domestic call arrested the husband. The wife gave permission for the officers to search a safe in the garage, and said they could get the keys off of defendant. **HELD:** Apparent authority exists when the facts warrant a person of reasonable caution to believe the person consenting had authority over the place. Here, it was reasonable for the officers to believe the wife had authority to consent to a search of a safe in a common area of the house she shared with her husband.

State v. Davis, ___ S.W.3d ___ (Mo. App. E.D. 12/6/2016). Defendant raped a woman in the basement of a house where he lived with his mother and aunt. The aunt gave police permission to search the house. Defendant later claims the aunt did not really live there, but was only "in and out." A condom with relevant DNA was found in a trashcan. **HELD:** Under the apparent authority doctrine, the officer reasonably believed the aunt had authority over the premises sufficient to give consent to a search. Evidence admissible.

State v. Moore, 972 S.W.2d 658 (Mo. App. S.D. 1998). Police obtained consent to

search the house from someone they had seen at the house before, whom they reasonably believed lived there.

State v. Lewis, 17 S.W.3d 168 (Mo. App. E.D. 2000). Police got consent from a woman who answered the door and said she was defendant's wife and that she lived at the residence.

8. Inventory Searches

An inventory search is the routine search performed upon property and persons taken into custody. It is justified not on the basis of probable cause, but on the basis that it is a reasonable administrative task, useful in safeguarding property, the police, and jail security.

Typical example: Defendant is arrested while in his car, and has no one with him to take his car home. Police may seize the car, rather than leave it on the side of road. The car is inventoried to protect the owner and the police from any claim they took or lost something.

An inventory search could also occur if the car was seized as evidence or as a forfeiture.

In this day and age it is malpractice for any department not to have a fixed written policy on seizing and inventorying vehicles and contents. The written policy should also specifically address the closed container issue.

South Dakota v. Opperman, 428 U.S. 364 (1976). A car was impounded by police for parking violations, pursuant to standard department policy. A police officer saw a watch on the dashboard and other personal property in the backseat. Using a standard inventory form and practices, the officer inventoried the car and found marijuana in the closed glove compartment. Defendant was convicted of misdemeanor possession of marijuana. **HELD:** Inventory searches are reasonable because: (1) they protect the owner's property while it is in police custody; (2) they protect the police from claims or disputes over lost or stolen property; and (3) they protect the police from potential danger.

Cady v. Dombrowski, 479 U.S. 367 (1973). An off-duty Chicago police officer was arrested for DWI in Wisconsin after a traffic accident. The Wisconsin police, by standard procedure, went to the place where his wrecked vehicle had been towed to inventory it for the police officer's service revolver, to protect the public. They found bloody police trousers with defendant's name, Dombrowski, on them, bloody towels, and other bloody objects. A body was later found on defendant's brother's farm. Defendant was convicted of murder. This inventory search is held to be reasonable.

Colorado v. Bertine, 479 U.S. 367 (1987). Routine inventory search of closed containers

in impounded vehicles approved. The key is to have a routine policy that is followed in all seizures of cars. The police department in *Bertine* would always seize cars of persons taken into custody from a vehicle. This was a DWI arrest. Drugs were found in backpack and sealed containers.

Florida v. Wells, 495 U.S. 1 (1990). A police department must have a set policy concerning opening of closed containers encountered in an inventory search in order for evidence discovered therein to be admissible. A Highway Patrolman stopped defendant for speeding, smelled alcohol on defendant's breath and arrested him for DWI. The officer impounded the car and inventoried it, including opening a locked suitcase in the trunk, which contained marijuana. The conviction was reversed since the Highway Patrol had no policy governing searches of closed containers in an inventory.

State v. Jones, 865 S.W.2d 658 (Mo. banc. 1993). An officer stopped defendant for his headlight being out. He noticed the inspection sticker was expired, the renewal stickers did not match, and the plates were expired and in someone else's name. The trooper decided to arrest defendant on the traffic charge. By MSHP written policy, when a lone driver is arrested on a traffic offense, his car will be inventoried before being towed. During the inventory, the trooper found a loaded gun in the trunk. Defendant was charged with being a convicted felon in possession of a handgun. **HELD:** The inventory procedures were in writing and were followed in good faith. Evidence admissible.

State v. Williams, 382 S.W.3d 232 (Mo. App. W.D. 2012). An officer arrested defendant for driving while revoked and handcuffed him. The officer searched the car and found a small bottle of PCP hidden under a leather cover over the vehicle's gearshift lever. At the suppression hearing, the officer claimed the search was done pursuant to a routine inventory search since she was having the car impounded. **HELD:** The search was not really done pursuant to routine inventory: (1) searching inside a gearshift lever is not a routine inventory per the written policy of the department; and (2) on the video the officer said she was having the car impounded because she "found something." Evidence suppressed.

State v. Meza, 941 S.W.2d 779 (Mo. App. W.D. 1997). Police officer stopped defendant for a traffic violation, smelled marijuana, administered field sobriety tests (which defendant passed), and asked about the marijuana odor, but defendant said he had nothing to say. The officer asked defendant to sign the traffic ticket, but defendant would not. The officer arrested defendant for C&I, then inventoried vehicle, finding marijuana. **HELD:** As long as the officer could validly arrest defendant for C&I, it was okay to do the arrest and inventory the car. The fact the officer also had an investigatory motive does not make the inventory search invalid.

A. Inventory of Drunk Person Taken Into Protective Custody

State v. Friend, 711 S.W.2d 508 (Mo. banc. 1986). Inventory of defendant's person after he had been picked up on a 12-hour hold for being intoxicated in public under Section 67.315, RSMo. was valid and evidence admissible.

B. Inventory of Purses and Containers

Purses, shoulder bags, and other items coming into police custody may also be inventoried pursuant to established department policies.

Illinois v. Lafayette, 462 U.S. 640 (1983). Defendant was arrested for disturbing the peace for a loud argument with a theater manager. He was taken to the police station. At the station, police inventoried his "purse-type shoulder bag" and found 10 amphetamine pills inside it. **HELD:** The personal effects including "any container or article in his possession" of an arrested person may be searched and inventoried as a part of the routine administrative procedure at a police station incident to booking and jailing the suspect. Under the Fourth Amendment balancing test, the intrusion on the individual is outweighed by the promotion of legitimate governmental interests involved.

United States v. Rabenberg, 766 F.2d 355 (8th Cir. 1985). A suitcase was mistakenly picked up by a boy at the airport. When he discovered his mistake, he called the police department and an officer came to pick it up. The boy had already opened the suitcase and had found a gun in it. The police officer seized the suitcase and inventoried it "so he might protect all persons concerned from claims of theft and from dangerous instrumentalities." Drugs were also found. **HELD:** It was reasonable for the police to do a full inventory on contents of a suitcase coming into their custody under these facts.

9. Inevitable Discovery/Independent Source Doctrine

If evidence is found as a result of a violation of a suspect's rights, it may still be admissible if the State can show that the evidence was found or would inevitably have been found, anyway, through a source independent of the violation of defendant's rights.

Nix v. Williams, 467 U.S. 431 (1984). Police find body of a murdered girl pursuant to defendant's illegally obtained confession. But at the time he confessed, the police were already combing the fields where the body was hidden. They had dozens of men walking the fields in a grid pattern, and ultimately would have found the body, even without the confession. **HELD:** The evidence of the location of body and evidence concerning it were admissible, even though the confession was not.

Murray v. U.S., 487 U.S. 533 (1988). "Independent Source" or "Inevitable Discovery" rule

reaffirmed. The Fourth Amendment does not require suppression of evidence observed in plain view during a warrantless search of a building, which was later seized pursuant to a validly issued search warrant, if the obtaining of the warrant was wholly independent of the prior illegal search. Here, the officers had probable cause to believe the defendant had marijuana in a warehouse. Defendant left the warehouse and officers moved in and searched it without a warrant. They found 270 bales of marijuana. They left but kept it under surveillance while other officers got a search warrant. The affidavit for the search warrant mentions the facts showing the original probable cause, without mentioning the warrantless entry. **HELD:** The search warrant was valid and the evidence was admissible. Sufficient proof existed that the agents would have gotten the search warrant, anyway, even without the warrantless entry.

United States v. Hill, 40 F.3d 275 (8th Cir. 1994). Defendant was under investigation for a drug conspiracy in Iowa. Iowa officers obtained a search warrant for his car and were waiting for him to arrive in Iowa, but he was pulled over for a traffic offense in Missouri, ten miles from the Iowa border. The Missouri search was ruled invalid. Defendant argues that the evidence found in his car pursuant to that search is inadmissible. **HELD:** The *Nix* inevitable discovery exception applies. It was inevitable that had the Missouri officers not stopped the car and found the drugs, the Iowa officers would have stopped it and found them legally pursuant to the search warrant. The government need only show by a preponderance of the evidence that the drugs would have been discovered in any event by lawful means.

State v. Oliver, 293 S.W.3d 437 (Mo. banc 2009). Officers were investigating a report that defendant had taken photos of naked children. At his house, they requested permission to look at the images inside his digital camera and computer. He refused, so the police started the search warrant process. The suspect left the house and his wife consented to allowing the police to seize the camera and computer. Days later they got a search warrant for the pictures. **HELD:** The police were already in the process of getting a search warrant to seize the camera and computer and would have completed the process had the wife not consented. Inevitable discovery applies when the state can prove by a preponderance of the evidence: (1) that certain standard, proper and predictable procedures of the local police department would have been utilized; and (2) those procedures inevitably would have led to the discovery of the challenged evidence.

State v. Butler, 676 S.W.2d 809 (Mo. banc. 1984). Any “half-decent” investigation would have discovered the bullet holes in the bedclothes, even absent the confession, thus the evidence is admissible. Cites *Nix v. Williams*.

State v. Hicks, 722 S.W.2d 650 (Mo. App. S.D. 1987). Defendant was convicted of murder for beating her 5-year-old stepdaughter to death with a wooden stake. The stake was seized from defendant’s home after consent to search from a third party. The third

party consent was probably invalid since it came from an adult son of defendant who did not live with defendant. **HELD:** The inevitable discovery rule applies since the medical evidence known to police was that victim had died of some sort of multiple blunt trauma to head and it was their obligation to look for the murder weapon and it was “inevitable” that absent the consent they would have done a search warrant to search the murder scene for the weapon. “Exclusion of vital physical evidence that would have inevitably been discovered perverts the judicial process and inflicts a totally unacceptable burden on the administration of criminal justice.”

United States v. Brooks, 715 F.3d 1069 (8th Cir. 2013). Police were investigating a bank robbery that just happened. Surveillance cameras showed the robbery and witnesses saw the robber flee in a white car. A teller put a GPS device in the bank bag and security officers were monitoring it. Defendant abandoned his car and stole a van. Officers pursued the van and shot him when he tried to run them down. The bank's cash was found on him. A cell phone charger was found in his abandoned car, and a cell phone matching it was found in the stolen van. The officers searched it without his consent, and relevant photos of the defendant with a gun were found. A search warrant was obtained for a more detailed search of the phone. **HELD:** Unnecessary to decide whether the warrantless cell phone search was okay, because the subsequent warrant was an “independent source for the evidence.” A warrant obtained after an illegal search is an independent source if: (1) police would have applied for the warrant had they not acquired the information; and (2) the application for the search warrant supports probable cause even after the tainted information has been redacted from it.

U.S. v. Mancera-Londono, 912 F.2d 373 (9th Cir. 1990). Inevitable discovery often comes up in the context of car inventory searches. In this case, an illegal warrantless search (lack of probable cause since an anonymous drug tip had not been sufficiently corroborated) of a car by DEA agents yielded evidence (150 kilos of cocaine) that would ordinarily have been suppressed. It was ruled admissible in spite of the improper search, though, since it would have been found anyway through the valid inventory of the car. The testimony was that DEA agents have a policy in force where they always conduct a routine inventory of rental cars coming into their possession before they turn them over to the rental agency. It was a standard practice following a written policy.

State v. Milliorn, 794 S.W.2d 181 (Mo. banc. 1990). The inevitable discovery rule can save the fruit of an improper search when a department has routine inventory procedures in place. The Missouri Supreme Court stressed four factors: (1) the vehicle must be legally impounded; (2) the inventory search must be motivated by a police desire to prevent false claims of lost property or to safeguard the impounded property; (3) the inventory must be according to a routine, standardized procedure; and (4) the inventory search must be inevitable, meaning that the search would be performed in any similar situation. In this case, the State offered no evidence that it was inevitable that

once this truck was impounded it would have been inventoried. Evidence suppressed.

TO ENSURE AN INVENTORY SEARCH WILL BE UPHeld UNDER THE INEVITABLE DISCOVERY DOCTRINE, THE POLICIES OF THE SEARCHING AGENCY SHOULD BE IN WRITTEN FORM AND THE INVENTORY SHEET SHOULD BE STANDARDIZED. PROSECUTORS SHOULD ALWAYS BE PREPARED TO OFFER THE NECESSARY TESTIMONY IF THIS MIGHT BE A BACK-UP THEORY OF ADMISSIBILITY. FURTHER, THESE POLICIES SHOULD ALSO EXTEND TO ANY CLOSED CONTAINERS FOUND IN SEIZED VEHICLES.

10. Administrative Inspections & Regulatory Searches

Many searches may be upheld even without the usual requirements of a warrant or probable cause because they are particular types of administrative inspections or regulatory searches, as opposed to criminal investigations.

A. Inspection of Housing - Absent consent, a warrant is needed, but probable cause does not depend upon specific proof of violations.

Camara v. Municipal Court, 387 U.S. 523 (1967). An inspector for the Division of Housing in San Francisco entered an apartment building to make a routine annual inspection for possible housing code violations. The building manager informed him that the tenant on the ground floor, Ronald Camara, was using the rear part of the building as a personal residence. Since this violated the existing permit of occupancy, the inspector confronted Camara and demanded to inspect the premises. Camara refused, and was charged with the crime of refusing to permit a lawful inspection in violation of the code. Camara claimed the code was unconstitutional since it allowed a search of his premises without probable cause or a search warrant. **HELD:** It was unconstitutional to allow the search without a warrant. Once a person like Camara refuses consent to a search, the Fourth Amendment requires that a warrant be obtained. However, the probable cause needed to justify the issuance of such a warrant does not depend upon specific proof or knowledge that this particular person is violating any law, but may be based instead upon the passage of time, the nature of the building, or the condition of the area. In reaching this decision that a lower level of proof was needed for a warrant in this context, the court balanced the “need to search against the invasion the search entails.” The conclusion was that the need for compliance with housing safety regulations was high, while the particular invasion of a person’s privacy by this type of inspection (which can often be done by appointment) is small.

B. Inspections of Businesses: “Closely Regulated Industries” Exception:

Certain industries have such a history of governmental involvement that reduces any expectation of privacy for a proprietor over the stock of such an enterprise. Many types

of businesses are routinely inspected to ensure compliance with fire, health and safety regulations. Also, particular businesses are subject to inspections of their business records or materials.

Some examples include taverns, liquor stores, pawn shops, auto repair shops, junk dealers, firearms dealers, pharmacies, hospitals, funeral parlors, massage parlors, race tracks, coal mines, gambling operations, and producers and distributors of food products.

For the most part, these inspections are intended to ensure compliance with particular statutes and administrative regulations intended to protect the public, customers of the businesses, or employees of the businesses.

New York v. Burger, 482 U.S. 691 (1987). Holds that a warrantless search of an automobile junkyard pursuant to a statute authorizing such inspections fell within the exception to the warrant requirement for administrative inspections of pervasively regulated industries.

C. Searches of Prisoners

Persons incarcerated in jails or prisons have very little, if any, expectation of privacy against searches of their cells, personal effects, persons, or even monitoring of their conversations, communications or mail.

Hudson v. Palmer, 468 U.S. 517, 527-28 (1984), on remand, 744 F.2d 22 (4th Cir. 1984). A prison inmate brought a 1983 civil rights suit against a prison guard claiming that he had violated the Fourth Amendment by conducting a “shakedown” search of his cell and destroying his property for purposes of harassment. **HELD:** “The two interests here are the interest of society in the security of its penal institutions and the interest of the prisoner in privacy within his cell. The latter interest, of course, is already limited by the exigencies of the circumstances: A prison shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room. We strike the balance in favor of institutional security, which we have noted is central to all other correctional goals. A right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order. We are satisfied that society would insist that the prisoner’s expectation of privacy always yield to what must be considered the paramount interest in institutional security. We believe that it is accepted by our society that loss of freedom of choice and privacy are inherent incidents of confinement.”

Florence v. Board of Chosen Freeholders of County of Burlington, 132 S. Ct. 1510 (2012). Defendant brought civil suit for being strip searched at the jail after an arrest on an outstanding warrant for not paying a fine. **HELD:** No violation of Fourth Amendment to

have a jail policy of non-touching strip searches for inmates being admitted into the general population, even pretrial inmates on non-serious offenses. No reasonable suspicion of contraband is needed.

State v. Johnson, 456 S.W.2d 1 (Mo. 1970), appeal after remand, 476 S.W.2d 516 (1972). Interception and examination of mail of inmates is permitted, and does not violate the Fourth Amendment.

Lanza v. New York, 370 U.S. 139, 143 (1962). Inmate of a New York jail was visited by his brother, and their conversation was electronically intercepted and recorded by jail officials. **HELD:** No Fourth Amendment violation. “[T]o say that a public jail is the equivalent of a man’s house or that it is a place where he can claim constitutional immunity from search or seizure of his person, his papers, or his effects, is at best a novel argument. . . . [I]t is obvious that a jail shares none of the attributes of privacy of a home, an automobile, an office or a hotel room. In prison, official surveillance has traditionally been the order of the day.”

State v. Lucero, 96 N.M. 126, 628 P.2d 696 (App. 1981). Three men were arrested and placed in a police car. The officer secretly turned on a tape recorder and left to inventory their car. **HELD:** They had no reasonable expectation of privacy in a police vehicle.

BUT SEE:

Wolff v. McDonnell, 418 U.S. 539 (1974). “Lawful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen, a retraction justified by the considerations underlying our penal system. But though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protection when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country.”

NOTE: Even if eavesdropping on an inmate’s conversations does not violate the Fourth Amendment, it may violate the Sixth Amendment right to counsel if the person to whom he is talking is his attorney. *People v. Haarfmann*, 555 P.2d 187 (Colo. App. 1976) (looking in room where inmate and attorney were meeting was an impermissible intrusion into an attorney-client consultation); *State v. Cory*, 382 P.2d 1019 (Wash. 1963) (bugging attorney-client conference in jail violated defendant’s right to counsel).

D. Searches of Parolees Without Probable Cause

Parolees have a reduced expectation of privacy and may be searched by police or parole officers even without reasonable suspicion or warrant.

Samson v. California, 547 U.S. 843 (2006). Defendant was on parole in California for being a felon in possession of a firearm. California law provides that every prisoner released on state parole “shall agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause.” A police officer recognized defendant walking down the street and stopped him. Based solely on his status as a parolee he searched him. The officer found a cigarette box in defendant’s pocket. Inside the box he found methamphetamine. **HELD:** Prisoners on parole “do not enjoy the absolute liberty to which every citizen is entitled.” *Id.* at 848-49. They have a reduced expectation of privacy. But for the fact they got out of prison early, they would still be behind bars serving their sentences, perhaps even in solitary confinement. Parole is “an established variation of imprisonment of convicted criminals. The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abides by certain rules during the balance of the sentence.” *Id.* at 850. The privacy interest here is reduced and the government interest in integrating prisoners back into the community while preventing them from continuing to violate the law is great. This search passes the reasonableness test of the Fourth Amendment.

People v. McCullough, 6 P.3d 774 (Colo. 2000). Defendant was on parole. When he was paroled he signed a form, pursuant to Colorado statutes, granting advance consent for searches by his parole officer. The parole officer showed up unannounced and did a search, finding cocaine. **HELD:** Parolees have a reduced expectation of privacy. The statute allowing for searches of parolees without reasonable suspicion by their parole officers is constitutional.

People v. Samuels, 228 P.3d 229 (Colo. App. 2009). Probationers have a reduced expectation of privacy, and the probation officer can search a probationer’s bedroom without a warrant based upon probable cause.

E. School Searches.

Searches of students divide mostly into two groups: (1) searches of dormitory rooms of college students or (2) searches of the lockers, effects or persons of elementary or secondary students. Because of the high expectation of privacy in a dorm room, and the intrusiveness of a search for illegal items, it is a safer practice for police to get a search warrant. Children in schools, though, have a lesser expectation of privacy, and thus the 4th Amendment balancing test allows searches of them upon reasonable suspicion.

New Jersey v. T.L.O., 469 U.S. 325, 341-42(1985). School authorities caught a 14-year-old smoking in the bathroom in violation of school rules and took her to the principal’s office. She denied smoking. They searched her purse and found cigarettes, as well as marijuana and rolling papers. **HELD:** Search warrants and probable cause are not required for

school officials to search students. Rather, the Fourth Amendment reasonableness test is used. The school search must be both (1) justified at its inception; and (2) reasonably related in its scope to the circumstances justifying it in the first place. Usually, “a search of a student by a teacher or other school official will be justified at its inception when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.” This search was reasonable and did not violate the Fourth Amendment.

Veronia School District 47J v. Acton, 515 U.S. 646 (1995). School district’s policy authorizing random drug urinalysis testing of student athletes does not violate the Fourth Amendment. Seventh-grader had signed up for football but was denied participation because he and his parents refused to sign the testing consent forms.

In re Gregory M., 627 N.E.2d 500, 31 A.L.R.5th 829 (N.Y. 1993). Student, 15, arrived at school without proper ID card and was sent to dean’s office to get new card. School policy required the student to leave his book bag with the security officer. When he tossed the bag onto a shelf it made a metallic thud, causing the security officer to run his fingers over the outer surface of the book bag. He felt the outline of a gun. The dean opened the bag and found a handgun. **HELD:** The balancing test of the Fourth Amendment comes out in favor of this search being reasonable. The intrusion on the child was minimal; the prevention of guns coming into schools was a governmental interest of the “highest urgency.” The child’s “diminished expectation of privacy” was “clearly outweighed” by the governmental interest.

Part Four - Suppression Hearings

I. Motions to Suppress

1. **A defendant may file a motion to suppress evidence. Section 542.296, RSMo. governs suppression hearings in Missouri courts. Federal Rule 41(h) provides that a defendant may file a motion to suppress evidence in the court where the trial will occur.**
2. **Motion must be in writing, with notice to the prosecutor and filed in the court in which there is a pending criminal prosecution arising out of the subject matter of the seizure. Section 542.296.**

An oral motion is not a formal motion to suppress and preserves nothing for appellate review. *State v. Hardiman*, 943 S.W.2d 348 (Mo. App. 1997).

Per Federal Rule 12, a motion to suppress must be raised before trial. Per 47(b) it must be in writing.

Failure to file a motion to suppress prior to trial is a waiver of that objection. *United States v. Johnson*, 614 F.2d 622 (8th Cir. 1980).

NOTE: Federal courts and most states hold that motions to suppress may not be filed prior to preliminary hearings, and the judge at a preliminary hearing may consider evidence offered by the prosecution without regard to whether that evidence was obtained by an illegal search. The exclusionary rule would seem to apply to preliminary hearings in Missouri, however, since, by statute, it applies to “any pending criminal proceeding.” Section 542.296, RSMo.

3. **The motion is to be taken up before trial out of the presence of the jury, in open court, on the record, with defendant and attorney present. 542.296.**

The trial court must rule upon pretrial motion to suppress and may not defer the ruling until a later time like it could with a motion in limine. *State v. Dwyer*, 847 S.W.2d 102 (Mo. App. W.D. 1992).

The trial court will not ordinarily pause mid-trial to have an evidentiary hearing about the way in which an item of evidence was obtained; if a pre-trial motion to suppress was not filed to exclude illegally obtained evidence, the objection is waived. *State v. Dwyer*, 847 S.W.2d 102 (Mo. App. W.D. 1992).

However, at the trial court’s discretion the court may entertain a motion to suppress at any time during trial. Rule 24.05.

The prosecutor should not generally agree to take up a motion to suppress with the trial because it can backfire if the judge grants the motion to suppress and acquits the defendant, and the prosecutor thereby loses the right to appeal an adverse suppression ruling. *State v. Spencer*, 438 S.W.3d 530 (Mo. App. E.D. 2014).

4. Per 542.296, RSMo, the motion to suppress may be based upon any one of the following grounds:

- A. That the search and seizure were made without warrant and without lawful authority;
- B. That the warrant was improper upon its face or was illegally issued, including the issuance of a warrant without a proper showing of probable cause;
- C. That the property seized was not that described in the warrant and that the officer was not otherwise lawfully privileged to seize the same;
- D. That the warrant was illegally executed by the officer;
- E. That in any other manner the search and seizure violated the rights of the movant under the Missouri Constitution, Art. I, Sec. 15, or the Fourth or Fourteenth Amendments of the U.S. Constitution.

II. Other Provisions Governing Motions to Suppress

1. The State's Burdens

- a. The "burden of going forward with the evidence and the risk of non-persuasion shall be upon the state to show by a preponderance of the evidence that the motion to suppress should be overruled." Section 542.296, RSMo. But proof beyond a reasonable doubt is not required. *State v. Sanders*, 16 S.W.3d 349 (Mo. App. W.D. 2000).
- b. When a search was based upon a search warrant, the court gives "great deference to the initial judicial determination of probable cause made at the time of the issuance of the warrant." *State v Bowen*, 927 S.W.2d 463 (Mo. App. W.D. 1996); *State v. Berry*, 801 S.W.2d 64 (Mo. banc. 1990). Thus, in warrant cases, the State's burden is usually met simply by showing that the search was by warrant. *U.S. v. Ventresca*, 380 U.S. 102 (1965). The judicial determination of probable cause made by the judge issuing the warrant will be overruled only if "clearly erroneous." *State v. Rush*, 160 S.W.3d 844, 848 (Mo. App. S.D. 2005). "We have concluded that the preference for warrants is most appropriately effectuated by according great deference to a magistrate's decision. Our task on appeal is not to conduct a de novo determination of probable cause, but only to determine whether there is substantial evidence in the record supporting the magistrate's decision to issue the warrant." *United States v. Wajda*, 810 F.2d 754, 760 (8th Cir. 1987).

- c. In warrantless search cases, “the burden is on the State to justify a warrantless search and to demonstrate that such falls within an exception to the warrant requirement.” *State v. Burkhardt*, 795 S.W.2d 399 (Mo. banc. 1990).
- d. Although it is the State’s burden to show by preponderance of evidence that a suppression motion should be overruled, it is the defendant’s burden to establish standing to challenge search and seizure by showing his own Fourth Amendment rights were violated. *State v. Burkhardt*, supra; *State v. Baker*, 632 S.W.2d 52 (Mo. App. 1982); *State v. Childress*, 828 S.W.2d 935 (Mo. App. S.D. 1992).
- e. Federal courts phrase the burden of proof this way: “It is well-established that the burden of production and persuasion generally rests upon the movant in a suppression hearing. . . Even in those circumstances where the Government has the ultimate burden of persuasion, the defendant has the initial burden of making a prima facie showing of illegality.” *United States v. Starks*, 193 F.R.D. 624, 628 (D. Minn. 2000). “As a general rule, the burden of proof is on the defendant who seeks to suppress evidence, but on the government to justify a warrantless search or seizure. The standard of proof is a preponderance of the evidence.” *United States v. Luken*, 515 F. Supp. 2d 1020, 1032 (D. S.D. 2007). As to the existence of grounds for a warrantless search, such as the voluntariness of consent, “the government has the burden to prove the consent was voluntary by a preponderance of the evidence and based upon the totality of the circumstances.” *United States v. Beasley*, 688 F.3d 523, 531 (8th Cir. 2012).

2. Testimony During a Hearing on a Motion to Suppress

- a. When a defendant testifies at the hearing regarding his motion to suppress, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection. *Simmons v. U.S.*, 390 U.S. 377 (1968). His testimony from the suppression hearing may, however, be used to impeach his testimony at trial. *People v. Spies*, 615 P.2d 710 (Colo. 1980).
- b. Cross-examination of the defendant at a suppression hearing must be limited to the scope of the direct examination and to matters of credibility. *People v. Rosa*, 928 P.2d 1365 (Colo. App. 1996).
- c. When multiple officers are working together, the Fourth Amendment test of reasonable suspicion or probable cause is satisfied if the information known by all of the officers collectively amounts to probable cause or reasonable suspicion.

State v. Hernandez, 954 S.W.2d 639, 642 (Mo. App. W.D. 1997). Officers were

making a *Terry* stop of defendant and he ran. Although the officer who tackled him might not, on his own knowledge, have had reasonable suspicion for the stop, the court should look at the facts known by all of the officers in determining whether reasonable suspicion existed. **HELD:** “When multiple police officers are working together closely in order to effect an arrest or engage in an investigatory stop, the Fourth Amendment is satisfied if the information known by all of the officers collectively amounts to probable cause or reasonable suspicion.”

3. Trial Court Rulings on Motions to Suppress

- a. The ruling on a pretrial motion to suppress is interlocutory only and additional evidence produced at trial may prompt the trial court to alter its pretrial ruling. *State v. Howell*, 524 S.W.2d 11 (Mo. banc. 1975); *State v. Trimble*, 654 S.W.2d 245 (Mo. App. S.D. 1983).
- b. Since a motion to suppress ruling is interlocutory, even if one judge has ruled that the evidence should be suppressed, the issue can be taken up again in front of a different judge and it is incumbent on the second judge to hear evidence and make a ruling without relying on what had been done in the first proceeding; there is no collateral estoppel even if the prosecutor dismisses and refiles after an adverse ruling on a motion to suppress, as long as the first ruling was made prior to jeopardy attaching (jury being sworn). *State v. Pippenger*, 741 S.W.2d 710 (Mo. App. W.D. 1987); *State v. Keightly*, 147 S.W.3d 179 (Mo. App. S.D. 2004).
- c. When a motion to suppress is overruled, the defendant must make specific objections to admission of evidence when it is offered at trial or he has not preserved the issue for appeal and it will be reviewed only for plain error. *State v. Matney*, 721 S.W.2d 189 (Mo. App. E.D. 1986).
- d. No jury instruction is given regarding the validity of the consent.

State v. Sullivan, 49 S.W.3d 800 (Mo. App. W.D. 2001). The defense wanted to give a jury instruction for the jury to determine whether defendant’s consent to a search had been voluntary. It was patterned after the instruction that deals with voluntariness of a confession, MAI-CR 3d 310.06. **HELD:** Voluntariness of a consent to a search is to be determined by the court, not the jury. It would have been improper to give such an instruction.

4. Appeals by the Prosecution

STATE:

- a. The prosecution may appeal an adverse ruling on a motion to suppress, causing the trial to be postponed pending the appellate court ruling. Section 547.200.2(2), RSMo. The appeal must be filed within five days.
- b. If a motion in limine has effect of being a motion to suppress it may be appealed by State. The difference is that a motion in limine excludes evidence on some rule of evidence whereas a motion to suppress excludes it because it was illegally obtained. *State v. Swope*, 939 S.W.2d 491 (Mo. App. S.D. 1997) (limine ruling that hearsay statements of child do not meet indicia of reliability threshold); *State v. Dwyer*, 847 S.W.2d 102 (Mo. App. W.D. 1992) (limine ruling on admissibility of evidence in a murder trial of a prior uncharged assault is not appealable); *State v. Foster*, 959 S.W.2d 143 (Mo. App. S.D. 1998) (“legal character of a pleading is determined by its subject matter” and not its title – thus, a “limine” motion that sought to exclude evidence because it was illegally obtained was really an appealable motion to suppress instead of an unappealable motion in limine).
- c. When the appellate court rules that a motion to suppress should have been granted, the case should be remanded for the state to either proceed to trial without the evidence or to conduct a new suppression hearing with additional evidence. *State v. Ingram*, 341 S.W.3d 800 (Mo. App. E.D. 2011); *State v. Davis*, 985 S.W.2d 876 (Mo. App. E.D. 1998).

FEDERAL:

The prosecution may appeal a decision or order of a district court suppressing evidence. The prosecutor must certify that the appeal is not done for the purpose of delaying trial and that the evidence being suppressed is substantial proof of a material fact in the proceeding. The appeal must be made within 30 days. 18 U.S.C. 3731.

Part Five - Applicability of Exclusionary Rule

1. Criminal Trials

When the defendant in a criminal case has shown that the evidence against him was obtained through an illegal search or seizure, the exclusionary rule generally requires that such evidence be suppressed.

The exclusionary rule applies not only to items obtained by the illegal search, but also to any derivative evidence which is discovered based upon the knowledge gained by the police through the illegal police conduct. This derivative evidence has been called the “fruit of the poisonous tree.”

As seen above, the exclusionary rule won’t keep the evidence out if the good faith exception applies, the inevitable discovery exception applies, or the evidence is saved by some other exception.

2. Probation Violation Hearings/Parole Hearings

A split of authority exists in various state courts on the issue of whether the exclusionary rule applies to probation violation hearings. Missouri appellate courts have not yet addressed the issue. Since the Supreme Court has ruled it does not apply to parole hearings, it probably does not apply to probation violation hearings, either.

Pennsylvania Board of Probation v. Scott, 524 U.S. 357 (1998). Court refused to extend the exclusionary rule to bar illegally seized evidence at parole revocation hearing.

United States v. Frederickson, 581 F.2d 711 (8th Cir. 1978). Holds that the exclusionary rule does not apply to probation violation hearings and that evidence illegally seized is admissible at those hearings. The opinion says the vast majority of jurisdictions, if not all of reported cases, view it this way.

People v. Wilkerson, 541 P.2d 896 (Colo. 1975). “The only issue on appeal is whether the evidence which may be the product of an illegal search or seizure is admissible in a probation violation hearing. We hold that it is . . .” *Id.* at 897. “A cautionary note should accompany our holding. While the exclusionary rule *per se* is inapplicable to probation revocation hearings, we do not thereby condone gross official misconduct by law enforcement officers. We reiterate our warning in *People v. Atencio*, 525 P.2d 461 (Colo. 1974) that ‘where the unreasonable search or seizure is such as to shock the conscience of the court, the court will not permit such conduct to be the basis of a state-imposed sanction.’” *Id.* at 898.

U.S. v. Workman, 585 F.2d 1205 (4th Cir. 1978). Court decided that exclusionary rule should

apply to probation violation hearings since a violation of probation has approximately the same result and the same potential for injury as the regular criminal trial itself.

3. Civil Trials

“As a general rule, evidence illegally obtained by governmental agencies may be used in private litigation.” John Wesley Hall, Jr. *Search & Seizure*, Section 5.61 (3d ed. 2000).

Honeycutt v. Aetna Insurance Co., 510 F.2d 340 (7th Cir. 1975). Evidence suppressed in a criminal arson trial because it was illegally obtained is still admissible in the civil suit. Same result: *Kassner v. Fremont Mut. Ins. Co.*, 209 N.W.2d 490 (Mich. 1973).

Tirado v. C.I.R., 689 F.2d 307 (2nd Cir. 1982). Narcotics agents violated the law in seizing illegal drugs and thus the evidence was suppressed in the criminal case, but the evidence was not barred by the exclusionary rule in subsequent civil litigation.

What if one of the parties in the civil suit is the same governmental body that violated the defendant’s rights in the first place? This can come up in forfeiture actions.

One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965). Officers seized evidence in violation of the Fourth Amendment so it was suppressed in the criminal trial, but the State still tried to offer it at a forfeiture proceeding of the car used to transport the illegal alcohol. **HELD:** The exclusionary rule does apply since the forfeiture action was a quasi-criminal proceeding, with the object being to penalize the defendant. Thus, the general rule that the exclusionary rule does not apply to civil proceedings has an exception as to forfeiture cases.

What if one party is a governmental body, but not the same governmental body that had violated the law? The exclusionary rule will not apply as long as it is not the same sovereign.

United States v. Janis, 428 U.S. 433 (1976). State police in Los Angeles had executed a search warrant for bookmaking paraphernalia at defendant’s premises and collected evidence of bookmaking, plus \$4,940 in cash. Criminal charges were filed and a motion to suppress was sustained due to invalidity of the search warrant. The criminal prosecution ended. Meanwhile, the IRS had calculated the tax owed by defendant and filed a levy on the \$4,940 in cash. Defendant filed suit to recover the money from the IRS. In the civil suit, the defendant moved to suppress the evidence on the ground it had been illegally seized. **HELD:** The exclusionary rule would not cover this situation. The evidence was admissible in the civil case because the local law enforcement officials had already been punished by the exclusion of the evidence in the state criminal trial, so the purpose of the exclusionary rule had been accomplished. It was significant that a different sovereign had committed the constitutional violation, so any deterrent effect

on the IRS would have been marginal.

Ritchie v. Director of Revenue, 987 S.W.2d 331 (Mo. banc. 1999). The exclusionary rule does not apply to civil driver's license suspension and revocation cases. Thus, the fact that the officer did not have probable cause or reasonable suspicion to stop the motorist's vehicle is irrelevant in the administrative suspension case for driving with a blood alcohol level over .10.

4. Grand Jury Proceedings

United States v. Calandra, 414 U.S. 338 (1974). Defendant was being investigated by a grand jury. He was a loanshark. Part of the evidence included records seized pursuant to a search warrant. The grand jury subpoenaed the defendant, who took the Fifth. He also filed a motion to suppress evidence collected via the warrant. The trial court found that the search warrant lacked probable cause and that the evidence seized exceeded the scope of the warrant, so the evidence should not be admitted before the grand jury. **HELD:** Reversed. The exclusionary rule simply does not apply to grand jury proceedings.

NOTE: Even though as a matter of Constitutional law the exclusionary rule does not apply to a grand jury proceeding, it could be argued that because of the wording of Section 542.296, RSMo, it might apply in Missouri since the word "investigation" is used.

5. Impeachment of Defendant's Testimony

The use of suppressed evidence to impeach a defendant's testimony, as opposed to its use to prove the case against the defendant in the State's case-in-chief, has been the subject of vigorous debate in the U.S. Supreme Court, producing a chain of four cases that might be characterized as a topsy-turvy roller-coaster ride, with the final result being that the U.S. Supreme Court flip-flopped in 1980 from its initial position in 1925.

The short answer now is that when a motion to suppress is granted and evidence has been excluded, the defendant who takes the stand risks opening the door to being cross-examined about that evidence, and the defendant risks opening the door by the things he says in his direct examination and by the things he says in his answers to any cross-examination questions within the scope of his direct examination.

The current status of the law in the words of Justice William Brennan is that in practical terms even the "moderately talented prosecutor" will be able to work in evidence that has been suppressed via cross-examination.

United States v. Havens, 446 U.S. 620 (1980). Defendant, a lawyer, and his accomplice were from Indiana and were smuggling cocaine from Peru into the U.S. by sewing extra

pockets inside the accomplice's shirt and packing them with cocaine. The only thing the defendant carried connecting him to the crime was a suitcase containing a T-shirt from which the pocket had been cut that had been sewn into the clothing of the accomplice. The accomplice was caught going through customs and a legal search found the cocaine on him. An illegal search found the incriminating T-shirt in defendant's suitcase. The motion to suppress the T-shirt was granted. The State was proceeding only with the testimony of the accomplice in the case-in-chief, who said defendant had acted with him and had actually sewn the pockets into the clothing. Excerpts from the direct and cross:

DIRECT

Q: And you heard accomplice say this material was draped around his body?

A: Yes, I did.

Q: Did you ever engage in that kind of activity with [accomplice]?

A: No.

CROSS

Q: In direct, you said you had nothing to do with the wrapping of any material under [accomplice's] clothes?

A: I said I had nothing to do with [accomplice] in connection with this cocaine matter.

Q: And your testimony is that you had nothing to do with the sewing of the cotton swatches to make pockets on that T-shirt?

A: Absolutely not.

Q: Sir, when you came through customs, didn't you have in your suitcase some size-40 medium T-shirts?

[Objection, which is overruled]

A: Not to my knowledge.

[Exhibit #9 handed to Defendant]

Q: Was this T-shirt in your luggage that day?

A: Not to my knowledge, no.

The prosecutor was then allowed to call the customs agent in rebuttal who had found that T-shirt with the missing pieces of cloth in defendant's bag. **HELD:** The cross was proper, as was the admission of the T-shirt into evidence. "It is one thing to say that the government cannot make affirmative use of evidence unlawfully obtained. It is quite another thing to say that the defendant can turn the illegal method by which evidence . . . was obtained to his own advantage, and provide himself with a shield against contradictions of his untruths. Such [extension of the exclusionary rule] would be a perversion of the Fourth Amendment." *Harris v. New York*, 410 U.S. 222, 224 (1970). "[W]e hold that a defendant's statements made in response to proper cross-examination, reasonably suggested by the defendant's direct examination, are subject to otherwise proper impeachment by the government, albeit by evidence improperly obtained that was inadmissible in the case-in-chief." *Havens*, 446 U.S. at 627-28.

Agnello v. United States, 269 U.S. 20 (1925). Defendant was charged with conspiracy to

sell cocaine. Police searched his home and found a can of cocaine. It was suppressed, however, and was not admitted in the case-in-chief. Defendant took the stand and testified in direct that he did not know the packages he had received from a co-defendant contained cocaine. On cross, the prosecutor asked whether defendant had ever seen cocaine. Defendant claimed he had not. Over objection, the prosecutor produced the can of cocaine seized from defendant's bedroom and asked if he had ever seen it. Defendant said he had not and denied ever seeing it in his home. In rebuttal, over objection, the prosecutor was permitted to put on evidence about the search and seizure of the can of cocaine from defendant's bedroom. **HELD:** Conviction reversed. The evidence should not have been used because the defendant, in his direct exam had done nothing to waive the exclusionary rule.

Walder v. United States, 347 U.S. 62, 63 (1954). Defendant was being prosecuted for four counts of selling drugs in 1952. He had a prior case from 1950 where he had been charged with selling heroin but a motion to suppress had been granted and the case had been dismissed. Defendant took the stand and denied all four counts of selling the drugs to the Confidential Informant and in his direct exam was asked if he had ever sold narcotics to anyone. Defendant said, "I have never sold narcotics to anyone in my life." Defendant's lawyer then asked, "Have you ever had any narcotics in your possession?" Defendant said no. **HELD:** Defendant clearly opened the door during direct, so the prosecutor was allowed to impeach him by questioning him about the heroin seized from his home in his presence in 1950, and was allowed to put on an officer who had participated in the 1950 search and a chemist who analyzed the heroin in 1950.

Harris v. New York, 401 U.S. 222 (1971). Defendant was charged with twice selling heroin to an undercover police officer. At trial, defendant admitted making the sales, but claimed that what he was selling was not cocaine, but was really baking powder. On cross, the prosecutor was allowed to ask defendant about statements defendant had made, which had been suppressed. Those statements clearly contradicted defendant's trial testimony. **HELD:** Every criminal defendant is privileged to testify in his own defense, but that privilege cannot be construed as a right to commit perjury. Once he took the stand, defendant was under the obligation to speak truthfully and accurately.

William F. Ringel in *Searches & Seizures, Arrests & Confessions*, Vol. 1, p. 3-25 (Second ed 2015) points out that these cases put a special burden on defense lawyers to preview the defendant's testimony to plan for any hidden impeachment evidence that the prosecutor might have in store. A defendant who wins a motion to suppress might be better off not taking the stand.

6. Impeachment of Other Defense Witnesses

Although the prosecution will be able to impeach the defendant with suppressed evidence,

the same does not apply to other defense witnesses. The prosecution is not allowed to use evidence that has been suppressed to impeach other defense witnesses when the defendant has not testified.

James v. Illinois, 493 U.S. 307 (1990). Defendant was in a group of boys fighting with another group of boys. Defendant was suspected of shooting at the other group. The investigating officer, looking for defendant, found him the next day at his mother's beauty salon sitting under a hair dryer. His hair was now black and curled. He admitted that the day before his hair had been reddish-brown, long, and combed back. The admissions about his change of appearance were suppressed. Defendant did not testify so the prosecutor did not get the chance to impeach him with this evidence. But defendant did call a friend who said that on the day of the shooting she had taken defendant to register for high school and at the time he had black curly hair. The prosecutor was the allowed to put on as rebuttal evidence the testimony of the police officer that defendant had admitted having reddish-brown hair on the night of the shooting and dying it the next day. **HELD:** Reversed. Defendant had not opened the door because he had not testified. A defense witness other than defendant cannot open the door to let in the excluded evidence for several policy reasons: (1) the threat of a perjury prosecution could keep defense witnesses off the stand; (2) the possibility that his defense witnesses might be cross-examined about suppressed evidence might chill the defendant from calling a witness who otherwise had some important truthful testimony; (3) defense lawyer might not have control over a regular witness to keep them from opening the door; and (4) the reason for the exclusionary rule - deterring police misconduct - would be diluted if police knew that defense witnesses could be questioned about suppressed evidence.

State v. Burnett, 637 S.W.2d 680 (Mo. banc. 1982). Defendant and a friend, Barry Stidham, had a fight with a bail bondsman at the bondman's office. Defendant did not testify but Stidham did. The bondsman claimed that defendant pulled a gun on him and that the bondsman had been injured in the resulting fight. Stidham claimed defendant had no gun, but that the bondsman pulled a gun on them. The suppressed evidence had been a briefcase containing a revolver holster and several bullets found in defendant's car. When Stidham took the stand he did not talk about not having a gun. At the end, the prosecutor asked, "You guys did not have a gun or holster or bullets with you?" Stidham denied having any of them with him. The prosecutor then called in rebuttal the officer who had found the briefcase with the holster and bullets. **HELD:** The defendant did not waive his Fourth Amendment rights because he did not testify. Absent defendant testifying, the suppressed evidence could not be used.

Conclusion

“Pieces are continually being added to the Fourth Amendment mosaic . . . Somehow, the more I learned about the Fourth Amendment, the more there seemed to be that remained to be mastered.”

Wayne R. LaFave

Search & Seizure: A Treatise on the Fourth Amendment, Preface to First Edition

The bottom line for police officers and prosecutors: always get a search warrant, unless you absolutely can't. Know your search warrant exceptions backward and forward.

About the Author

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