

SEARCH AND SEIZURE

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FOURTH AMENDMENT CASE LAW UPDATE

I. THE EXCLUSIONARY RULE, SUPPRESSION OF EVIDENCE, AND PROTECTING THE CITIZENRY FROM ITS PROTECTORS.

Despite recent attempts to malign its efficacy and efficiency, the Exclusionary Rule has remained the primary vehicle for enforcing compliance with the Fourth Amendment since 1961¹. The prohibition on admitting illegally obtained evidence not only serves to deter illegal police conduct, but also maintains the "imperative of judicial integrity" by extricating courts from participation in police illegality.

"Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the Constitutional rights of citizens by permitting use of the fruits of such invasions." *Terry v. Ohio*, 392 U.S. 1, 13, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

Thus, courts stand as protection against our protectors.

"[Fourth Amendment rights] ... are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government..."

"But the right to be secure against searches and seizures is one of the most difficult to protect. Since the officers are themselves the chief invaders, there is no enforcement outside the court." *Illinois v. Gates*, 462 U.S. 213, 274-75, 103 S.Ct. 2317, 76 L.Ed.2d 527, 572 (1983) [Brennan, J., dissenting, citing *Brinegar v. U.S.*, at 180-181 (1949) (Jackson, J., dissenting)].

However, in *U.S. v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d at 677 (1984), a majority of the Supreme Court rejected any justification other than the deterrence rationale for excluding illegally obtained evidence from criminal trials, noting: "The rule thus operates as 'a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal right of the person aggrieved'...." *U.S. v. Leon*, 468 U.S. 897, 905 (1984). Thus the Court has held under some circumstances that the exclusionary rule does not apply because its deterrent effect is diminished by competing interests or by attenuation from the illegal police conduct. *See, INS v. Lopez-Mendoza*, 468 U.S. 1032, 104 S.Ct. 3479, 82 L.Ed.2d 778 (1984) [refusing to apply the exclusionary rule to deportation proceedings because the *deterrent effect* was outweighed by the social costs involved in the context of "unique immigration proceedings" that are "preventative as well as punitive"]; *U.S. v. Janis*, 428 U.S. 433, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976) [noting evidence illegally seized by state officers not excluded in federal civil tax proceeding as additional deterrence deemed outweighed by social costs]; *U.S. v. Calandra*, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974) [stating exclusionary rule not applicable to grand jury proceedings]; *Stone v. Powell*, 428 U.S. 465, 49 L.Ed.2d 1067, 96 S.Ct. 3037 (1976) [suppression issues are not cognizable in writs of habeas corpus because the proceeding is so removed from the prior police illegality as to have lost its deterrent effect].

THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE

In *U.S. v. Leon*, 468 U.S. 897, 905 (1984) a majority of the Supreme Court established the most significant exception to the "exclusionary rule," allowing use of admittedly illegally obtained evidence where the officer

¹*Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

acted in "objective good faith" reliance upon a warrant signed by a neutral and detached magistrate. *U.S. v. Leon*, 468 U.S. 897, 926 (1984).

See, e.g., Massachusetts v. Sheppard, 468 U.S. 981, 104 S.Ct. 3424, 82 L.Ed.2d 737 (1984) [holding officer's reliance on warrant "reasonable", since it lacked particularity due to magistrate's clerical error *and* magistrate said *he* would edit the form to include objects sought by police who relied on magistrate's assertions]; *U.S. v. Gomez*, 652 F. Supp. 461 (E.D.N.Y. 1987) [holding a "reasonably well-trained officer" could not have determined that a magistrate-authorized search was illegal, under good-faith exception].

An officer can only rely on the decision of a neutral and detached magistrate, if the court has issued a warrant. Thus the "good faith" exception does not apply to warrantless searches. *U.S. v. Winsor*, 846 F.2d 1569 (9th Cir. 1988) (en banc). Nor does it apply where the magistrate has been misled by the officer who obtained the warrant. *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667(1978) [good faith exception does not apply when determining whether officer obtained a warrant by making material misrepresentations to the magistrate in reckless disregard for the truth]. *See also, United States v. Fisher*, 22 F.3d 574, 578 (5th Cir. 1994) ["Warrants based on affidavits for lacking in evidence of probable cause as to render official belief in its existence entirely unreasonable do not fall within this exception"]. In addition, courts do not consider the *Leon* "good faith" exception when deciding whether to suppress evidence pre-indictment, pursuant to a motion for return of seized property. *Ritchey v. Smith*, 515 F.2d 1239, 1245 (5th Cir. 1975); *Gurleski v. U.S.*, 405 F.2d 253 (5th Cir. 1968). The rationale for non-application of the "good faith" exception here, is that the court is exercising its authority to correct the misconduct of the prosecutor and his agents.

Other circumstances under which the "good faith" exception does not apply include: when the issuing magistrate wholly abandons his judicial role, when the warrant is based on an affidavit so lacking in indicia of probable cause that belief that probable cause exists is entirely unreasonable and when the warrant is so facially deficient particularizing the place to be searched and things to be seized that the executing officers cannot reasonably presume it to be valid. *U.S. v. Russell*, 960 F.2d 421, 423 (5th Cir.), *cert. denied*, 506 U.S. 953 (1992).

The Court in *Hudson v. Michigan*, 547 U.S. 586 (2006), ruled that evidence need not be excluded when police violate the "knock-and-announce" rule. The opinion by Justice Scalia reaffirmed the validity of both the knock-and-announce rule and the "exclusionary rule" for evidence obtained by police in most cases of Fourth Amendment violation. However, the majority held that the exclusionary rule could not be invoked for evidence obtained after a knock-and-announce violation, because the interests violated by the abrupt entry of the police "have nothing to do with the seizure of the evidence." Justice Scalia wrote that the knock-and-announce rule was meant to prevent violence, property-damage, and impositions on privacy, not to prevent police from conducting a search for which they have a valid warrant. The Court also found that the social costs of the exclusionary rule as applied to the knock-and-announce rule outweighed any possible "deterrence benefits", and that alternative measures such as civil suits and internal police discipline could adequately deter violations. Justice Stephen Breyer wrote a dissenting opinion, and was joined by Justices Stevens, Souter, and Ginsburg. The dissent noted the Court's long history of upholding the exclusionary rule and doubted that the majority's cited precedents supported its conclusion. The dissent also expressed doubt that knock-and-announce violations could be deterred without excluding the evidence obtained from the searches.

EXCEPTIONS TO OFFICER'S "GOOD FAITH" RELIANCE UPON WARRANT

1. "SUBJECTIVE" GOOD-FAITH INSUFFICIENT: OFFICER'S RELIANCE WAS NOT REASONABLY BASED UPON "OBJECTIVE" STANDARDS

"[T]he officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable...and it is clear that in some circumstances the

officer will have no reasonable grounds for believing that the warrant was properly issued." *Leon*, 468 U.S. at 922-23.

Moreover, this "objective reasonableness" standard must be applied to all officers involved, not merely those who executed the warrant, but also to those who obtained or provided information to secure it. *Leon*, 468 U.S. at 923 n.1. See also *U.S. v. DeLeon-Reyna*, 898 F.2d 486 (5th Cir. 1990).

2. FRANKS-TYPE MISREPRESENTATIONS IN OBTAINING WARRANT:

The *Leon* Court "noted" that the deference accorded to a magistrate's finding of probable cause does not preclude inquiry into the knowing or reckless falsity of the affidavit on which that determination was based. *Leon*, 468 U.S. at 317.

"Suppression therefore remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth." *Leon*, 468 U.S. at 923.

Furthermore, material omissions from the officer's affidavit have been considered equivalent to misstatements. *United States v. Martin*, 615 F.2d 318, 328 (5th Cir. 1980). Additionally, "recklessness can in some circumstances be inferred directly from the omission itself." *United States v. Tomblin*, 46 F. 3d 1369 (5th Cir. 1995).

But see U.S. v. Ofshe, 817 F.2d 1508 (11th Cir. 1987) [holding a minor omission is not critical to a showing of probable cause].

3. MAGISTRATE NOT "NEUTRAL AND DETACHED":

The *Leon* Court also recognized the "good faith exception" to the exclusionary rule should not apply where the issuing magistrate wholly abandoned his role as a "neutral and detached" judicial officer. *Leon*, 468 U.S. at 923 [citing *Lo-Ji Sales Inc. v. New York*, 442 U.S. 319, 99 S.Ct. 2319, 60 L.Ed.2d 920 (1979) where a magistrate utilizing prepared form warrants, joined and led search].

But see U.S. v. Orozco-Prader, 732 F.2d 1076, 1088 (2^d Cir.), *cert. denied*, 469 U.S. 845 (1984) [judge was neutral and detached despite his statement at time of issuing the search warrant that government agents and U.S. Attorney "know proof and know significance ... and therefore the court has to accept their representations without question"]; *U.S. v. Rome*, 809 F.2d 665 (10th Cir. 1987) [the Magistrate's failure to follow letter of Rule in issuing telephonic warrant by neglecting the requirements of (1) a verbatim record (2) a "duplicate original warrant" (3) particularity and (4) his immediate signature of the "original warrant" did not abandon detached and neutral role]; *U.S. v. Breckenridge*, 782 F.2d 1317 (5th Cir. 1985), *cert. denied*, 479 U.S. 837 (1986) [stating a neutral and detached magistrate who failed to read warrant affidavit had not abandoned his judicial role and did not spoil officer's good faith reliance on warrant]; *U.S. v. Harper*, 802 F.2d 115 (5th Cir. 1986).

4. AFFIDAVIT TOTALLY LACKING IN PROBABLE CAUSE:

The *Leon* Court further indicated that the "good faith exception" to the exclusionary rule would not apply where the warrant affidavit was so totally lacking in probable cause as to make any reliance thereupon unreasonable. See *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).

"Nor would an officer's manifest objective good faith in relying on a warrant based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" *Leon*, 468 U.S. at 923.

See *People v. Mitchell*, 678 P.2d 990 (Colo. 1984) [Colorado "good faith" statute inapplicable where individual arrested and searched on strength of arrest warrant "totally devoid of factual support".]

"...The warrant was void not because the facts supporting it fell somewhat below the Constitutional threshold of probable cause, but so far as the record shows, because there were no facts at all to support its issuance." *Mitchell*, 678 P.2d at 2004.

See also *U.S. v. Cardall*, 773 F.2d 1128 (10th Cir. 1985) [a warrant should not be considered to be so deficient as to defeat an officer's "good faith" reliance upon it unless the underlying affidavit is totally devoid of factual support]; *Cassias v. State*, 719 S.W.2d 585 (Tex.Crim.App. 1986) [refusing to read into the lengthy affidavit material that does not appear on its face, court holds that, under the "totality of the circumstances", the "facts and circumstances presented ...are too disjointed and imprecise to warrant a man of reasonable caution in the belief that marijuana and cocaine would be found at the described residence"].

5. FACIALLY DEFICIENT WARRANT:

Particularity of place to be searched or items to be seized:

The Court in *Leon* also recognized that reliance may be unreasonable where the warrant is "facially deficient", such as failing to particularize the place to be searched or the things to be seized. *Leon*, 468 U.S. at 923.

6. TIMELINESS:

U.S. v. Jones, 640 F.Supp. 143 (S.D. W.Va. 1986), *rev'd*, 822 F.2d 56 (4th Cir. 1987) [an executing officer could not have relied in objective good faith on a warrant that on its face reflects that it has not been executed on time]; *Herrington v. State*, 697 S.W.2d 899 (Ark. 1985). Most warrants require that they be executed within three days and during daylight hours.

7. RELIABILITY OF INFORMANT AND/OR INFORMATION:

U.S. v. Stout, 641 F. Supp. 1074 (N.D. Cal. 1986) [stating affidavit was totally lacking in any basis to determine either reliability of informant or dependability of his information].

8. RELIANCE ON PRECEDENT THAT WAS SUBSEQUENTLY HELD UNCONSTITUTIONAL

In *Davis v. U.S.*, 131 S.Ct. 2419 (2011) Officer Curtis Miller arrested Petitioner Willie Davis for using a false name during a routine traffic stop. Incident to the arrest, Officer Miller searched the vehicle and discovered a gun in his jacket. Davis was subsequently charged with being a convicted felon in possession of a firearm. Following a jury trial, Davis was convicted and sentenced to 220 months in prison. The U.S. Court of Appeals for the Eleventh Circuit found that while the search was illegal the evidence found in the vehicle was still admissible. Davis obtained a writ of *certiorari* on the issue of whether the good-faith exception to the exclusionary rule applies to a search that was authorized by precedent at the time of the search but is subsequently ruled unconstitutional.

The Court devotes a considerable amount of time to its pre-*Arizona v. Gant* search-incident-to-arrest cases because Davis' arrest pre-dated *Gant*. At first glance, such an approach would seem most peculiar, until one reads the language that follows. The Court follows a crisp summary of *New York v. Belton* and similar automobile search-incident-to-arrest cases with a frightening description of the exclusionary rule; not as a personal, individual right, but rather as a tool only to find application when the benefit of deterring future violations of the Fourth Amendment outweighs the heavy social costs of letting the guilty go free. The Court adopts this stance to the absolute detriment of its older conception of the exclusionary rule as "synonymous with violations of the Fourth Amendment." *Arizona v. Evans*, 514 U.S. 1, 13 (1995) (citing *Whiteley v. Warden, Wyo. State Penitentiary*, 401 U.S. 560 (1971)). While the Court asserts that good faith exceptions to the exclusionary are commonplace, and that its holding in this case remains in keeping with this precedent, it is essential to note that most of the decisions relied upon by the Court for this proposition pertain to warrant cases where the error was attributable to ministerial errors of the magistrate. Alternatively, in subsequently invalidated statute cases, the letter of the law was objectively ascertainable although illegal. In contrast, an officer's understanding of court decisions undoubtedly requires officers to make subjective judgments impenetrable from scrutiny by reviewing courts. The Court

endeavors to assuage such fears by assuring future defendants that there will still remain an incentive to litigate Fourth Amendment issues, albeit without any sort of “windfall to . . . one random litigant.” In any event, the Court admits that an exception to this judicially created exception to a judicially created remedy might exist in some extreme cases. Otherwise, cases involving officers who reasonably rely on binding appellate court precedent are not subject to the exclusionary rule.

As recently as March of 2013, the United States Court of Appeals for the First Circuit in *United States v. Sparks*, 711 F.3d 58 (1st Cir. 2013), held that that the *Davis* good-faith exception is properly applied where new developments in law have “upended the settled rules on which police relied.” *Sparks*, 711 F.3d at 68.

9. ANYTIME IT WOULD BE "UNREASONABLE" TO RELY ON THE WARRANT:

All of the above exceptions enumerated by the Court appear to be based on circumstances in which "manifest objective good faith"... would fail because "no reasonably well-trained officer should rely on the warrant". *Leon*, 468 U.S. at 923.

10. COLLECTIVE BAD FAITH (WHAT IS GOOD FOR THE GOOSE):

Just as courts may cumulate officers' knowledge to determine whether probable cause existed to justify a search, officers obtaining or executing a warrant may not insulate their knowledge or good intentions from fellow officers acting in bad faith.

One can cumulate an officer's "bad faith" in viewing the representations of even an "innocent" affiant. *Leon*, 468 U.S. at 923 n.24.

"It is necessary to consider the objective reasonableness, not only of the officers who eventually executed a warrant, but also of the officers who originally obtained it or who provided information material to the probable cause determination. Nothing in our opinion suggests, for example, that an officer could obtain a warrant on the basis of a 'bare bones' affidavit and then rely on colleagues who are ignorant of the circumstances under which the warrant was obtained to conduct the search...." *Leon*, 468 U.S. at 923 n.24.

Franks v. Delaware, 438 U.S. 154, 163, 98 S.Ct. 2674, 57 L.Ed.2d 667, 677, n. 6 (1978):

"...[P]remise ... [-] police [can]not insulate once [sic] officer's deliberate misstatement merely by relaying it through an officer-affiant personally ignorant of its falsity."

U.S. v. Cortina, 630 F.2d 1207, 1212, 1217 (7th Cir. 1980)[the good faith exception would become a Maginot Line, laughingly circumvented by police if we are to insulate falsehoods in an affidavit from invalidating a warrant simply because the executing officer was unaware of the lies]; *U.S. v. Calists*, 838 F.2d 711, 714 (3d Cir. 1988) (en banc) [quoting *Franks* "police [can] not insulate one officer's deliberate misstatement..."]; *U.S. v. Coplton*, 185 F.2d 629, 640 (2d Cir. 1950)[matters obtained through a violation of law by one official may not be introduced in evidence by the prosecution].

Also, a boot strap approach will not be permitted. An illegal search producing the basis for the probable cause recitation in an affidavit for a search warrant cannot make the subsequent search acceptable under the "good faith" exception to the exclusionary rule. *U.S. v. Vasey*, 834 F.2d 782 (9th Cir. 1981).

11. OTHER CASES:

-OVER BREADTH AND GENERAL SEARCH:

Warrants that fail to particularize the items to be seized are invalid because they would allow illegal general searches. Thus, officer's "good faith" reliance upon a warrant will not save a search where the warrant relied upon is facially overbroad. *U.S. v. Leary*, 846 F.2d 592 (10th Cir. 1988).

U.S. v. Medlin, 842 F.2d 1194 (8th Cir. 1988) [allowing local law enforcement officers participating in search based on federal warrant that did not specify the items that were actually seized by the local officers, also called for suppression of items seized by federal agents that were expressly authorized by the warrant].

See also *U.S. v. Fuccillo*, 808 F.2d 173 (1st Cir. 1987); *U.S. v. LeBron*, 729 F.2d 533, 536-39 (8th Cir. 1984) [holding that a warrant for "other stolen property" or "any records which would document illegal transactions involving stolen property" lacks the requisite particularity].

A valid warrant should describe the things to be taken and the place to be searched with particularity such that it provides a guide to the exercise of informed discretion of the officer executing the warrant....

“We recognize that, despite the dangers, a warrant may issue to search and seize records *if there is probable cause* to believe that records which are evidence or instrumentality of a crime will be there and the description is stated with sufficient particularity....

The warrant in the instant case, without more, authorized a search for 'any records, which would document illegal transactions involving stolen property'. There is no attempt to particularize the description of the property or of the records themselves. The only limiting factor is the reference to 'stolen property'. As earlier discussed, this generic classification is not sufficient to provide any guidance to an executing officer. Absent as well is any explanation of the method by which the officers were to distinguish such records from any documents relating to legal transactions." *LeBron*, 729 F.2d at 538–39.

U.S. v. Guarino, 729 F.2d 864 (1st Cir. 1984) [striking down a warrant authorizing seizure of "obscene" films "of the same tenor" as certain enumerated items]; *U.S. v. Young*, 745 F.2d 733 (2d Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985) ["This particularity requirement serves three related purposes: preventing general searches, preventing the seizure of objects upon the mistaken assumption that they fall within the magistrate's authorization, and preventing the issuance of warrants without a substantial factual basis."]; *U.S. v. Spilotro*, 800 F.2d 959 (9th Cir. 1986) [items relating to loan sharking and bookmaking not described with sufficient particularity]; *U.S. v. LeBron*, 729 F.2d 533, 539 (8th Cir. 1984) [a search for any records that would show transactions in stolen property was too generic a classification and thus constituted an impermissible general search].

Contra U.S. v. Gomez, 652 F. Supp. 461 (E.D N.Y. 1987) [similar case with opposite result]; *U.S. v. Burke*, 718 F. Supp. 1130 (S.D.N.Y. 1989);

U.S. v. Buck, 813 F.2d 588 (2d Cir. 1987), *cert. denied*, 484 U.S. 857 (1987) [even though warrant lacked sufficient particularity, same was not so apparent that executing officers could not rely on the warrant, especially in light of fact that officers searching in 1981 could not reasonably have anticipated developments in the law]; *U.S. v. Villegas*, 899 F.2d 1324 (2d Cir. 1990) ["sneak peak" warrant authorizing covert entry to take pictures was held constitutional].

Search warrant which utterly fails to describe the persons or things to be seized is *per se* invalid, even if the particularized description is provided in search warrant application [*Groh v. Martinez*, 540 U.S. 551 (2004)].

The Exclusionary Rule does not apply to police errors in record keeping. *See Herring v. U.S.* 129 S.Ct. 695(2009).

-NO NEXUS BETWEEN PROBABLE CAUSE AND THE PLACE TO BE SEARCHED:

There must be sufficient "nexus" between probable cause and the place to be searched.

"For a probable cause determination to be meaningful there must be a nexus among (1) criminal activity, (2) the things to be seized, and (3) the place to be searched." W. LAFAVRE SEARCH AND SEIZURE: 'A TREATISE ON THE FOURTH AMENDMENT ' 33.7(d) (1978). See also Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 358 (1974); *U.S. v. Freeman*, 685 F.2d 942, 949 (5th Cir. 1982); *U.S. Maestas*, 546 F.2d 1177, 1189 (5th Cir. 1977).

It also should be clear that an arrest at one location does not give sufficient particularized probable cause to believe evidence of that crime will be located at some distant location, even if same constitutes the arrestee's residence. *U.S. v. Gramlich*, 551 F.2d 1359 (5th Cir.), cert. denied, 434 U.S. 866 (1977)[“This fact alone is insufficient to justify the inference that incriminating evidence existed at that residence”]. This is because warrants are directed against evidence of crime and not against persons. Thus, the fact that there is probable cause to arrest a person for a crime does not automatically give police probable cause to search his residence or other area in which he has been observed for evidence of that crime." *U.S. v. Savoca*, 739 F.2d 220, 224 (6th Cir. 1984), reh'g, 761 F.2d 292 (6th Cir. 1985).

The affidavit in *Gramlich* stated that the defendant had been observed over a period of several weeks. During that time, he purchased a van, motorboat and radio equipment under an assumed name. The defendant was also known to possess a 23 foot motorboat named "Pronto" which, according to the affidavit had been docked at the pier outside of the defendant's residence. *Gramlich*, 551 F.2d at 1362 n.7. The affidavit went on to relate that on several occasions the defendant had been observed piloting "Pronto" out into the Gulf of Mexico in order to rendezvous with other boats. Based upon the surveillance described, in addition to the arrest of the defendant fifty miles away while he was unloading marijuana from a motorboat, the magistrate granted a search warrant for the defendant's house. The Fifth Circuit suppressed the evidence obtained as a result of that search because the information in the affidavit failed to establish an adequate connection between the residence searched and the alleged drug smuggling activities. *U.S. v. Gramlich*, 551 F.2d 1359 (5th Cir.), cert. denied, 434 U.S. 866 (1977).

Likewise, reliable information that a known felon has committed a burglary and was arrested with some of the proceeds some distance from his home, will not authorize a search of his residence. *U.S. v. Flanagan*, 423 F.2d 745 (5th Cir. 1970). See also *U.S. v. Bailey*, 458 F.2d 408 (9th Cir. 1972); *U.S. v. Whitlow*, 339 F.2d 975 (7th Cir. 1964); *Gillespie v. U.S.*, 368 F.2d 1 (8th Cir. 1966).

"The statement (in an affidavit), even if reliable, that a named person who is a known felon has committed a burglary, plus possession by the suspect of some of the proceeds when arrested, does not without more authorize the issuance of a warrant to search the residence of the accused miles away." *Flanagan*, 423 F.2d at 747.

In *U.S. v. Green*, 634 F.2d 1222 (5th Cir. 1981), the Fifth Circuit noted that while a "careful review of the affidavit reveals ample evidence from which the magistrate could conclude that (the defendant) was engaged in criminal activity in California," . . . "no evidence, other than residence, was set forth in the affidavit that connected the Key West, Florida, home to the criminal activity.... The motion to suppress should have been granted." *Green*, 634 F.2d at 1225-26.

Similarly, in *U.S. v. Lockett*, 674 F.2d 843 (11th Cir. 1982) the only statement evidencing a nexus between explosives and the residence to be searched, in an affidavit reciting numerous other events and activities of George Lockett, read:

"On July 11, 1980, this affiant observed these premises from the public county road and I saw no structures which would indicate proper storage facilities on the premises for storing high explosives. Record, Vol. 1 at 16. There follows a hand written statement by the affiant to the effect that he believes that dynamite is on the premises." *Lockett*, 674 F.2d at 845.

In the Eleventh Circuit's view, "such a conclusory statement, without more, of course has no probative value." As a result, the *Lockett* Court concluded that the affidavit set forth no facts from which the magistrate could infer that dynamite was located at that particular place". *Lockett*, 674 F.2d at 846. See *U.S. v. Algie*, 721 F.2d 1039, 1042 (6th Cir. 1983) [fifteen phone calls from an apartment "which authorities knew to be used for gambling coupled with an affiant's belief that telephones are often used to make lay-off bets", is "insufficient to convince a reasonably prudent person that contraband or evidence of a crime would be found on the premises"]].

Another court, however, has applied the good faith exception despite any lack of nexus between the house to be searched and the evidence seized. *U.S. v. Hendricks*, 743 F.2d 653 (9th Cir. 1984).

"Federal agents were in possession of a cocaine-bearing package from Brazil, which they anticipated would be picked up by the individual to whom it was addressed, ...the warrant stated that the package 'is now being concealed' at defendant's residence and added 'the search warrant is to be executed only upon the condition that the above described box is brought to the aforesaid premises'."

The Court concluded the warrant lacked probable cause and explained the magistrate abdicated to the agents "an important judicial function - the determination that probable cause exists to believe that the objects are currently in the place to be searched". Nevertheless, the court determined that the agents acted in "reasonable reliance on the warrant and hence declines to order suppression of the fruits of the search". *Hendricks*, 743 F.2d at 655. See also *U.S. v. Gant*, 759 F.2d 484 (5th Cir. 1985); *Commonwealth v. Way*, 492 A.2d 1151 (Pa. 1985) [holding lack of substantial nexus between the street crime and the premises to be searched renders the warrant facially invalid]; *U.S. v. Marriott*, 638 F. Supp. 333 (N.D. Ill. 1986).

But see U.S. v. Asselin, 775 F.2d 445 (1st Cir. 1985) [officers were found to have acted in "good faith" interpreting the word "premises" to include surroundings so as to authorize two searches of a disabled car adjacent to the carport and a birdhouse hanging from tree fifteen feet from trailer steps]; *U.S. v. Kenney*, 595 F. Supp. 1453 (D.C. Ma. 1984) ["probable cause existed to search *safety deposit* box for cash "because officers had probable cause to believe defendant was engaged in trafficking", but there existed no nexus between the gold, silver and jewelry found in the box and suspected drug trafficking].

ANTICIPATORY WARRANTS

An "anticipatory warrant" must be explicit and very narrowly drawn, clearly setting out the anticipated triggering event, or the objectively, well-trained officer would not be entitled to rely upon same. *U.S. v. Ricciardelli*, 998 F.2d. 8 (1st Cir. 1993).

"[W]e find, without serious question, that the defects on the warrant's face were apparent enough that the postal inspectors should have realized that it did not comport with the Fourth Amendment. The law was settled that the conditions governing the execution of anticipatory warrants must be explicit, clear, and narrowly drawn. The instant warrant plainly did not satisfy these criteria; and, furthermore, the principal omission in the warrant--the lack of any requirement that the contraband arrive at the premises--was both glaring and easily correctable. Examining the postal inspector's actions in this light, it is crystal clear that they could, and should, have asked the magistrate to condition the search of appellant's home on the delivery of the videotape there; failing both to insert this condition and to recognize the consequences of its omission constituted objectively unreasonable conduct. It follows, then, that attempting to execute an anticipatory search warrant bereft of such a limiting condition fell 'outside the range of professional competence expected' of federal agents."

However, recently, the Supreme Court held that anticipatory warrants are not categorically unconstitutional *per se*. *United States v. Grubbs*, No. 04-1414, 126 S.Ct. 1494 (2006). Furthermore, since the Fourth Amendment particularity requirement only specifically pertains to the "place to be searched" and the "persons or things to be

seized," the actual triggering condition for an anticipatory warrant need not be set out in the warrant itself. *Grubbs* at 1500. Therefore, anticipatory warrants which are issued in advance of the triggering condition do not violate the Fourth Amendment.

BURDEN OF PROOF ON PROSECUTION TO DEMONSTRATE "GOOD FAITH"

The Supreme Court in *Leon* appeared to place the burden upon the prosecution "*to establish objective good faith*".

"The good-faith exception for searches conducted pursuant to warrants is not intended to signal our unwillingness strictly to enforce the requirements of the Fourth Amendment, and we do not believe that it will have this effect. As we have already suggested, the good-faith exception, turning as it does on objective reasonableness, should not be difficult to apply in practice. When officers have acted pursuant to a warrant, *the prosecutions should ordinarily be able to establish objective good faith without a substantial expenditure of judicial time.*" *Leon*, 468 U.S. at 924.

See also U.S. v. Gant, 587 F.Supp. 128 (S.D. Tex. 1984), *rev'd on other grounds* 759 F.2d 484 (5th Cir. 1985), *cert. denied*, 474 U.S. 851 (1985). [allocating burden of proof upon the Government, "which if proved by the government, would save the evidence from the effects of the exclusionary rule"]; *U.S. v. Hendricks*, 743 F.2d 653, 656 (9th Cir. 1984)[*"The standard to be employed [in determining the officers' good faith reliance] is an objective one and the prosecution bears the burden of proof"*].

GOOD FAITH RELIANCE ON SUMMONS

The good faith exception has also been employed in other areas where law enforcement officers are acting in reliance upon the issuance of process by a grand jury or prosecutor on its behalf. *U.S. v. Gluck*, 771 F.2d 750 (3d Cir. 1985) [*"good faith" exception applies to IRS summons based on facially valid grand jury disclosure order unauthorized under U.S. v. Baggot*, 463 U.S. 476, 103 S.Ct. 3164, 77 L.Ed.2d 785 (1983)].

"GOOD FAITH" EXCEPTION APPLIES TO WARRANTLESS ADMINISTRATIVE SEARCHES AUTHORIZED BY STATUTE LATER FOUND UNCONSTITUTIONAL

The Supreme Court has extended the good faith exception to a warrantless administrative search conducted in objectively reasonable reliance upon a statute later held unconstitutional. *Illinois v. Krull*, 480 U.S. 340, 107 S.Ct. 1160, 94 L.Ed.2d 346 (1987). However, constraints similar to those set forth in *Leon* apply to such a search.

"A statute cannot support objectively reasonable reliance if, in passing the statute, the legislature wholly abandoned its responsibility to enact constitutional laws. Nor can a law enforcement officer be said to have acted in good-faith reliance upon a statute if its provisions are such that a reasonable officer should have known that the statute was unconstitutional... [T]he standard of reasonableness we adopt is an objective one; the standard does not turn on the subjective good faith of individual officers." *Krull*, 480 U.S. at 355 [citing *Leon*, 468 U.S. at 919 n.10].

The Court also recognized the risks involved in its holding.

"It is possible, perhaps, that there are some legislators who, for political purposes, are possessed with a zeal to enact a particular unconstitutionally restrictive statute, and who will not be deterred by the fact that a court might later declare the law unconstitutional. ...[W]e are not willing to assume ...legislators ... perform their legislative duties with indifference to the constitutionality of the statutes they enact. If future empirical evidence ever should undermine that assumption, our conclusions may be revised accordingly. *Krull*, 480 U.S. at 352 n.8 [citing *Leon*, 468 U.S. at 927-28.].

Four justices dissented against the majority's empirical assumptions.

"Providing legislatures a grace period during which the police may freely perform unreasonable searches in order to convict those who might have otherwise escaped creates a positive incentive to promulgate unconstitutional laws. . . . [i]t cannot be said that there is no reason to fear that a particular legislature might yield to the temptation offered by the Court's good faith exception." *Krull*, 480 U.S. at 352 [O'Connor, J., dissenting].

LEON "GOOD FAITH" EXCEPTION DOES APPLY TO OTHER WARRANTLESS SEARCHES

In 2005, the Sixth Circuit examined a case in which the warrants on which police relied were themselves the fruit of the poisonous tree. *See U.S. v. McClain*, 444 F.3d 556 (6th Cir. 2005). In *McClain*, officers obtained a warrant based on an affidavit that "explicitly relied in part on evidence obtained during the initial warrantless search" of a property "and described the circumstance of that [warrantless] search." *McClain*, 444 F.3d at 560. The court acknowledged that "a search carried out on a suspect's premises without a warrant is per se unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of 'exigent circumstances.'" *Id.* at 561 (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 474-75 (1971)). "The question therefore [became] whether the good faith exception to the exclusionary rule can apply in a situation in which the affidavit supporting the search warrant is tainted by evidence obtained in violation of the Fourth Amendment." *Id.* at 565. The court held that "the *Leon* good faith exception should apply despite an earlier Fourth Amendment violation." *Id.*

"GOOD FAITH" EXCEPTION DOES NOT APPLY TO STATUTORY SUPPRESSION REMEDIES

The "good faith" exception to the Fourth Amendment's exclusionary rule does not apply to Rule 41(e)'s statutory suppression remedy for *pre-indictment* return and suppression of illegally seized items.

In re Motion for Return of Property Pursuant to Fed. R. Crim. P. 41(e), 681 F. Supp. 677 (D. Haw.) [while the judicially created post-indictment exclusionary rule contained in FED. R. CRIM. P. Rule 12(b)(3) is subject to judicially created exceptions such as *Leon's* "good faith" exception, the Congressionally created "explicit textual remedy" created statutorily by FED. R. CRIM. P. Rule 41(e) is not subject to *Leon's* Court created "good faith" exception].

Neither does the "good faith" exception apply to the suppression provision under wiretap law. 18 U.S.C. §2511.

However, a police officer's reasonable mistake as to whether a particular vehicle is covered by a statutory scheme authorizing warrantless stops and inspections of commercial vehicles undermines the constitutionality of the stop and requires suppression of evidence discovered during it. Unlike stops based on individualized suspicion of criminal activity, stops based on the Fourth Amendment's administrative search doctrine cannot be justified on the basis of an officer's objectively reasonable mistake of fact, the court stressed. It also ruled that the good-faith exception to the exclusionary rule does not apply in these circumstances. *See United States v. Herrera*, 444 F.3d. 1238 (10th Cir. 2006)

GOOD FAITH MUST BE OBJECTIVE

The standard for applying the "good faith" exception to the exclusionary rule is an "objective," not subjective one.

"We emphasize that the standard of reasonableness we adopt is an objective one. Many objections to a good-faith exception assume that the exception will turn on the subjective good faith of individual officers. 'Grounding the modification in objective reasonableness, however, retains the value of the exclusionary rule as an incentive for the law enforcement profession as a whole to conduct themselves in accord with the Fourth Amendment.' The objective standard we adopt, moreover, requires officers to have a reasonable knowledge of what the law prohibits. *U.S. v. Peltier*, 422 U.S. 531, 542 (1975) [quoting *Illinois v. Gates*].

As Professor Jerold Israel has observed: "The key to the [exclusionary] rule's effectiveness as a deterrent lies, I believe, in the impetus it has provided to police training programs that make officers aware of the limits imposed by the Fourth Amendment and emphasize the need to operate within those limits. [An objective good-faith exception] ...is not likely to result in the elimination of such programs, which are now viewed as an important aspect of police professionalism. Neither is it likely to alter the tenor of those programs; the possibility that illegally obtained evidence may be admitted in borderline cases is unlikely to encourage police instructors to pay less attention to Fourth Amendment limitations. Finally, [it] ...should not encourage officers to pay less attention to what they are taught, as the requirement that the officer act in 'good faith' is inconsistent with closing one's mind to the possibility of illegality."

In sum, the officer's good faith reliance on a warrant must be objectively reasonable. And whether the officer acted in good faith is a question of law which receives an independent review in the courts of appeal. For example, the Supreme Court found that a mistake in the execution of a warrant might, under the circumstances of the case, warrant application of the "good faith" exception. However, the exception will not apply if officers are negligent in execution of a warrant and their mistake is unreasonable. Thus, the Court found the objective good faith standard was met where officers made a mistake conducting a search where the warrant did not authorize. The officers obtained a warrant for an apartment on the third floor of a building, but mistakenly thought the apartment named in the warrant covered the entire floor. The court held that the officers made a "good faith" mistake in searching the wrong apartment. *Maryland v. Garrison*, 480 U.S. 79, 107 S.Ct. 1013, 94 L.Ed.2d 72 (1987). *But see U.S. v. Palacios*, 666 F. Supp. 113 (S.D. Tex. 1987) [stating evidence is not admissible under good faith exception when arrest warrant is negligently executed thereby arresting wrong person; mistake was not reasonable].

While the Supreme Court has voiced concern over the "substantial social costs exacted by the exclusionary rule for the vindication of Fourth Amendment rights" it leaves no question as to the rule's continued viability. *U.S. v. Leon*, 468 U.S. 897, 907 (1984).

"The substantial social costs exacted by the exclusionary rule for the vindication of Fourth Amendment rights have long been a source of concern....

"...Nevertheless, the balancing approach that has evolved in various contexts - including criminal trials - forcefully suggest[s] that the exclusionary rule be more generally modified to permit the introduction of evidence obtained in the reasonable good-faith belief that a search or seizure was in accord with the Fourth Amendment." *U.S. v. Leon*, 468 U.S. 897, 907 (1984).

Despite the Court's concern, a study regarding the practical effect of the "good faith" exception on warrants indicates no increase in their quality and quantity. Rather, some studies suggest that the effect of the *Leon* decision has been to encourage prosecuting authorities to seek warrants in situations where previously they would not. Police Executive Research Forum, *The Effects of United States v. Leon on Police Search Warrant Policies and Practice* (1988).

Texas' Statutory equivalent to the Federal Exclusionary Rule also provides for a good faith exception. TEX. CODE CRIM. P. Art. 38.23(b) (Vernon 1989) [where a defective warrant has been issued by a magistrate and the warrant was based on probable cause, if the executing officer believes in good faith the warrant is valid, the evidence is nevertheless admissible].

STATES ARE FREE TO PROVIDE GREATER PROTECTIONS FOR THEIR CITIZENRY UNDER STATE CONSTITUTION AND STATUTES

But since the Supreme Court sets a floor below which our constitutional rights cannot fall and the states set the ceiling, states are free to provide greater protections than afforded citizens under the federal system. *Lego v. Twomey*, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972); *Oregon v. Hass*, 420 U.S. 714, 95 S.Ct. 1215, 43

L.Ed.2d 570 (1975); *Texas v. White*, 423 U.S. 67, 72, 96 S.Ct. 304, 46 L.Ed.2d 209 (1975); *Michigan v. Mosley*, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975).

"[I]t is appropriate to observe that no state is precluded from adhering to higher standards under state law. Each state has the power to impose higher standards governing police practices under the state law than is required by the federal constitution." *Mosley*, 423 U.S. at 120.

For example, Pennsylvania has rejected the *Leon* good faith exception to the exclusionary rule. *See Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991) [finding that the exclusionary rule also protects the individual's right to privacy the Court rejected the *Leon* good faith exception]; *State v. Santiago*, 492 P.2d 657 (Haw. 1971) [rejecting *Harris v. New York*, 401 U.S. 222 (1971)]; *State v. Johnson*, 346 A.2d 66 (N.J. 1975) [rejecting waiver of constitutional right approach of *Schneckloth v. Bustamonte*, 412 U.S. 218 (1975)]; *Blue v. State*, 558 P.2d 636 (Alaska 1977) [rejecting *Kirby v. Illinois*, 406 U.S. 682 (1972)] [interpretation of right to counsel at pre-indictment lineups]; *State v. Kaluna*, 520 P.2d 51 (Haw. 1974) [rejecting Supreme Court's interpretation of right to search incident to an arrest in *U.S. v. Robinson*, 414 U.S. 218 (1973) and *Gustafson v. Florida*, 414 U.S. 260 (1973)]; *State v. Jackson*, 688 P.2d 136 (Wash. 1984) [rejecting the *Gates* "totality" test]; *State v. Sidebotham*, 474 A.2d 1377 (N.H. 1984) [Jones-type automatic standing held still available in New Hampshire]; *State v. Bolt*, 689 P.2d 519 (Ariz. 1984) [refusing to allow securing premises for purposes of obtaining warrant as per *Segura*]; *Sanchez v. State*, 707 S.W.2d 575 (Tex.Cr.App. 1986) [noting Independent State Constitution restricts use of even uncounseled silence]; *State v. Jewitt*, 500 A.2d 233 (Vt. 1985); *State v. Young*, 867 P.2d 593 (Wash. 1994).

"Since 1970 there have been over 250 cases in which state appellate courts have viewed the scope of rights under state constitutions as broader than those secured by the federal Constitution as interpreted by the U.S. Supreme Court.... 'A lawyer today representing someone who claims some constitutional protection and who does not argue that the state constitution provides that protection is skating on the edge of malpractice'. ...

One longs to hear once again of legal concepts, their meaning, and their origin. All too often legal argument consists of litany of federal buzz words memorized like baseball cards...

To paraphrase Jefferson, we might as well require a man to wear still the coat which fitted him as a boy as to educate a law student in this time of post-Warren counter-revolution as if there had been no resurrection of federalism and state judicial independence. It is small wonder that lawyers are confused or baffled when they decide to engage in independent interpretation of the Vermont Constitution.

This generation of Vermont lawyers has an unparalleled opportunity to aid in the formulation of a state constitutional jurisprudence that will protect the rights and liberties of our people, however the philosophy of the U.S. Supreme Court may ebb and flow. The development of state constitutional jurisprudence will call for the exercise of great judicial responsibility as well as diligence from the trial bar. It would be a serious mistake for this court to use its state constitution chiefly to evade the impact of the decisions of the U.S. Supreme Court. Our decisions must be principled, not result oriented." *State v. Jewitt*, 500 A.2d 233 (Vt. 1985).

The Supreme Court dismissed as improvidently granted a writ of certiorari on the ground that the court below had rested its suppression decision "on independent and adequate state grounds". This was in spite of the fact that the Court had decided the same issue on the same day differently in a Federal case where the decision below rested solely on Federal Constitution standards, reaffirming that States are free to prescribe greater protections for their citizenry. *Florida v. Casal*, 462 U.S. 637, 103 S.Ct. 3100, 3103, 77 L.Ed.2d 277 (1983).

Even in *Gates*, the Supreme Court recognized that a different rule would attach if it were considering "actions of state officials under state Statutes."

"Due regard for the appropriate relationship of this Court to state courts, *McGoldrick v. Compagnie General*, 309 U.S. 430, 435-36 (1940); demands that these courts be given an opportunity to consider the constitutionality of the actions of state officials ...we permit a state court, even if it agrees with the state as a matter of federal law, to rest its decision on an adequate and independent state ground." *Gates*, 462 U.S. at 221.

In *California v. Ramos*, the Supreme Court, speaking through Justice O'Connor, reiterated that:

"It is elementary that States are free to provide greater protections in their criminal justice system than the Federal Constitution requires." *California v. Ramos*, 463 U.S. 992, 103 S.Ct. 3446, 3459-60, 77 L.Ed.2d 1171 (1983).

However, note that the Texas Court of Criminal Appeals, in an en banc opinion held that the Texas Constitution contains no requirement that a seizure or search must be authorized by a warrant, and any seizure or search that is otherwise reasonable will not be found to be in violation of Texas Constitution because it was not authorized by a warrant and that the Texas Constitution does not offer greater protection than the Fourth Amendment and may offer less protection. *Hulit v. State*, 982 S.W.2d 431 (Tex. Crim. App. 1998).

Additionally, the court added that it had "expressly conclude[d] that this court, when analyzing and interpreting Art. I, § 9, Tex. Const., will not be bound by Supreme Court decisions addressing the comparable Fourth Amendment issue," quoting *Heitman v. State*, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991). *See also Polk v. State*, 704 S.W.2d 929, 934 (Tex.Cr.App. 5-Dist. 1986); *Oliver v. State*, 711 S.W.2d 442, 445 (Tex.App.- Ft. Worth, 1986) [the independent source and inevitable discovery exceptions to the judicially created exclusionary rule do not apply to article 38.23 and will not, short of an amendment]; *Commonwealth v. Upton*, 476 N.E.2d 548 (1985) [two-pronged *Aguilar-Spinelli* test retained for state law purposes instead of the *Gates* totality of the circumstances standard. Court cited that the *Aguilar* standard had been working well for twenty years, encouraged careful police work and tended to reduce the number of unreasonable searches]; *State v. Jackson*, 688 P.2d 136 (Wash. 1984).

SEVERAL STATES HAVE REJECTED ANY LEON "GOOD FAITH" EXCEPTION

A number of state courts have rejected the *Leon* "good faith" exception to the exclusionary rule on state constitutional grounds: *State v. Oakes*, 598 A.2d 119 (Vt. 1991).

"By treating the federal exclusionary rule as a judicially created remedy rather than a constitutional right, the Supreme Court's decision focuses, not on interpretation of the federal constitution, but on an attempted empirical assessment of the costs and benefits of creating a good faith exception to the federal exclusionary rule. This empirical assessment can inform this Court's decision on the good faith exception only to the extent that it is persuasive. If the assessment is flawed, this Court cannot simply accept the conclusion the Supreme Court draws from it. To do so would be contrary to our obligation to ensure that our state exclusionary rule effectuates [our State Constitutional provisions], and would deserve those rights.

"When the [United States Supreme] Court's analysis is examined carefully, however, it is clear that we have not been treated to an honest assessment of the merits of the exclusionary rule, but have instead been drawn into a curious world where the 'costs' of excluding illegally obtained evidence loom to exaggerated heights and where the 'benefits' of such exclusion are made to disappear with a mere wave of the hand.

"The exclusionary rule's deterrent effect, however, does not rest primarily on 'penalizing' an individual officer into future conformity with the Constitution. Rather, it rests on 'its tendency to promote

institutional compliance with Fourth Amendment requirements on the part of law enforcement agencies generally.'...It creates an incentive for the police as an institution to train its officers to conform with the Constitution. Consequently, the important question is not whether it is of any benefit to 'penalize' the objectively reasonable conduct of an individual officer, but rather whether failure to do so will lower the incentive for institutional compliance." *State v. Oakes*, 598 A.2d 119 (Vt. 1991).

See also Commonwealth v. Edmunds, 586 A.2d 887, 899 (Pa. 1991).

"Indeed, we disagree with that Court's suggestion in *Leon* that we in Pennsylvania have been employing the exclusionary rule all these years to deter police corruption. We flatly reject this notion. We have no reason to believe that police officers or district justices in the Commonwealth of Pennsylvania do not engage in 'good faith' in carrying out their duties. What is significant, however, is that our Constitution has historically been interpreted to incorporate a strong right of privacy, and an equally strong adherence to the requirement of probable cause under Article 1, Section 8. Citizens in this Commonwealth possess such rights, even where a police officer in 'good faith' carrying out his or her duties inadvertently invades the privacy or circumvents the strictures of probable cause. To adopt a 'good faith' exception to the exclusionary rule, we believe, would virtually emasculate those clear safeguards which have been carefully developed under the Pennsylvania Constitution over the past 200 years." *Commonwealth v. Edmunds*, 586 A.2d at 899.

See State v. Carter, 370 S.E.2d 553 (N. C. 1988); *State v. Marsala*, 579 A.2d 58 (1990), *remanded*, 620 A.2d 1293 (Conn. 1993).

"Initially, we note that the exclusionary rule, although primarily directed at police misconduct, is also appropriately directed at the warrant issuing process, and that it is somewhat odd to suppose that the exclusionary rule was not designed to deter the issuance of invalid warrants. ... If we were to adopt the good faith exception, our practice of declining to address doubtful constitutional issues unless they are essential to the disposition of a case would preclude our consideration of probable cause beyond reviewing whether an officer had an 'objectively reasonable' belief in its existence. Absent a meaningful necessity to review probable cause determinations, we conclude that close cases will become 'both the hardest to decide and the easiest to dispose of under the good faith exception; in such cases the officer's objective good faith is clearest'...In short, we are simply unable to sanction a practice in which the validity of search warrants might be determined under a standard of 'close enough is good enough instead of under the 'probable cause' standard mandated by article 1 section 7, of our state constitution." *State v. Marsala*, 579 A.2d 58 (1990), *remanded*, 620 A.2d 1293 (Conn. 1993).

See also State v. Guzman, 842 P.2d 660, 672, 677 (Idaho 1992).

"In sum, the United States Supreme Court has abandoned the original purposes of the exclusionary rule as announced in *Weeks* and adopted by this Court in *Arregui*, in that the federal system has clearly repudiated any purpose behind the exclusionary rule other than that of a deterrent to illegal police behavior. Thus, the change in federal law has provided an impetus for a return by this Court to exclusive state analysis...The exclusionary rule unencumbered by the good faith exception provides incentives for the police department and the judiciary to take care that each warrant applied for and issued is in fact supported by probable cause. In addition to encouraging compliance with the constitutional requirement that no warrant shall issue but upon probable cause, it also lessens the chances that innocent citizens will have their homes broken into and ransacked by the police because of warrants issued upon incomplete or inaccurate information. We believe these are laudable effects of the exclusionary rule which appear to have gone unrecognized by the *Leon* majority." *State v. Guzman*, 842 P.2d at 672, 677.

“The *Leon* good faith exception contemplates that appellate courts defer to trial courts and trial courts defer to the police. It fosters a careless attitude toward details by the police and issuing judicial officers and it even encourages them to attempt to get away with conduct which was heretofore viewed as unconstitutional...The decision in *Leon* represents a serious curtailment of the Fourth Amendment rights of the individual. But under the broader protection guaranteed the individual under our State Constitution, the State is not permitted to introduce evidence in its case in chief which has been seized without probable cause.” *State v. Novembrino*, 491 A.2d 37, 45- 46 (N.J. 1985), *aff’d*, 519 A.2d 820 (1987).

“Whether or not the police acted in good faith here, however, the *Leon* rule does not help the People's position. That is so because if the People are permitted to use the seized evidence, the exclusionary rule's purpose is completely frustrated, a premium is placed on the illegal police action and a positive incentive is provided to others to engage in similar lawless acts in the future. We therefore decline, on State constitutional grounds, to apply the good-faith exception the Supreme Court stated in *United States v. Leon*.” *People v. Bigelow*, 488 N.E.2d 451 (N.Y. 1985).

Other state courts have come to the same conclusion on statutory grounds.

See Commonwealth v. Upton, 476 N.E.2d 548 (Mass. 1985);

But see State v. Wills, 524 N.W.2d 507 (Minn. App. 1994); *Gordon v. State*, 801 S.W.2d 899 (Tex. Cr. App. 1990); *Mobley v. State*, 834 S.E.2d 785 (2019).

Texas has a statutory exclusionary rule, TEX. R. CRIM. P. Art. 38.23(a) which provides that:

"No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case." TEX. R. CRIM. P. Art. 38.23(a).

In 1987, the Texas legislature amended that statute, TEX. R. CRIM. P. Art. 38.23(b) to include a "good faith" exception:

"It is an exception to the provisions of Subsection (a) of this Article that the evidence was obtained by a law enforcement officer acting in objective good faith reliance upon a warrant issued by a neutral magistrate based upon probable cause." TEX. R. CRIM. P. Art. 38.23(b).

However, rather than creating a state statutory "good faith" exception, the Texas Court of Criminal Appeals has interpreted the language of this particular statute to constitute an express legislative rejection of any *Leon* "good faith" exception.

"We also note the appeals court was incorrect in finding the statute a codification of *United States v. Leon*,... because Art. 38.23(b) requires a finding of probable cause, while the exception enunciated in *Leon* appears more flexible in allowing a good faith exception if the officers's belief in probable cause is reasonable. Thus, we must direct our attention to the validity of the warrant and affidavit without recourse to any 'good faith' exception to the warrant requirement." *Gordon v. State*, 801 S.W.2d 899, 912-13 (Tex. Cr. App. 1990).

Still others have rejected the good faith exception on the basis of judicial opinion.

State v. Grawien, 367 N.W.2d 816 (Wisc.), *rev. denied*, 371 N.W.2d 375 (1985);
State v. Joyce, 639 A.2d 1007 (1994).

THE GOOD FAITH EXCEPTION TO A STOP

See Heien v. North Carolina, 135 S.Ct. 530 (2014).

Heien involved a traffic stop initiated because the initiating police officer misinterpreted a North Carolina statute involving break light requirements. The officer believed that the statute required all lights on the rear of the vehicle to be in good working order. However, North Carolina courts ruled all rear brake lights were not required to function, but rather only one break light. The majority opinion, written by Chief Justice Roberts, held that the police officer's mistake of law was still sufficient to satisfy Fourth Amendment requirements for conducting a traffic stop. That was because the mistake of law was a reasonable one. That ruling is interesting, because the Court seems to say that a reasonable mistake of law by the government, when conducting a search, does not necessarily violate the Fourth Amendment. In her dissent, Justice Sotomayor touches on this potential consequence of the majority opinion. She states, when discussing the good-faith exception: "More fundamentally, that is a remedial concern, and the protections offered by the Fourth Amendment are not meant to yield to accommodate remedial concerns. Our jurisprudence draws a sharp 'analytica[l] distinct[ion]' between the existence of a Fourth Amendment violation and the remedy for that violation. *Citing to Davis*, 564 U.S., at, 131 S. Ct. 2419, 180 L. Ed. 2d 285 (slip op., at 14).

See Utah v. Strieff, 136 S. Ct. 27 (2015).

On January 16, 2015, the Supreme Court of Utah decided *Utah v. Strieff*, 357 P. 3d 532 (*cert. granted*), 136 S. Ct. 27, (2015), and held that an officer's discovery of outstanding arrest warrant during an unlawful arrest did not remove taint under the attenuation exception to the exclusionary rule. There, an anonymous message was left on a drug tip line that narcotics activity was taking place at a residence. *Id.* at 536. Throughout the week, an officer monitored the home for about 3 hours total and observed what he felt was suspicious "short term traffic" at the home. *Id.* He thus determined that the traffic indicated possible drug sales activity. *Id.* During his observations, the officer did not see Strieff enter the home but saw him leave the residence and walk toward a convenience store. *Id.* The officer ordered Strieff to stop so that he could ask what was going on in the home. *Id.* The officer asked Strieff for his identification, to which he complied, and discovered Strieff had an outstanding traffic warrant. *Id.* The officer arrested Strieff based on this information and found a baggie of methamphetamine and drug paraphernalia during the search incident to arrest. *Id.* The Supreme Court of Utah held that the attenuation doctrine is limited to circumstances involving a defendant's independent acts of free will. *Id.* at 544. The court ultimately held that Strieff was entitled to suppression of the evidence secured during the search incident to his arrest, as the attenuation doctrine was not a viable exception to the exclusionary rule for the State in Strieff's case. *Id.* at 546. The Supreme Court granted certiorari on October 01, 2015. On February 22, 2016, the first oral arguments were heard on the case since the passing of Justice Scalia. The government argued that the officer's stop was a reasonable and good faith mistake and that suppression would harm society far more than deterring similar mistakes. Justice Sotomayor expressed her concern that this approach would give too much latitude to law enforcement, and Justice Kagan added that the treat of this behavior is especially serious in lower-income communities where many residents have outstanding warrants for minor infractions.¹ To date, this case has not yet been decided, but it will be interesting to see if the Supreme Court will take the opportunity to address some of the confusion surrounding the Exclusionary Rule when it does issue an opinion.

II. WARRANTS

¹ *The Supreme Court and Police Searches*, The New York Times, Feb. 23, 2016, available at: <http://nyti.ms/1Rk7wzU>

WARRANT SHOULD BE PREFERRED PRACTICE

Because obtaining a warrant interposes the "informed and deliberate" judgment of "a neutral and detached magistrate" rather than leaving such critical decisions, such as probable cause determinations, to those "engaged in the often competitive enterprise of ferreting out crime", the preferred practice is to obtain a warrant. *U.S. v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 3417, 82 L.Ed.2d 677 (1984); *Michigan v. Clifford*, 464 U.S. 287, 104 S.Ct. 2668, 78 L.Ed.2d 477 (1984); *Johnson v. U.S.*, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed.2d 436 (1948).

Thus, warrantless searches are presumed to be unreasonable and the burden is on the government to show that some exception to the warrant requirement applies. Having probable cause to conduct a search will not suffice to validate it. Unless the failure to obtain a warrant is excused under one of the recognized exceptions to the warrant requirement, the search is illegal. *Thompson v. Louisiana*, 469 U.S. 17, 105 S.Ct. 409, 83 L.Ed.2d 246 (1984). Accordingly, "in a doubtful or marginal case a search conducted pursuant to a warrant may be sustained where without one it would fail." *U.S. v. Ventresca*, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965); *U.S. v. Bursey*, 491 F.2d 531, 534 (5th Cir. 1974).

WHO MAY ISSUE A SEARCH WARRANT?

FED. R. CRIM. P. Rule 41(a) provides that only a federal magistrate or a judge of a "state court of record within the district wherein the property is located" may issue a federal search warrant. Accordingly, Municipal Judges who are not judges of "courts of record" within the state have no authority to issue warrants. *U.S. v. Sturgeon*, 501 F.2d 1270 (8th Cir. 1974); *U.S. v. Perez*, 375 F. Supp. 332 (W.D. Tex. 1974).

But see U.S. v. Comstock, 805 F.2d 1194 (5th Cir. 1986), *cert. denied*, 481 U.S. 1022 (1987) [federal search pursuant to state warrant required that officers had good faith belief that J.P. was court of record].

REQUIREMENT OF PRESENTING WARRANT

FED. R. CRIM. P. Rule 41(d) provides:

"The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The federal magistrate shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant." FED. R. CRIM. P. Rule 41(d).

While neither the Fourth Amendment nor Rule 41 require that the search warrant be physically present prior to commencing the search, *Katz v. U.S.*, 389 U.S. 347, 355, n. 16, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); at least one court has implied that officers may be required to present the warrant before vacating the searched premises.

"[L]aw enforcement officials are not constitutionally required to present a copy of the search warrant prior to commencing the search, so long as the previously issued warrant is presented the officers vacated the premises." *U.S. v. Hepperle*, 810 F.2d 836, 839 (8th Cir. 1987), *cert. denied*, 483 U.S. 1025 (1987) [emphasis added].

But see U.S. v. Marx, 635 F.2d 436, 441 (5th Cir. 1981) [holding failure to deliver copy of search warrant to party whose premises were searched until day after search did not invalidate search in absence of showing of prejudice; violations of Rule 41(d) essentially ministerial in nature];
U.S. v. McKenzie, 446 F.2d 949, 954 (6th Cir. 1971) [holding absence showing of prejudice, irregularities in Rule 41(d) procedures do not void an otherwise valid search].

FEDERAL OFFICERS HAVE LIMITED AUTHORITY

Federal officers have only those powers to arrest and search specifically granted by Congress.

(a) Postal Inspectors:

Alexander v. U.S., 390 F.2d 101 (5th Cir. 1968); *U.S. v. Chapman*, 420 F.2d 925 (5th Cir. 1969); *U.S. v. Montos*, 421 F.2d 215 (5th Cir. 1970); *U.S. v. Davis*, 328 F. Supp. 350 (E.D. La. 1971).

(b) Immigration Officers:

An Immigration Officer has authority pursuant to this statute to search only for aliens and consequently a search of any place or thing not reasonably susceptible of concealing an alien is unreasonable.

Roa-Rodriguez v. U.S., 410 F.2d 1206 (9th Cir. 1969) [searching jacket]; *U.S. v. Hortze*, 179 F. Supp. 913 (S.D. Cal. 1959) [searching cigarette package]; *U.S. v. Winer*, 294 F. Supp. 731 (S.D. Tex. 1969) [searching under seat of small auto]; *Contreras v. U.S.*, 291 F.2d 63 (9th Cir. 1961) [searching paper sack]; *U.S. v. Lujan-Romero*, 469 F.2d 683 (9th Cir. 1972) [searching footlocker].

But see U.S. v. Miranda, 426 F.2d 283 (9th Cir. 1970) [upholding a search by immigration officers of the 3 inch space between the radiator and the hood of the defendant's automobile].

Note that in *INS v. Delgado*, 466 U.S. 210, 104 S.Ct. 1758, 80 L.Ed.2d 247 (1984), the Supreme Court approved "factory surveys" where INS agents enter a factory or work site pursuant to a warrant or the consent of an employee in order to question employees about their citizenship, holding the practice is not a "seizure" of the employees within the meaning of the Fourth Amendment and in an individual workers case amounts to "mere consensual encounter" and not a detention or seizure:

"The presence of agents by the exits posed no reasonable threat of detention to these workers while they walked throughout the factories on job assignments. Likewise, the mere possibility that they would be questioned if they sought to leave the buildings should not have resulted in any reasonable apprehension by any of them that they would be seized or detained in any meaningful way. Since most workers could have had no reasonable fears that they would be detained upon leaving, we conclude that the work forces as a whole were not seized." *INS v. Delgado*, 466 U.S. at 219.

However, "INS has 'no discretion with which to violate constitutional rights'." *International Molders v. Nelson*, 799 F.2d 547, 551-52 (9th Cir. 1986) [upholding district court finding of systematic Fourth Amendment violations relying on *LaDuke v. Nelson*, 762 F.2d 1318, 1324, n. 8 (9th Cir. 1985)].

(c) FBI:

Border searches are authorized under 19 U.S.C. ' 482 *only* as to those officers Congressionally empowered to stop and board vessels for that purpose and the FBI has not had such authority delegated to it.

U.S. v. Soto-Soto, 598 F.2d 545, 549-50 (9th Cir. 1979).

"The search was conducted by an FBI Agent not a customs or immigration officer. There was no delegation of authority to this agent to conduct this search. The FBI agent surpassed his authority as an FBI agent and can claim no additional authority from other statutes. He ignored the divisions of authority which Congress carefully legislated."

(d) U.S. Marshals:

U.S. v. Watson, 423 U.S. 411, 420, 96 S.Ct. 820, 46 L.Ed.2d 598, 607 (1970),

"In 1792 Congress invested U.S. Marshals and their deputies with the same powers in executing the laws of the U.S. as sheriffs and their deputies in their several states have by law in executing the laws of that state."

(e) Double Duty:

In Texas, Immigration officers are often designated as "customs agents" as well. This fiction has been held to enable such officers to stop a vehicle as immigration officers for aliens and to search the vehicle as customs agents for contraband. *U.S. v. Thompson*, 475 F.2d 1359, 1362-3 (5th Cir. 1973); *U.S. v. McDaniel*, 463 F.2d 129, 134 (5th Cir. 1972), *cert. denied*, 413 U.S. 919 (1973).

Contra U.S. v. Hortze, 179 F. Supp. 913 (D.C. Cal. 1959).

STATE OFFICERS

AUTHORITY TO ARREST/SEARCH

"[M]ost every peace officer possesses in common with all other peace officers the same powers, duties and responsibilities." *Preston v. State*, 700 S.W.2d 227 (Tex.Crim.App. 1985) [searching by campus police].

SEARCHES BY PRIVATE PERSONS

Searches conducted by private individuals without the assistance, knowledge, collusion, encouragement or approval of any governmental entity or agent do not fall within Fourth Amendment protections. *Walter v. U.S.*, 447 U.S. 649, 656-7, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980) ["a wrongful search or seizure conducted by a private party does not violate the Fourth Amendment"]; *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); *Burdeau v. McDowell*, 256 U.S. 465, 475, 41 S.Ct. 574, 65 L.Ed.2d 1048 (1921).

"The Fourth Amendment gives protection against unlawful searches and seizures, and as shown in ...previous cases, its protection applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies." *Burdeau v. McDowell*, 256 U.S. 465, 475, 41 S.Ct. 574, 65 L.Ed.2d 1048 (1921).

See also U.S. v. Janis, 428 U.S. 433, 456, n. 31, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976) ["It is well established ...that the exclusionary rule, as a deterrent sanction, is not applicable where a private party or a foreign government commits the offending act."]; *U.S. v. Coleman*, 628 F.2d 961, 965 (6th Cir. 1980) ["[T]he Fourth Amendment proscribes only governmental action, and does not apply to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the government or with the participation or knowledge of any governmental official.... Since the police did not instigate, encourage, or participate in the search of the truck, the search by [the private party] was outside the scope of the Fourth Amendment."]; *U.S. v. Bonfiglio*, 713 F.2d 932, 939 (2d Cir. 1983), *abrogated by Ruggiero v. Krzeminski*, 928 F.2d 558 (2d Cir. 1991) ["[A] wrongful search or seizure by a private party does not violate the Fourth Amendment or deprive the government of the right to use evidence it has lawfully obtained from a private party."]; *U.S. v. Thomas*, 613 F.2d 787, 792 (10th Cir.), *cert.*

denied, 449 U.S. 888 (1980)[“It is well settled that independent searches by private citizens are unaffected by Fourth Amendment prohibitions against unreasonable searches and seizures, and that results thereof constitute admissible evidence.”].

However, where it can be shown that Government authorities participated in a search or seizure at some stage, then Fourth Amendment protections will be implicated, even though the search was not originated or requested by police authorities.

And in Texas, searches by private citizens are subject to suppression under Article 38.23 of the Texas Rules of Criminal Procedure. The provision excludes evidence obtained by illegal means, who ever obtains it.

ART. 38.23 Evidence Not to be Used.

“No evidence *obtained by an officer or other person* in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of American, shall be admitted in evidence against the accused on the trial of any criminal case.”

At a time when some judges are displaying hostility to the Constitutional exclusionary rule (if not the Fourth Amendment itself), it is important to remember that the legislative representatives of the people of Texas enacted and repeatedly reenacted a broader, statutory rule of exclusion long before it was required by federal courts. . . .

See also MCCORMICK & RAY, 1 TEXAS LAW OF EVIDENCE 473 (2d Ed. 1956).

"The Texas statute lays down a rule far broader than that existing in any other state and goes much beyond the doctrine of the *Boyd* and *Weeks* cases. In the first place, while the federal rule excludes only evidence illegally obtained by federal officers, and those cooperating with them, the Texas statute makes a clean sweep and excludes evidence thus obtained by anyone."

State v. Johnson, 939 S.W.2d 586 (Tex.Crim. App. 1996) [exclusionary statute encompasses evidence illegally obtained by private individuals]; *Cobb v. State*, 85 S.W.3d 258 (Tex.Crim.App. 2002)[because private person did not commit theft when he took knives from defendant's apartment while retrieving car keys for defendant's hospitalized girlfriend, the state exclusionary rule applicable to evidence seized by a private citizen in violation of law did not apply; the father took the knives to the police and was not acting to deprive the defendant of them].

AIRLINE EMPLOYEES

Searches of unlabelled luggage at airport by airline employees is a private search and therefore is not within the scope of the Fourth Amendment. *U.S. v. Connolly*, 636 F. Supp. 1581 (D. Colo. 1986); *U.S. v. Pierce*, 893 F.2d 669, (5th Cir. 1990)[citing Ninth Circuit test [*U.S. v. Snowadzki*] the Fifth Circuit found that airport employees were not agents and their search of package was not state action where purpose of opening package was not solely to search for drugs]. However, if law enforcement participates in the search in any way, at any time before the object of the search is completely accomplished, the evidence obtained is inadmissible. *Lustig v. U.S.*, 338 U.S. 74, 79, 69 S.Ct. 1372, 93 L.Ed. 1819 (1949).

"This Court has consistently held that searches by private individuals undertaken without 'collusion with federal officers' ...or 'at the behest of Government officials' ...do not implicate the Fourth Amendment inasmuch as no Governmental action is involved."*U.S. v. Andrews*, 618 F.2d 646, 652 (10th Cir.), *cert. denied*, 449 U.S. 824 (1980).

"Although the surreptitious search of premises by a private party does not violate the Fourth Amendment, if, in conducting the search, the searcher is acting as an instrument or agent of the Government, there is a Fourth Amendment transgression.... However, '[a] private person cannot act unilaterally as an agent or instrument of the state; there must be some degree of governmental knowledge and acquiescence'." *U.S. v. Bennett*, 709 F.2d 803, 805 (2d Cir. 1983).

"But the evidence would be excludable in the present case even if the TWA employee had not acted solely to satisfy the government's interest in viewing the contents of the package, but instead had initiated and participated in the search for reasons contemplated by the inspection clause in TWA's tariff. The customs agents joined actively in the search. They held open the flaps of the large package; removed, opened, and inspected the contents of the small boxes which it contained; and marked the small boxes for future identification. Thus, at the very least, the search of appellant's package was a joint operation of the customs agents and the TWA employee. When a federal agent participates in such a joint endeavor, 'the effect is the same as though he had engaged in the undertaking as one exclusively his own'." *Corngold v. U.S.*, 367 F.2d 1, 5-6 (9th Cir. 1966).

TEST FOR WHETHER GOVERNMENT PARTICIPATION IS SUFFICIENT TO A WARRANT FOURTH AMENDMENT PROTECTIONS

U.S. v. Snowadzki, 723 F.2d 1427, 1429 (9th Cir. 1984).

"To determine whether a private person acted as a government agent in an illegal search and seizure, this court considers '(1) whether the government knew of and acquiesced in the intrusive conduct, and (2) whether the party performing the search intended to assist law enforcement efforts or to further his own ends.'... The burden of establishing government involvement in a private search rests on the party objecting to the evidence." *U.S. v. Snowadzki*, 723 F.2d at 1429.

MAIL COURIERS

U.S. v. Ford, 525 F.2d 1308, 1311 (10th Cir. 1975).

"Mrs. Ford does not question the right and duty of an air carrier to inspect any package or article submitted for shipment if it has reason to believe the package does not conform to tariff regulations. But, if government officers participated in this inspection, it became a warrantless government search, per se unreasonable unless falling within one of the carefully defined exceptions." *U.S. v. Ford*, 525 F.2d at 1311.

SCHOOL OFFICIALS

Horton v. Goose Creek Ind. School Dist., 690 F.2d 470 (5th Cir. 1982) [school officials, employed and paid by state and supervising children [who are for the most part compelled to attend] are agents of government and constrained by Fourth Amendment]. See also *Jones v. Latexo Independent school Dist.*, 499 F. Supp. 223, 229 (1980).

"The blanket inspection carried out by the 'sniffer dog' and the resulting searches of selected students and private vehicles constituted state action.... ...While the doctrine of *in loco parentis* places the school teacher or employee in the role of a parent for some purposes, that doctrine cannot transcend constitutional rights."

"The fact that some of the challenged actions were carried out by employees of SAI, a private corporation, does not lessen the degree of state involvement. The entire drug detection program at the Latexo School was initiated and implemented at the direction of the School Board and with the active involvement of Superintendent Acker and other school personnel. At the very least, the school was a joint participant in the program at all times, rendering the challenged conduct state action...." [citations omitted]. *Jones v. Latexo Independent School Dist.*, 499 F. Supp. at 229.

However, it is important to remember in special settings, as in a school, children's Fourth Amendment protections are diminished by the school's duty to act *in loco parentis*. *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 122 S.Ct. 2559, 153 L.Ed.2d 735 (2002)[school children who participate in extra circular activities may be drug tested pursuant to school policy without a warrant and without an initial showing that the school is experiencing a drug problem].

VIOLATION OF STATUTES

Even non-constitutional violations of state or federal statutes may render evidence inadmissible.

Miller v. U.S., 357 U.S. 301, 78 S.Ct. 1190, 2 L.Ed.2d 1332 (1958) [violation of District of Columbia Law and substantially identical requirements of federal statute].

As explained above, Texas precludes the admission of evidence obtained by law enforcement or private persons in violation of any law. See Texas Code of Criminal Procedure Art. 38.23. Also a violation of the federal wiretap statute will result in exclusion of the evidence obtained thereby from any proceeding for any purpose. However, a violation of the Right to Financial Privacy Act of 1978 does not result in suppression of the fruits. *U.S. v. Frazin*, 780 F.2d 1461 (9th Cir. 1986), *cert. denied*, 479 U.S. 844 (1986). Nor is the violation of ethical rules typically remedied by suppression of the evidence obtained by the violation.

POSSE COMITATUS ACT

The use of military personnel in violation of the Posse Comitatus Act is constitutionally unreasonable if it results in searches and seizures by military means. 18 U.S.C. 1385. *Bissonette v. Haig*, 776 F.2d 1384 (8th Cir. 1985). However, such violations have not resulted in exclusion of the evidence obtained. *U.S. v. Wolffs*, 594 F.2d 77 (5th Cir. 1979)[foreclosed the creation of an exclusionary rule, unless it was "confronted ...with widespread and repeated violations of the Posse Comitatus Act"]; *U.S. v. Hartley*, 796 F.2d 112 (5th Cir. 1986) [citing *Wolffs*, 594 F.2d at 85]; *U.S. v. Walden*, 490 F.2d 372 (4th Cir.), *cert. denied*, 417 U.S. 977, 94 S.Ct. 3187, 41 L.Ed.2d 1148 (1974); *State v. Danko*, 219 Kan. 490, 548 P.2d 819 (1976); *State v. Sanders*, 303 N.C. 608, 281 S.E.2d 7 (1981), *cert. denied*, 454 U.S. 973, 102 S.Ct. 523, 70 L.Ed.2d 392 (1981).

VIOLATION OF AGENCY REGULATIONS

The Supreme Court has held that the exclusionary rule does not apply to evidence [tape recordings] obtained in violation of I.R.S. regulations noting that "no statute was violated by the recording of respondent's conversations." *U.S. v. Caceras*, 440 U.S. 741, 99 S.Ct. 1465, 1473 & n. 21, 59 L.Ed.2d 733 (1979).

PROCEDURAL RULES CANNOT CIRCUMVENT THE FOURTH AMENDMENT:

The prosecutor cannot make use of civil forfeiture procedures (civil forfeiture "seizure" warrant) to "search" for and gain evidence or to physically intrude upon and evict a tenant. *U.S. v. Ladson*, 774 F.2d 436 (11th Cir. 1988). See also *Forfeiture Searches of Real Property*, 25 CRIM. L. REV. 59 (1987).

III. WARRANTLESS SEARCHES: SHIFT IN SUPREME COURT'S PHILOSOPHY ("ONLY A FEW NARROWLY DEFINED EXCEPTIONS") HAS BEEN TRANSMOGRIFIED INTO "A WIDE RANGE OF DIVERSE ...FLEXIBLE COMMON SENSE EXCEPTIONS"

While the Supreme Court has held:

"The most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment -- subject only to a few specifically established and well-defined exceptions [which] are jealously and carefully drawn'." *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55, 91 S.Ct. 2022, 29 L.Ed.2d 564, 576 (1971).

More recently it stated:

"Our cases hold that procedure by way of a warrant is preferred, although in a wide range of diverse situations we have recognized flexible, common sense exceptions to this requirement." *Texas v. Brown*, 460 U.S. 730, 103 S.Ct. 1535, 1539, 75 L.Ed.2d 502 (1983).

Justice Brennan in dissent remarks that:

"[W]ords such as 'practical', 'nontechnical' and 'common sense' as used in the Court's opinion, are but code words for an overly permissive attitude towards police practices in derogation of the rights secured by the Fourth Amendment. Everyone shares the Court's concern over the horrors of drug trafficking, but under our Constitution only measures consistent with the Fourth Amendment may be employed by government to cure this evil. We must be ever mindful of Justice Stewart's admonition in *Coolidge*, that '[i]n times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represent may appear unrealistic or 'extravagant' to some. But the values were those of the authors of our fundamental constitutional concepts'.... In the same vein, *Glasser v. United States*, 315 U.S. 60 (1942), warned that '[s]teps innocently taken may, one by one, lead to the irretrievable impairment of substantial liberties'. *Id.* at 86." *Illinois v. Gates*, 462 U.S. at 290.

A. EXCEPTIONS TO WARRANT REQUIREMENT:

Texas recognizes a number of statutory exceptions to the warrant requirement, as well as exceptions developed through case law. One statutory exception provides for the arrest of an individual who has committed an offense in the presence of the police officer. See Article 14.01, Texas Code of Criminal Procedure. "[T]he information afforded to the officer by his senses must give the officer reason to believe that *a particular suspect* committed the offense." *State v. Steelman*, 93 S.W.3d 102 (Tex.Crim.App. 2002)[emphasis in original]. Another statutory exception appears in the Texas Transportation Code, which allows blood to be drawn from drivers in fatal accidents. *Hailey v. State*, 87 S.W.3d 118 (Tex. Crim. App. 2002), *cert. denied* 538 U.S. 1060 (2003).

1. PLAIN VIEW:

Under the "plain view doctrine", "once officers are lawfully in a position to observe an item first hand, the owner's privacy interest in that item is lost." *Illinois v. Andreas*, 463 U.S. 765, 103 S.Ct. 3319, 77 L.Ed.2d 1003 (1983). See also *U.S. v. Osunegbu*, 822 F.2d 472 (5th Cir. 1987) [searching post office box and outside of mail].

PLACE FROM WHICH ITEM IS OBSERVED (NOT SUCH A PLAIN VIEW)

However, the officer must obtain his view from a location where he has a right to be. *U.S. v. Jackson*, 588 F.2d 1046, 1053 (5th Cir. 1979) ["[w]e have not hesitated to find an illegal search where the government

agent trespasses in order to secure his plain view"]; *U.S. v. Whaley*, 781 F.2d 417, 418 (5th Cir. 1986) [a sheriff 'drove onto the driveway of a residence where his car's lights illuminated ...plants he had observed from the roadway was unconstitutional since the officer was only able to make "positive identification" by driving his car onto the individual's curtilage, thereby invading his privacy]; *Fixel v. Wainwright*, 492 F.2d 480 (5th Cir. 1974)[same]; *U.S. v. Ladson*, 774 F.2d 436 (11th Cir. 1985) [agents who entered premises pursuant to a forfeiture order against the real estate's owner, had no right to inventory the contents of those leased premises which belonged to the tenant]; *U.S. v. Amuny*, 767 F.2d 1113, 1125-29 (5th Cir. 1985) [holding that "climbing onto the wing [of an aircraft] and garnering an otherwise unavailable view through the front windshield constitute an unlawful search", noting that "the plain view doctrine does not apply" to an observation obtained by such an intrusion];

Cf. U.S. v. Martin, 806 F.2d 204 (8th Cir. 1986) [noting items in plain view in vehicle parked on public street lacked Fourth Amendment protection from unreasonable search, such that "plain view doctrine" did not apply].

The plain view doctrine does not controvert the rule that, absent exigent circumstances, a police officer must have a warrant to enter a home or its curtilage to make a search or seizure.

See In re T.H., 898 A.2d 908 (D.C. 2006) [A police officer who spied a box of illegal fireworks in the open cargo area of a parked sport utility vehicle did not have probable cause to arrest a back seat passenger for possessing the fireworks. The court decided that the presence of the fireworks in the car was not so suggestive of the defendant's involvement in lawbreaking as to give rise to probable cause.]

"PLAIN VIEW" NEED NOT BE INADVERTENT

Interpreting another passage from the dicta in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), the Supreme Court held that the Fourth Amendment does not prohibit warrantless seizure of evidence of crime in plain view, even where its discovery was not inadvertent. *Horton v. California*, 496 U.S. 128, 110 L.Ed.2d 112, 110 S.Ct. 2301 (1990).

"IMMEDIATELY APPARENT" ITEM IN "PLAIN VIEW" IS EVIDENCE OF CRIME

The Supreme Court has held that in order for the "plain view" doctrine to warrant a seizure it must be "immediately apparent" to the searching officer that he has contraband or evidence of a crime before him.

Cases where not "immediately" apparent:

Coolidge v. New Hampshire, 403 U.S. 443, 468, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); *Arizona v. Hicks*, 480 U.S. 321, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987) [officers may not lift an object in order to read a serial number]; *U.S. v. Gray*, 484 F.2d 352 (6th Cir. 1973), *cert. denied*, 414 U.S. 1158 [serial nos. on firearms]; *Williams v. State*, 743 S.W.2d 642 (Tex.Crim.App. 1988) [not immediately apparent guns were stolen]; *Nicholas v. State*, 502 S.W.2d 169, 172 (Tex.Crim.App. 1973) [photographic negatives]; *McGlynn v. State*, 704 S.W.2d 18 (Tex.Crim.App. 1982) [prescription bottle]; *Sullivan v. State*, 626 S.W.2d 58 (Tex.Crim. App. 1981) [pill bottle]; *Minnesota v. Dickerson*, 508 U.S. 366, 113 S. Ct. 2130, 124 L.Ed.2d 334 (1993) [plain view does not allow manipulation of an object to determine what it is].

But see U.S. v. Meyer, 827 F.2d 943 (3d Cir. 1987), *abrogated by Horton v. California*, 496 U.S. 128 (1990)[officer may rely on surrounding circumstances in determining immediate apparent nature]; *U.S. v. Iredia*, 866 F.2d 114 (5th Cir. 1989) [officer testified that during *Belton* search it was "immediately apparent" to him that an address book was probably incriminating evidence, the book's seizure after the vehicle containing same was moved to a secret service garage was proper even though not seized during a search conducted with standardized police procedures].

In Texas, the one-time discovery of a single plastic bag containing marijuana residue in the garbage did not establish probable cause to search the house in light of the totality of other circumstances. See *State v. Davila*, 169 S.W.3d 735 (Tex. App-Austin 2005).

AUDIO TAPES

U.S. v. Falcon, 766 F.2d 1469 (10th Cir. 1985) [court held that an audio tape discovered during a consent search could be listened to without a warrant].

WRITINGS

However, one court has held that even after *Texas v. Brown* it is not "immediately apparent" that writings are evidence or instrumentalities of crime without reading same. *U.S. v. McLernon*, 746 F.2d 1098 (6th Cir. 1984) [it was not immediately apparent that a note pad and calendar were incriminating].

"The district court ...apparently understood the Supreme Court's *Brown* decision to have 'qualified' the immediately apparent test 'by holding that the police need only have probable cause to believe the seized item has criminal significance or evidentiary value...." Our decisions predating and post-dating *Brown*, however, and the majority in *Brown* itself, have not only unequivocally adhered to the 'immediately apparent' test, but have embellished that test. We find absolutely nothing in the Supreme Court's *Brown* decision to undermine the policies, principles and precedents which require us to determine whether the agents' probable cause to believe the note pad and calendar were evidence of a crime was both immediate and apparent to them upon their 'plain view' of the objects. The note pad and the calendar themselves were undoubtedly in 'plain view'.

Yet, we find that probable cause of criminality was neither immediate nor apparent to the agents from their plain view of the items. Unlike the sawed-off shotgun in *Truitt* and the knotted balloon in *Brown*, the note pad and calendar in this case were hardly 'intrinsically' incriminating. Indeed such items are found in plain view of virtually every desk across this country. We do not, and cannot, subscribe to a rule of law which allows officers of the state to seize an item as evidence merely because it is in 'plain view'." *U.S. v. McLernon*, 746 F.2d 1098 (6th Cir. 1984).

See also *Scoggan v. State*, 736 S.W.2d 239 (Tex.App.-1987), *reversed and remanded on other grounds*, 799 S.W.2d. 679 (Tex. Crim. App.1990) [magazines were not properly seized although in plain view when seizure of photos and clothes were authorized by the warrant].

But see Johnston v. U.S., 832 F.2d 1 (1st Cir. 1987) [adding machine tapes could be seized during search for evidence relating to drug trafficking because in plain view and police had probable cause].

The collective knowledge doctrine could be applied to establish that the incriminating nature of firearms was "immediately apparent" were during a protective sweep of suspect's home officers did not themselves have knowledge of prior conviction, thereby making possession illegal. See *U.S. v. Waldrop*, 404 F.3d 365 (5th Cir 2005).

FIREARMS

U.S. v. Dart, 747 F.2d 263 (4th Cir. 1984) [holding "it was not immediately apparent that any of the weapons first seen in the stack were unregistered or stolen"]; *U.S. v. Bonitz*, 826 F.2d 954 (10th Cir. 1987) [items used to convert a rifle into an automatic weapon and the rifle could not be seized since not in plain view]; *U.S. v. Owen*, 621 F. Supp. 1498 (E.D. Mich. 1985) [refusing to apply good faith exception to warrant seizure of weapons whose contraband character had not been immediately apparent]; *U.S. v. Gray*, 484 F.2d 352 (6th Cir.), *cert. denied*, 414 U.S. 1158 (1973); *U.S. v. LaFerrera*, 596 F. Supp. 362 (S.D. Fla. 1984) [searching of premises for evidence of theft of electricity pursuant to a valid search warrant, police found and removed weapons, although

it is permissible to secure the weapons for the safety of those conducting the search, absent probable cause to believe a crime has been or is being committed, police were not authorized in seizing the items in plain view because it was not immediately apparent that the items were illegal]; *U.S. v. Szymkowiak*, 727 F.2d 95 (6th Cir. 1984) [observation of an AR-15 rifle did not cause the illegal nature of the weapon to be "immediately apparent" so that it could be lawfully seized under the plain view doctrine]; *State v. Cook*, 332 S.E.2d 147 (W.Va. 1985) [evidentiary value of checkbook found during search of accused's hotel room was not apparent until it had been opened and examined]; *U.S. v. Robinson*, 535 F.2d 881, 886 (5th Cir. 1976) [could not tell envelope with check [observable] was a stolen Treasury Check]; *U.S. v. Martin*, 640 F. Supp. 543 (E.D.Ark. 1986) [notebook and folder which were nondescript].

STEREO EQUIPMENT

Arizona v. Hicks, 480 U.S. 321, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987) [moving stereo equipment constitutes seizure requiring probable cause].

PLASTIC BAGS

Moya v. U.S., 761 F.2d 322 (7th Cir. 1985) [observation of the corner of a plastic bag protruding from accused's luggage did not establish the degree of cause necessary to warrant belief same was contraband]; *Texas v. Brown*, 460 U.S. 730, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983) [probable cause to believe that a small party balloon tied at one end was used to conceal narcotics].

"PLAIN TOUCH" DOCTRINE

The District of Columbia Court of Appeals has expanded the "plain view doctrine" to include the seizure of the contents of bags that when lawfully touched by a police officer are "so apparent to him as to bring them into his 'plain view'." *U.S. v. Williams*, 822 F.2d 1174, 1182 (D.C. Cir. 1987), *overturned on other grounds*, *U.S. v. Caballero*, 936 F.2d 1292 (D.C. Cir. 1991). However, an officer may not manipulate an item in a pocket to determine what is inside. *Minnesota v. Dickerson*, 508 U.S. 366, 113 S. Ct. 2130, 124 L.Ed.2d 334 (1993).

"IMMEDIATELY APPARENT" MEANS NO MORE THAN "PROBABLE CAUSE" TO BELIEVE

The Supreme Court, in an opinion by Justice Rehnquist criticized the "use of the phrase 'immediately apparent'" as a "very likely ... unhappy choice of words" in *Coolidge v. New Hampshire*, 403 U.S. 443, n. 24, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1978), "since it can be taken to imply that an unduly high degree of certainty as to the incriminatory character of evidence is necessary for an application of the 'plain view' doctrine." *Texas v. Brown*, 460 U.S. 730, 103 S.Ct. 1535, 1542, 75 L.Ed.2d 502 (1983).

Rather than some "high degree of certainty" the Court held the officer needs only "probable cause to associate the property with criminal activity." *Texas v. Brown*, 460 U.S. at 741.

"It merely requires that the facts available to the officer would 'warrant a man of reasonable caution and belief' ...that certain items may be contraband or stolen property or useful and evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false." *Texas v. Brown*, 460 U.S. at 741.

The Court found that the fact the particular "party balloon" seen in defendant's vehicle was "knotted about one half inch from the tip" and that in the experience of the arresting officer (and a testifying chemist) "narcotics frequently were packaged' in balloons of such "distinctive character", coupled with the open glove compartment containing "several small plastic vials, quantities of loose white powder, and an open bag of party balloons", constituted probable cause to seize the balloon in "plain view". *Texas v. Brown*, 460 U.S. at 743.

The Supreme Court clarified the issue by holding that an object seen by officers in plain view after lawfully entering a residence may not be searched or seized unless the officers have probable cause to believe that the object is contraband or evidence of a crime. *Arizona v. Hicks*, 480 U.S. 321, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987).

"We have not ruled on the question whether probable cause is required in order to invoke the 'plain view' doctrine. Dicta in *Payton v. New York*, 445 U.S. 573, 587 (1980), suggested that the standard of probable cause must be met, but our later opinion in *Texas v. Brown*, 460 U.S. 730 (1983), explicitly regarded the issue as unresolved. *Texas v. Brown*, 460 U.S. at 742 n.7 [plurality]; *see also id.* at 746 [Stevens, J., concurring].

We now hold that probable cause is required. To say otherwise would be to cut the 'plain view' doctrine loose from its theoretical and practical moorings. The theory of that doctrine consists of extending to non-public places such as the home, where searches and seizures without a warrant are presumptively unreasonable, the police's longstanding authority to make warrantless seizures in public places of such objects as weapons and contraband. *See Payton v. New York*, 445 U.S. at 586-587. And the practical justification for that extension is the desirability of sparing police, whose viewing of the object in the course of a lawful search is as legitimate as it would have been in a public place, the inconvenience and the risk - to themselves or to preservation of the evidence - of going to obtain a warrant. *See Coolidge v. New Hampshire*, 403 U.S. at 468 (plurality). Dispensing with the need for a warrant is worlds apart from permitting a lesser standard of cause for the seizure than a warrant would require, i.e., the standard of probable cause. No reason is apparent why an object should routinely be seizable on lesser grounds, during an unrelated search and seizure, than would have been needed to obtain a warrant for that same object if it had been known to be on the premises." *Arizona v. Hicks*, 480 U.S. at 327.

The Court reaffirmed *Hicks* by holding that the manipulation of a hard object that was not a weapon constituted a search and therefore did not fit within the "plain view" or pat down exception to warrant requirement. *Minnesota v. Dickerson*, 508 U.S. 366, 113 S. Ct. 2130, 124 L.Ed.2d 334 (1993).

U.S. v. Johnston, 784 F.2d 416 (1st Cir. 1986) ["Immediately Apparent" requirement may be based upon cumulated knowledge of all officers but police cannot closely scrutinize an item to ascertain its incriminating nature]; *U.S. v. Villarreal*, 963 F.2d 770, 776 (5th Cir. 1992) [drums labeled as "phosphoric acid" with shipping orders indicating the same, yet which contained marijuana, did not outwardly reveal their contents, and therefore owner still had reasonable expectation of privacy in actual contents. . . . "Stated another way, a label on a container is not an invitation to search it."]; *State v. Griffith*, 2011 Ohio 4476 (Ohio Ct. App. 2011) [small quantity of marijuana found in plain view (or smell) in passenger compartment is not reason to search the trunk, more is required].

INVESTIGATION PRECLUDES "IMMEDIATELY APPARENT"

If officers must scrutinize an item further, then its incriminating nature is not immediately apparent. *U.S. v. Johnston*, 784 F.2d 416 (1st Cir. 1986); *State v. Gallegos*, 712 P.2d 207 (Utah 1985) [noting independent outside investigation establishing probable cause precludes plain view doctrine's element of "immediately apparent" illegality; item investigated must be named in warrant].

SEARCH OF SEIZED ITEMS MAY STILL REQUIRE A WARRANT

The concurring justices in *Texas v. Brown* were quick to point out that while the officer there had probable cause to believe he had evidence of a crime before him "... a closed container may not be opened without a warrant, even when the container is in plain view and the officer has probable cause to believe contraband is concealed within" [citing *Chadwick* and *Sanders*] unless "there was probable cause to search the entire vehicle" [under *Ross*] or [there was virtual certainty that the balloon contained a controlled substance "because the balloon was one of those rare single-purpose containers" which by its nature could not support any "reasonable expectation of privacy" [under *Sanders*]]. *Texas v. Brown*, 460 U.S. at 747. [Stevens, J., concurring].

Accordingly, while officers may be entitled to seize opaque plastic wrapped packages that reeked of marihuana, they were required to obtain a warrant prior to opening and searching packages once the officer had rendered them to their own custody and control.

U.S. v. Miller, 769 F.2d 554 (9th Cir. 1985) [holding seizure of a clear plastic bag that fell out of defendant's suitcase and a field test of the white powder inside were held to be lawful under the plain view doctrine. But the court held that a warrant was required to make incisions into a second bag and an opaque container in it because it was neither immediately apparent that it was contraband nor was it a "single purpose container"].

Likewise, where officers executing a search warrant seized documents in plain view but outside of the scope of the warrant, a separate search warrant was required to obtain the printed matter contained on the documents since same was not immediately apparent. *LeClair v. Hart*, 800 F.2d 692 (7th Cir. 1986) [officers dictated the contents of document verbatim into a tape recorder].

Walter v. United States, 447 U.S. 649, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980)[where federal agents were in lawful possession of videotapes which had been shipped in interstate commerce, the labels of which clearly indicated that the contents depicted sexually explicit materials, a warrant was nevertheless required for the agents to view the tapes. This is because, while it is illegal to ship obscene materials in interstate commerce, it is not illegal to ship merely sexually explicit materials. Since a label indicating sexually explicit contents does not *per se* indicate that the contents are obscene, the evidence of illegality was not "immediately apparent"].

Contra U.S. v. Johns, 469 U.S. 478, 105 S.Ct. 881, 83 L.Ed.2d 890, 899 (1985)[warrantless search of packages seized from a truck on a landing strip three days after the seizure was held permissible]; *Cooper v California*, 386 U.S. 58, 61-62, 17 L Ed 2d 730, 87 S. Ct. 788 (1967) [upholding as inventory of impounded vehicle warrantless search that took place seven days after seizure of automobile pending forfeiture proceedings]."

Comprehensive searches of computers have relied upon the plain view doctrine. *Comprehensive Drug Testing v. United States*, 621 F.3d 1162 (9th Cir. 2009) (*en banc* revised and superseded opinion "CDT III"). However some courts have rejected that a search of a computer could rely upon the plain view doctrine and must obtain a particular warrant not a general warrant if a computer is to be searched. *See In re United States of America's Application for a Search Warrant to Seize and Search Electronic Devices from Edward Cunniss*, 770 F. Supp. 2d 1138 (W.D. Wash. 2011) (invalidating a general warrant to search defendants computer unless a "filter team" is used).

"FIELD TEST"

In *U.S. v. Jacobsen*, 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984) however, the Court held that a federal agent needed no search warrant to conduct a "field test" of a white powdery substance in a translucent plastic bag that had been turned over to the agent following its discovery by Federal Express, a private freight carrier. Relying on the private search doctrine, the Court reasoned that the DEA agents' intrusion into the contents of the bag did not exceed the scope of the antecedent private search by Federal Express employees - who had examined the contents of the box "for insurance purposes" after it was damaged. After the freight carrier's search, the box simply could not support any expectation of privacy.

According to the majority it did not matter whether or not the "powder" was actually in "plain view" when DEA agents arrived, as the contents had already been described to the agents and "there was a virtual certainty that a manual inspection ...would not tell [the agent] anything more than he had already been told".

And, analogizing the "field test" to the intrusion of luggage by sniffing canines approved in *U.S. v. Place*, 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983), the Court stressed the nature of information revealed by the test does not compromise any legitimate interest in privacy:

"A chemical test that merely discloses whether or not a particular item is cocaine does not compromise any legitimate interest in privacy. This is true, whether the result is positive or negative. If positive, the test has revealed the presence of a substance in which there can be no legitimate interest. If the results are negative nothing of special interest has been revealed." *U.S. v. Jacobsen*, 466 U.S. at 123.

2. **EXIGENT CIRCUMSTANCES:**

One of the "jealously and carefully drawn" exceptions to the warrant requirement is where law enforcement officers are faced with exigent circumstances requiring prompt action.

Courts have held such "exigent circumstances" to include:

a. ***DANGER TO LIVES OF OFFICERS OR OTHERS:***

Warden v. Hayden, 387 U.S. 294 (1967); *U.S. v. Crespo*, 834 F.2d 267 (2d Cir. 1987); *U.S. v. Tabor*, 722 F.2d 596 (10th Cir. 1983); *U.S. v. Metzger*, 778 F.2d 1195 (6th Cir. 1985).

But see U.S. v. Walker, 673 F. Supp. 292 (N.D. Ill. 1987) [warrantless search for others in house while proceeding with bail bond forfeiture warrant was impermissible because there was no danger presented].

b. ***DESTRUCTION OF EVIDENCE:***

U.S. v. Williams, 612 F.2d 735 (3d Cir. 1979), *cert. denied*, 445 U.S. 934 (1980); *U.S. v. Impink*, 728 F.2d 1228 (9th Cir. 1984); *U.S. v. Palumbo*, 742 F.2d 656 (1st Cir. 1984) [officers must use least restrictive intrusion in preventing destruction of evidence]; *State v. Ramirez*, 746 P.2d 344 (Wash. Ct. App. 1987) [smell of burning marijuana did not provide an exigent circumstance since the same provided suspicion of only minor crime violation].

Kentucky v. King, 131 S.Ct. 1849 (2011)[warrantless entry to prevent the destruction of evidence is allowed where police do not create the exigency through actual or threatened Fourth Amendment violation]

Computer Data; *U.S. v. Bradley*, 644 F.3d 1213 (11th Cir. 2011)[An officer shutting down a computer server for an entire business without a warrant to search the server was justified by exigent circumstances that employees would erase crucial evidence with a few keystrokes].

In the very recent case, *Missouri v. McNeely*, 133 S. Ct. 1552 (2013), the Court addressed the issue of whether the natural dissipation of alcohol in a person's bloodstream constitutes an "exigent circumstance" justifying a warrantless blood draw. While recognizing that there may be circumstances in which obtaining a warrant impracticable, the Court refused to adopt a *per se* rule allowing warrantless blood draws from DWI suspects. *McNeely*, 133 S. Ct. at 1555. In part II-B of the majority opinion, authored by Justice Sotomayor, in which Justices Scalia, Kennedy, Ginsburg and Kagan joined, the Court held that "[w]hether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances." *Id.* at 1563. Concurring in part and dissenting in part, the Chief Justice, joined by Justices Breyer and Alito made "no quarrel with the Court's 'totality of the circumstances approach as a general matter.'" *Id.* at 1569 (Roberts, C.J., concurring in part, dissenting in part). The Chief Justice explained that, while "the majority offers no additional guidance, merely instructing courts and police officers to consider the totality of the circumstances," he would prefer the Court to "[s]imply put, when a drunk driving suspect fails field sobriety tests and refuses a

breathalyzer, whether a warrant is required for a blood draw should come down to whether there is time to secure one.” *Id.* at 1574. (Roberts, C.J., concurring in part, dissenting in part).

The lone vote contrary to the rest of the Court was by Justice Thomas. He put forth that “[b]ecause the body’s natural metabolism of alcohol inevitably destroys evidence of a crime, it constitutes an exigent circumstance.” *Id.* (Thomas, J., dissenting).

c. HOT PURSUIT:

Warden v. Hayden, 387 U.S. 294 (1967); *U.S. v. Santana*, 427 U.S. 38 (1976); *U.S. v. Williams*, 612 F.2d 735 (3d Cir. 1979), *cert. denied*, 445 U.S. 934 (1980).

See also Drug Enforcement Report, at 4 (August 8, 1988)[noting that pursuant to agreement between U.S. Forest Service and DEA, forest rangers are "deputized" to engage in "hot pursuit" of marijuana growers off of national forest land].

GOVERNMENT CANNOT CREATE ITS OWN EXIGENCY

U.S. v. Collazo, 732 F.2d 1200, 1204 (4th Cir. 1984) ["The Government will not be allowed to plead its own lack of preparation to create an exigency justifying warrantless entry"]; *Niro v. U.S.*, 388 F.2d 535 (1st Cir. 1968); *U.S. v. Satterfield*, 743 F.2d 827, 845 (11th Cir. 1984) [protection against unknown accomplice returning to the house while the officers took the arrestees to jail and obtained a search warrant "...is not the type of circumstance[] that creates an urgent need for immediate actions".]; *U.S. v. Thompson*, 700 F.2d 944, 950 (5th Cir. 1983); *U.S. v. Morgan*, 743 F.2d 1158, 1163 (6th Cir. 1984) [defendant posed no risk until officers surrounded home and flooded it with high-powered spotlights]; *U.S. v. Allard II*, 600 F.2d 1301, 1304 n.2 (9th Cir. 1979); *U.S. v. Hultgren*, 713 F.2d 79 (5th Cir. 1983) [government created delays and inconvenience of presenting facts to magistrate]; *U.S. v. Dowell*, 724 F.2d 599 (7th Cir.), *cert. denied*, 104 S.Ct. 1683 (1984).

But see U.S. v. Gomez, 652 F. Supp. 715 (S.D.N.Y. 1987) [prior to knocking on apartment door and identifying themselves, police lacked probable cause for a search warrant; but, upon hearing breaking glass inside closed apartment, their acts in entering apartment to prevent flight and to avoid destruction of evidence were reasonable response to exigency, and not a police-created exigency]; *U.S. v. De Los Santos*, 810 F.2d 1326 (5th Cir. 1987) [informant stated that defendant was going to go to a house to pick up heroin. Agents had to follow defendant to discover location of house, wait for defendant to leave in order to search house to discover no drugs, and then agents formed reasonable belief that defendant had picked up drugs in order to arrest him]; *Kentucky v. King*, 131 S.Ct. 1849 (2011)[police followed suspect who just bought drugs from undercover agent into apartment complex only to lose him. After smelling burning marijuana at one door they knocked and announced, heard evidence being destroyed, and entered the premises without a warrant to find that this was not the person they were searching for but never the less arrested him and charged him with drugs obtained from this warrantless entry. This was not police created exigency].

NO EXIGENT CIRCUMSTANCES

Where officers had 90-120 minutes during which they could at least attempt to obtain a telephone arrest warrant, their failure to do so undermines their claim of exigent circumstances. *U.S. v. Alvarez*, 810 F.2d 879 (9th Cir. 1987). *See also U.S. v. Patino*, 830 F.2d 1413 (7th Cir. 1981) [officers had 40 minutes]. A static-only 911 call by its self did not provide police officers with the exigent circumstances necessary to conduct a warrantless search of the residence from which the call originated. *U.S. v. Martinez*, 643 F.3d 1292 (10th Cir. 2011).

But see U.S. v. Aquino, 836 F.2d 1268 (10th Cir. 1988) [court was concerned about warrantless entry of home after lapse of time without a warrant but upheld conviction].

3. SAFETY STATUTE MUST BE LIMITED TO ITS SAFETY PURPOSE:

Where a citizen's Fourth Amendment protections are diminished under a "safety" statute, regulation, or exception, the scope of any governmental intrusion undertaken pursuant to that exception must be limited to the safety purpose that warranted the intrusion in the first place.

a. PUBLIC SAFETY/EMERGENCY EXCEPTION TO WARRANT REQUIREMENT:

Under the "public safety" exception to the requirement of giving *Miranda* warnings, an accused's custodial statements may be admissible despite their nature and regardless of the officer's motivation in questioning the suspect.

New York v. Quarles, 467 U.S. 649, 651, 81 L.Ed.2d 550, 554, 104 S.Ct. 2626 (1984) [officers may inquire as to location of firearm allegedly used in crime to protect supermarket patrons despite failing to give *Miranda* warnings to arrestee].

"[O]verriding considerations of public safety justified the officer's failure to provide *Miranda* warnings before he asked questions devoted to locating the abandoned weapon." *New York v. Quarles*, 467 U.S. at 651.

"Although *Terry* and *Long* speak in terms of an objective test ('reasonableness') for determining the officer's frisk for weapons, we do not read those cases as permitting a frisk where, although the circumstances might pass an objective test, the officers were not actually concerned for their safety." *U.S. v. Lott*, 870 F.2d 778 (1st Cir. 1989) [protective search of vehicle or person must be justified by officer's *subjective* concern].

Texas expanded the public safety exception in recognizing a "community caretaking" exception to the warrant requirement. *Wright v. State*, 7 S.W.3d 148 (Tex.Crim. App. 1999); *State v. Cavanaugh*, No. 01-04-00194CR not selected for publication (Tex. App. Hous. [1st Dist] 2005); *Huschle v. State*, No. 05-05-00907 CR (Tex. App. Dal. 2006).

"In evaluating whether an officer reasonably believes that a person needs help, courts may look to a list of four non-exclusive factors: (1) the nature and level of the distress exhibited by the individual; (2) the location of the individual; (3) whether or not the individual was alone and/or had access to assistance other than that offered by the officer; and 4) to what extent the individual, if not assisted, presented a danger to himself or others." *Corbin v. State*, 85 S.W.3d 272 (Tex.Crim. App. 2002).

However, if the court finds that the officer was primarily motivated by a "non-community caretaking purpose", the community-caretaking exceptions is not applicable and cannot be used to justify his intrusion. *Swaffar v. State*, 258 S.W.3d 254 (Tex.App.-Fort Worth 2008).

b. EMERGENCY EXCEPTION LIMITED TO SAFETY PURPOSE WARRANTING INITIAL INTRUSION:

However, the Supreme Court has held that where police officers enter premises under the emergency exception to the warrant requirement, their search is limited to the purpose warranting their initial intrusion. *Arizona v. Hicks*, 480 U.S. 321, 327, 107 S.Ct. 1149, 94 L.Ed.2d 347, 355 (1987). Unless that safety purpose amounts to a criminal violation in a regulated industry such as statutes regulating "chop shop" junkyards. *New York v. Burger*, 482 U.S. 691, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987).

"Dispensing with the need for a warrant is worlds apart from permitting a lesser standard of cause for the seizure than a warrant would require, i.e., probable cause. No reason is apparent why an object should routinely be seizable on lesser grounds, during an unrelated search and seizure, than would have

been needed to obtain a warrant for the same object if it had been known to be on the premises." *Arizona v. Hicks*, 480 U.S. at 327.

See also Minnesota v. Dickerson, 508 U.S. 366, 113 S. Ct. 2130, 124 L.Ed.2d 334 (1993) [a frisk permitted in *Terry* stop for safety purpose, once satisfied may not manipulate an object to determine if crack cocaine].

The Supreme Court held that The Fourth Amendment's emergency aid doctrine permits law enforcement officers to make a warrantless entry of a home when they are presented with circumstances that would lead a reasonable officer to believe that an occupant is seriously injured or in imminent danger of being seriously injured, regardless of the officers' actual motives for making the warrantless entry; a threat of ongoing violence within a home is a sufficiently serious danger to justify a warrantless entry of the home under the emergency aid doctrine. Law enforcement officers' actual, subjective motives for making a warrantless entry of a home are irrelevant to whether the entry is "reasonable" for purposes of the Fourth Amendment's emergency aid doctrine. In a unanimous opinion, the court left unanswered a number of divisive questions about the doctrine, but it did make clear that facts that indicate a threat of ongoing domestic violence will allow police to make a warrantless entry of a home. *See Brigham City, Utah v. Stuart*, 547 U.S. 398 (2006).

Also see Shepherd v. State, 273 S.W.3d 681 (Tex.Crim.App.,2008). [Finding that "the emergency doctrine does not apply when police are carrying out their crime-fighting role by conducting a search based on probable cause to gather evidence of a crime. Rather, the doctrine allows the police to engage in conduct that would otherwise violate the Fourth Amendment if they are acting on *reasonable belief* that doing so is immediately necessary to protect or preserve life or avoid serious injury." (emphasis added and internal quotations omitted)]

Also see Glazner v. State, 175 S.W.3d 262 (Tex.Crim.App.2005). [The search of Appellant's person was not unlawful. A pat-down search is permitted if the cop can "point to specific and articulable facts, which, taken with rational inferences from those facts, reasonably warrant the intrusion." The officer need not feel personally threatened, or be absolutely certain the person is armed to justify the pat-down. The officer testified at the suppression hearing that he saw what he believed was a knife in the defendant's pocket. Therefore, the pat-down was justified because Martin believed Appellant might be armed.]

c. NO MURDER SCENE EXCEPTION TO WARRANT REQUIREMENT:

Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978).

"[T]he 'murder scene exception' ...is inconsistent with the Fourth and Fourteenth Amendments ...the warrantless search of Mincey's apartment was not constitutionally permissible simply because a homicide had recently occurred there." *Mincey v. Arizona*, 437 U.S. at 395.

Thompson v. Louisiana, 469 U.S. 17, 105 S.Ct. 409, 83 L.Ed.2d 246 (1984) [unanimously declined to read a "murder scene" exception into the Fourth Amendment].

d. NO MEDICAL EMERGENCY BEYOND SCOPE OF MEDICAL NECESSITY:

Thompson v. Louisiana, 469 U.S. 14, 105 S.Ct. 409, 83 L.Ed.2d 246 (1984).

"Petitioner's attempt to get medical assistance does not evidence a diminished expectation of privacy on her part. To be sure, this action would have justified the authorities in seizing evidence under the plain view doctrine while they were in petitioner's house to offer her assistance. In addition, the same doctrine may justify seizure of evidence obtained in the limited 'victim-or-suspect' search discussed in *Mincey*. However, the evidence at issue here was not discovered in plain view while the police were assisting petitioner to the hospital, nor was it discovered during the 'victim-or-suspect' search that had been completed by the time the homicide investigators arrived. Petitioner's call for help can hardly be seen

as an invitation to the general public that would have converted her home into the sort of public place for which no warrant to search would be necessary." *Thompson v. Louisiana*, 469 U.S. at 22.

e. NO FIRE SAFETY EXCEPTION BEYOND FIRE SAFETY NEEDS:

Michigan v. Clifford, 464 U.S. 287, 104 S.Ct. 641 (1984):

"If a warrant is necessary, the object of the search determines the type of warrant required. If the primary object is to determine the cause and origin of a recent fire, an administrative warrant will suffice.

If the primary object of the search is to gather evidence of criminal activity, a criminal search warrant may be obtained only on a showing of probable cause to believe that relevant evidence will be found in the place to be searched.

Because the cause of the fire was then known, the search of the upper portions of the house, described above, could only have been a search to gather evidence of the crime of arson. Absent exigent circumstances, such a search requires a criminal warrant.

Even if the mid-day basement search had been a valid administrative search, it would not have justified the upstairs search. The scope of such a search is limited to that reasonably necessary to determine the cause and origin of a fire and to ensure against rekindling." *Michigan v. Clifford*, 464 U.S. at 294, 298.

f. DRUG TESTING CONSTITUTES A SEARCH:

In two cases decided the same day, the Supreme Court upheld drug testing in the work place after finding same constitutes a search subject to Fourth Amendment protections. *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 103 L.Ed.2d 639 (1989); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 103 L.Ed.2d 685 (1989).

In *Skinner*, the Court upheld railroad safety regulations which authorized drug testing of certain employees without a warrant or probable cause after finding same constitutes a search.

The majority first holds that drug testing is a search reasoning that "[t]here are few activities in society more personal or private than the passing of urine," *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. at 602; and then holds that Fourth Amendment protections are not invoked since the privacy interests involved are minimal, a contradiction exposed by Justice Marshall in his dissent:

"The majority's characterization of the privacy interests implicated by urine collection as 'minimal' is nothing short of startling. This characterization is, furthermore, belied by the majority's own prior explanation of why compulsory urination constitutes a search for the purposes of the Fourth Amendment:

"There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom." *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. at 679 [relying on *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 103 L.Ed.2d 685 (1989)].

The fact that the majority can invoke this powerful passage in the context of deciding that a search has occurred, and then ignore it in deciding that the privacy interests this search implicates are 'minimal', underscores the shameless manipulability of its balancing approach." *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. at 679.

In *National Treasury Employees Union v. Von Raab*, in a five-to-four decision, the Supreme Court held that drug testing of U.S. Customs Service employees seeking transfer to positions which directly involved the interdiction of illegal drugs, required the carrying of a firearm or required the handling of "classified" materials did not violate the Fourth Amendment. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 103 L.Ed.2d 685 (1989).

Likewise, in the special setting of a high school, the Supreme Court upheld suspicionless urinalysis drug testing policy against a Fourth Amendment challenge, reasoning that requiring all students who participated in competitive extracurricular activities was a reasonable means of furthering the school's important interest in preventing drug use among school children. *Board of Education of School District No. 92 of Pottawatomie County, v. Earls*, 536 U.S. 822, 122 S.Ct. 2559, 153 L.Ed.2d 735 (2002).

In another setting, the roadside stop of a driver suspected of driving while intoxicated, a warrant is required before an officer may draw and test the blood of the driver. The doctrine that one consents to a breath test by driving a vehicle on the highways does not invalidate a search of drawn blood conducted pursuant to a lawfully obtained warrant for the same. *See Beeman v. State*, 86 S.W.3d 613 (Tex.Crim.App. 2002) [implied consent statute did not preclude taking of blood sample pursuant to search warrant issued under Fourth Amendment, and thus result of test was admissible].

"...WELL MEANING BUT WITHOUT UNDERSTANDING"

Justice Scalia, in a forceful dissent, warns of the dangers inherent in the war on drugs in our society:

"There is irony in the Government's citation, in support of its position of Justice Brandeis's statement in *Olmstead v. United States*, 277 U.S. 438, 485, 72 L.Ed. 944, 48 S.Ct. 564, 66 A.L.R. 376 (1928) that '[f]or good or for ill, [our Government] teaches the whole people by its example.' Brief for United States at 36. Brandeis was dissenting from the Court's admission of evidence obtained through an unlawful Government wiretap. He was not praising the Government's example that 'the end justifies the means,'" *Olmstead v. United States*, 277 U.S. at 485. An even more apt quotation from that famous Brandeis dissent would have been the following:

"[I]t is ...immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Olmstead v. United States*, 277 U.S. at 479.

Those who lose because of the lack of understanding that begot the present exercise in symbolism are not just the Customs Service employees, whose dignity is thus offended, but all of us - who suffer a coarsening of our national manners that ultimately give the Fourth Amendment its content, and who become subject to the administration of federal officials whose respect for our privacy can hardly be greater than the small respect they have been taught to have for their own." *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 103 L.Ed.2d 685 (1989) [relying on *Olmstead v. U.S.*, 277 U.S. 438, 485 (1928)].

4. ADMINISTRATIVE SEARCHES:

The Supreme Court has expanded the "closely regulated" business exception to include "junkyards".

New York v. Burger, 482 U.S. 691, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987).

"An expectation of privacy in commercial premises, however, is different from, and indeed less than, a similar expectation in an individual's home. ... This expectation is particularly attenuated in commercial property employed in 'closely regulated' industries. The Court observed in *Marshall v. Barlow's, Inc.*, '[c]ertain industries have such a history of government oversight that no reasonable expectation of privacy... could exist for a proprietor over the stock of such an enterprise.'" *Marshall v. Barlow's, Inc.*, 436 U.S. 307 at 313.

Because the owner or operator of commercial premises in a 'closely regulated' industry has a reduced expectation of privacy, the warrant and probable-cause requirements, which fulfill the traditional Fourth Amendment standard of reasonableness for a government search... has lessened application in this context. Rather, we conclude that, as in other situations of 'special need'... where the privacy interests of the owner are weakened and the government interests in regulating particular businesses are concomitantly heightened, a warrantless inspection of commercial premises may well be reasonable within the meaning of the Fourth Amendment.

This warrantless inspection, however, even in the context of a pervasively regulated business, will be deemed to be reasonable only so long as three criteria are met.

First, there must be a 'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made. See *Donovan v. Dewey*, 452 U.S. 594 at 602 [stating 'substantial federal interest in improving the health and safety conditions in the Nation's underground and surface mines']; *United States v. Biswell*, 406 U.S. 311 at 315 [noting regulation of firearms is 'of central importance to federal efforts to prevent violent crime and to assist the States in regulating the firearms traffic within their borders']; *Colonnade Corp. v. United States*, 397 U.S. 72 at 75 [interest "in protecting the revenue against various types of fraud"].

Second, the warrantless inspections must be "necessary to further [the] regulatory scheme". *Donovan v. Dewey*, 452 U.S. at 600.

For example, in *Dewey*, we recognized that forcing mine inspectors to obtain a warrant before every inspection might alert mine owners or operators to the impending inspection, thereby frustrating the purposes of the Mine Safety and Health Act - to detect and thus to deter safety and health violations. *Donovan v. Dewey*, 452 U.S. at 603.

Finally, 'the statute's inspection programs, in terms of the certainty and regularity of its application, [must provid[e] a constitutionally adequate substitute for a warrant.' In other words, the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers. See *Marshall v. Barlow's, Inc.*, 436 U.S. at 325 [Stevens, J., dissenting]. To perform this first function, the statute must be 'sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes.' *Donovan v. Dewey*, 452 U.S. 594 at 600. In addition, in defining how a statute limits the discretion of the inspectors, we have observed that it must be 'carefully limited in time, place, and scope.'" *United States v. Biswell*, 406 U.S. 311 at 315.

See also *Robinson v. State*, 728 S.W.2d 858 (Tex. 1987) [Texas has such a statute]; *U.S. v. Schafer*, 461 F.2d 856 (9th Cir. 1972) [Plant Pest Act Case where the court stated the four requirements for a warrantless "administrative search"].

Again, these include:

1. a significant public protection is involved,

2. the intrusion involved is minimal,
3. *the goal is not the discovery of a crime*, and
4. the governmental purpose would be thwarted by requiring a warrant.

Contra U.S. v. Thomas, 973 F.2d 1152 (5th Cir. 1992) [an administrative search will not be invalidated because searching agent reasonably suspected crime, and was searching for evidence of same, even where no administrative searches were ever conducted for any other reason].

5. NO CIVIL FORFEITURE EXCEPTION TO WARRANT REQUIREMENT:

The government cannot use a civil forfeiture "seizure" warrant to search for and to gain evidence or to physically intrude upon an owner. *U.S. v. Ladson*, 774 F.2d 436 (11th Cir. 1985). *See also Forfeiture Searches of Real Property*, 25 AMER. CRIM. L. REV. 59 (1987).

6. FOURTH AMENDMENT DOES NOT APPLY TO SEARCHES, BY U.S. AGENTS, OF ALIEN'S PROPERTY IN FOREIGN COUNTRY:

In *U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 108 L.Ed.2d 222, 110 S.Ct. 1056 (1990), the Supreme Court held the Fourth Amendment does not apply to the search of an alien's property, by U.S. agents, located in a foreign country. In a 6 to 3 opinion written by Rehnquist, the Supreme Court held that:

"[W]e think it significant to note that [the Fourth Amendment] operates in a different manner than the Fifth Amendment, which is not at issue in this case. The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants. Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial. The Fourth Amendment functions differently. It prohibits 'unreasonable searches and seizures' whether or not the evidence is sought to be used in a criminal trial, and a violation of the Amendment is 'fully accomplished' at the time of a unreasonable governmental intrusion. For purposes of this case, therefore, if there were a constitutional violation, it occurred solely in Mexico. Whether evidence obtained from respondent's Mexican residences should be excluded at trial in the United States is a remedial question separate from the existence *vel non* of the constitutional violation.

"...What we know of the history of the drafting of the Fourth Amendment also suggests that its purpose was to restrict searches and seizures which might be conducted by the United States in domestic matters. The Framers originally decided not to include a provision like the Fourth Amendment, because they believed the National Government lacked power to conduct searches and seizures.

"...The available historical data show, therefore, that the purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government; it was never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the United States territory.

"...Justice Stevens' concurrence in the judgment takes the view that even though the search took place in Mexico, it is nonetheless governed by the requirements of the Fourth Amendment because respondent was 'lawfully present in the United States...even though he was brought and held here against his will.' But this sort of presence -- lawful but involuntary -- is not of the sort to indicate any substantial connection with our country. The extent to which respondent might claim the protection of the Fourth Amendment if the duration of his stay in the United States were to be prolonged -- by a prison sentence, for example - - we need not decide." [citations omitted--Kennedy and Stevens concurring/ Brennan, Marshall, and Blackmun Dissenting]. *U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 108 L.Ed.2d 222, 110 S.Ct. 1056 (1990).

B. REMEDY FOR FOURTH AMENDMENT VIOLATION OF ILLEGALLY SEIZED EVIDENCE IS MOTION TO SUPPRESS AND HEARING

FED. R. CRIM. P. Rule 41(f) specifically provides for the filing of a Motion to Suppress and a pretrial hearing thereon as the appropriate remedy for enforcing a defendant's Fourth Amendment protection against unreasonable search and seizure. In Texas, Article 28.01 of the Code of Criminal Procedure provides for the filing of a Motion to Suppress and further provides for the court to decide a motion based on the contents of the motion, affidavits and/or a hearing. Thus, courts may resolve suppression issues using one or multiple methods. *See Bishop v. State*, 85 S.W.3d 819 (Tex.Crim.App. 2002).

FED. R. CRIM. P. Rule 12(I) provides for the disclosure of witness statements under FED. R. CRIM. P. Rule 26.2 [reciprocal *Jencks*] at suppression hearings.

"(I) PRODUCTION OF STATEMENTS AT SUPPRESSION HEARING. Except as herein provided, rule 26.2 shall apply at a hearing on a motion to suppress evidence under subdivision (b)(3) of this rule. For purposes of this subdivision, a law enforcement officer shall be deemed a witness called by the government, and upon a claim of privilege the court shall excise the portions of the statement containing privilege matter." FED. R. CRIM. P. 12(I).

And "law enforcement" officers are "deemed" to have been called by the government even if subpoenaed and put on the stand by the defendant.

The Advisory Committee Notes to FED. R. CRIM. P. Rule 12(I) expressly provide that when "a federal, state or local officer has testified at a suppression hearing, the defendant will be entitled to any statement of the officer in the possession of the government and relating to the subject matter concerning which the witness has testified, without regard to whether the officer was in fact called by the government or the defendant."

But see FED. R. CRIM. P. 41(e) (effective December 1, 1989, deleting the language which provided for automatic suppression of evidence determined to have been illegally seized in a pre-indictment motion for return of property).

See also U.S. v. Viers, 637 F. Supp. 1343 (W.D. Ky. 1986) [failure to describe some items seized with particularity does not result in invalidation of warrant but only suppression of those items not adequately described].

PRE-INDICTMENT RETURN/SUPPRESSION OF SEIZED PROPERTY

Where Government agents act in "callous disregard for the constitutional rights" of the individual, Courts have "anomalous jurisdiction," supervisory power, equitable jurisdiction, and authority under Rule 41(e) of the Rules of Criminal Procedure to return items seized in a search pre-indictment. *See Hunsucker v. Phinney*, 497 F.2d 29,34-5 (5th Cir. 1974); *Richey v. Smith*, 515 F.2d 1239, 1243-4 (5th Cir. 1975); *In re Grand Jury Proceedings*, 115 F.3d 1240, 1245 (5th Cir. 1997); *Pena v. U.S.*, 122 F.3d 3, 4 (5th Cir. 1997); *Ramsden v. U.S.*, 2 F.3d 322, 324 (9th Cir. 1993).

Rule 41 of the Federal Rules of Criminal Procedure, provides in part:

"Motion for Return of Property. A person *aggrieved by an unlawful search and seizure or by the deprivation of property may move the district court for the district in which the property was seized for the return of the property* on the ground that such person is entitled to lawful possession of the property. The court shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted, the property shall be returned to the movant, although reasonable conditions may be imposed to protect access and use of the property in subsequent proceedings." *See: Fed. R. Crim. P. 41(e)* [emphasis supplied].

This new wording of Rule 41(e) requires the Court to consider not only the lawfulness of the search and seizure but also separately whether Movant is aggrieved by a deprivation of his property, apart from any inquiry regarding the legality of the search. *In re the Matter of the Search of Kitty's East v. U.S.*, 905 F.2d 1367, 1375 (10th Cir. 1990). In order to show the retention of his property by the Government is unreasonable, Movant need only show that the United States' legitimate interests can be satisfied even if the property is returned. Under such circumstances, the Government's continued retention of the property becomes unreasonable. *In re Search of Kitty's*, 905 F.2d at 1375.

“A substantial body of precedent establishes that federal district courts have power to order the suppression or return of unlawfully seized property even though no indictment has been returned and thus no criminal prosecution is yet in existence. Though firmly established, this jurisdiction is an exceptional one. Judge Friendly has observed that one may search the jurisdictional statutes...in vain for a grant of such power...*Grant v. United States*, 282 F.2d 165, 168 (CA2, 1960), and Judge Wyzanski has referred to the power as ‘the anomalous jurisdiction,’ *Lord v. Kelley*, 223 F.Supp. 684 (D.Mass. 1963), appeal dismissed, 334 F.2d 742 (CA1, 1964), cert. denied, 379 U.S. 961...(1965). The theory articulated by most of the cases is that jurisdiction to order suppression or return prior to indictment exists not by virtue of any statute but rather derives from the inherent authority of the court over those who are its officers.” (footnotes omitted) *Hunsucker v. Phinney*, 497 F.2d, at p. 32.

A District Court in this Division recently had occasion to exercise this supervisory power noting that although “the Supreme Court permits the government to present even illegally seized evidence to a grand jury,” *See: U.S. Calandra*, 414 U.S. 338, 348 (1978), courts retain supervisory power over the conduct of their agents sufficient to warrant suppression of evidence, even before indictment, where those agents' conduct is sufficiently egregious.

NECESSITY TO OBJECT AT TRIAL

Where the Motion to Suppress is denied defense counsel need not renew his motion at trial. 3 WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 678, at 142; *U.S. v. Whitlow*, 339 F.2d 975, 980 (7th Cir. 1968); *Waldon v. U.S.*, 219 F.2d 37, 41 (D.C. Cir. 1955); *Williams v. U.S.*, 263 F.2d 487 (D.C. Cir. 1959); *Gurteski v. U.S.*, 405 F.2d 253, 261 (5th. Cir. 1968), cert. denied, 395 U.S. 977.

However, care should be taken to be certain that the record reflects that the evidence sought to be suppressed prior to trial is the same as that offered by the Government during trial or the error will not be preserved. As to the admissibility of evidence tainted by an illegal search at any subsequent trial or hearing.

See MOORE'S FEDERAL PRACTICE section 41.08[5], at 41-94; *U.S. v. Janis*, 428 U.S. 433, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976) [suggesting exclusionary rule not applicable to civil proceeding].

However, after reversal of a conviction and the grant of a new trial, the case is returned to the same position it would have been in, had the Defendant not been tried. Suppression issues may, therefore, be litigated again at the Defendant's option.

IV. CHALLENGING THE WARRANT QUOTIENT FOR DETERMINING PROBABLE CAUSE

Prior Supreme Court decisions required not only that an officer seeking a warrant based on an informant's hearsay provide the Magistrate with an underlying factual basis for his independent determination that the informant was reliable, but also a factual basis for determining whether on this occasion the informant acquired his information in a reliable and dependable fashion.

Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); *Spinelli v. U.S.*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969).

Now these two independent "prongs" of "veracity" and "basis of knowledge" will be considered together under a "totality of circumstances" approach.

Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2323, 76 L.Ed.2d 527 (1983).

"A deficiency in one [prong] may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability."

Texas also applies the "totality of the circumstances" analysis in determining whether there is probable cause for issuance of a search warrant under the Texas Constitution. *Bower v. State*, 769 S.W.2d 887 (Tex. Cr. App. 1989), *cert. denied*, 492 U.S. 927 (1989). [Texas courts abandoned the "two-prong" *Aguilar* and *Spinelli* test and adopted the test in *Illinois v. Gates*].

While the Court insisted on a "bright line rule" to guide police officers in searching automobiles incident to the arrest of drivers in *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), "[a] single familiar standard is essential to guide police officers who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Belton*, 453 U.S. at 458.

The Court insists upon "a fluid concept--turning on the assessment of probabilities in particular factual contexts--not readily, or even usefully, reduced to a neat set of legal rules" when grading the Magistrate's determination of probable cause. *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2323, 76 L.Ed.2d 527 [stating that "[o]ne single rule will not cover every situation"].

And where Massachusetts State Court had viewed *Gates* as a "mere refinement" of the *Aguilar/Spinelli* two-pronged test, the Supreme Court tersely reversed in a *per curiam* opinion characterizing the State Court's opinion as "insisting on judging bits and pieces of information in isolation against the artificial standards provided by the two-pronged test". The Court held, "[W]e did not merely refine or qualify the (former) two-pronged test [in *Gates*], we rejected it as hypertechnical." *Massachusetts v. Upton*, 466 U.S. 727, 731, 104 S.Ct. 2085, 2088, 80 L.Ed.2d 721, 726 (1984). *See also U.S. v. Little*, 735 F.2d 1049 (8th Cir. 1984) [applying the totality of the circumstances test and holding no probable cause existed for court ordered "beeper" due to affiant's failure to *either* demonstrate that the information was received from reliable informants *or* independently corroborate that information]; *U.S. v. Garcia*, 732 F.2d 1221 (5th Cir. 1984) [using the "totality of the circumstances" test, found probable cause for a vehicle stop by a roving border patrol 115 miles from the U.S.-Mexican Border. Factors contributing to probable cause included the vehicle's overloaded appearance; the history of alien smuggling in the area; and the agent's special training and experience].

Gates expressly admonishes that in applying the new "totality of circumstances" test, the reviewing court should not abdicate its traditional role of "conscientiously review[ing] the sufficiency of the affidavits on which warrants are issued."

Common sense consideration of the totality of the circumstances as applied to probable cause (that being a practical non-technical probability that contraband is on the premises to be searched is sufficient). A showing that the belief is more likely true than false is not demanded. Cases decided under *Gates*, which have found probable cause based on informant's tip:

U.S. v. Adcock, 756 F.2d 346 (5th Cir. 1985); *U.S. v. Reed*, 733 F.2d 492 (8th Cir. 1984); *U.S. v. Campbell*, 732 F.2d 1017 (1st Cir. 1984); *Marvin v. U.S.*, 732 F.2d 669 (8th Cir. 1984); *U.S. v. Rodgers*, 732 F.2d 625 (8th Cir. 1984); *U.S. v. Rose*, 731 F.2d 1337 (8th Cir.), *cert. denied*, 469 U.S. 931, 105 S.Ct. 326, 83 L.Ed.2d 263 (1984); *Carter v. U.S.*, 729 F.2d 935 (8th Cir. 1984); *U.S. v. Phillips*, 727 F.2d 392 (5th Cir. 1984); *U.S. v. Francesco*, 725 F.2d 817 (1st Cir. 1984); *U.S. v. Camp*, 723 F.2d 741 (8th Cir. 1984); *U.S. v. Mendoza*, 722 F.2d 96 (5th Cir. 1983).

Cases decided under *Gates* that have found that an informant's tip did not constitute probable cause under the *Gates* "totality of the circumstances" test:

In re Grand Jury Proceeding (Young), 716 F.2d 493, 501 (8th Cir. 1983); *U.S. v. Campbell*, 732 F.2d 1017 (1st Cir. 1984); *U.S. v. Parker*, 722 F.2d 179 (5th Cir. 1983), *overruled on other grounds*, *U.S. v. Hurtado*, 905 F.2d 74 (5th Cir. 1990); *U.S. v. Kolodziej*, 712 F.2d 975 (5th Cir. 1983). *See also U.S. v. Adcock*, 756 F.2d 346 (5th Cir. 1985) [in reviewing sufficiency of affidavit, court should apply a common sense consideration of the totality of the circumstances]; *U.S. v. Aguilar*, 825 F.2d 39 (4th Cir. 1987) [probable cause existed where suspect exhibited drug courier profile characteristics coupled with experienced agent's observation of a large bulge and a piece of white plastic at his right ankle].

Also see In re T.H., D.C., 2006 D.C. App Lexis 210, Argued May 11, 2006 [A police officer who spied a box of illegal fireworks in the open cargo area of a parked sport utility vehicle did not have probable cause to arrest a back seat passenger for possessing the fireworks. The court decided that the presence of the fireworks in the car was not so suggestive of the defendant's involvement in lawbreaking as to give rise to probable cause].

PROBABLE CAUSE IS STILL THE STANDARD

Justice Scalia affirmed that a "search or seizure" must be supported by the traditional standard of "probable cause". *Arizona v. Hicks*, 480 U.S. 321, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987).

[T]here is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all. Our disagreement with the dissenters pertains to where the proper balance should be struck; we choose to adhere to the textual and traditional standard of probable cause." *Hicks*, 480 U.S. at 329-30.

See also Minnesota v. Dickersen, 508 U.S. 366, 113 S. Ct. 2130, 124 L.Ed.2d 334 (1993).

And probable cause must be affirmatively shown on the face of the record. *Garrison v. State*, 726 S.W.2d 134 (Tex.Crim.App. 1987).

CONSTITUTIONAL RIGHT TO GO BEHIND FOUR CORNERS OF SEARCH WARRANT AFFIDAVIT WHERE PRIMA FACIE SHOWING OF MISSTATEMENT MADE:

A search warrant affidavit which contains erroneous facts, false statements or misrepresentations may render the search warrant and the ensuing search invalid. Where a search warrant affidavit contains intentional or reckless misstatements of fact, such will render the warrant issued thereon invalid where such erroneous facts are material to the showing of probable cause. *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

See also U.S. v. Perez, 247 F. Supp. 2d 459 (S.D. N.Y. 2003)[false statement in affidavit that those logging into website from which child pornography can be obtained automatically received child pornography defeated probable cause for nationwide search of computers in "operation candy man"].

"...[W]hen law enforcement gathers information about the activity of individuals on the internet, the potential for unreasonable intrusions into the home--the chief concern of the drafters of the Fourth

Amendment--is great. This case demonstrates the tension that can exist: the Government argues, in essence, that it has probable cause to search the homes and seize the computers of thousands of individuals merely because they entered their e-mail addresses into a website where images of child pornography were available, even without any proof that the individuals uploaded, downloaded or discussed the images, or otherwise participated in the website." *U.S. v. Perez*, 247 F. Supp. 2d 459, 461 (S.D. N.Y. 2003).

U.S. v. Strauser, 247 F. Supp.2d 1135, 1136 (E.D. Mo. 2003)[“government's investigation ... ‘Candyman’ ... government concedes that the warrant affidavit falsely indicated that Strauser had received emails containing over one hundred images of child pornography, when in fact, there was no evidence that he had ever received any child pornography”]; *U.S. v. Thomas*, 489 F.2d 664 (5th Cir. 1973); *U.S. v. Upshaw*, 448 F.2d 1218, 1222 (5th Cir. 1971), *cert. denied*, 406 U.S. 934 (1972); *U.S. v. Morris*, 477 F.2d 657 (5th Cir. 1973); *U.S. v. Hunt*, 496 F.2d 888 (5th Cir. 1974); *U.S. v. Carmichael*, 489 F.2d 983 (7th Cir. 1974) [en banc]; *U.S. v. Marihart*, 492 F.2d 897 (8th Cir. 1974); *U.S. v. Harwood*, 470 F.2d 322 (10th Cir. 1972); *Curry v. Estelle*, 531 F.2d 1260 (5th Cir. 1976); *U.S. v. Astroff*, 578 F.2d 133 (5th Cir. 1978) [en banc] [a statement that the "inspection of the ...suitcases ...revealed a green vegetable substance which appeared to be about one hundred and fifty pounds of marijuana... when in fact the officers had only 'smelled' what they believed to be marijuana, was only a negligent mistake and applying *Franks* the defendant was precluded from even an evidentiary hearing on the veracity of the warrant"]].

OMISSIONS MAY CONSTITUTE MISREPRESENTATIONS

The Fifth Circuit (among other circuits) treats omissions essentially the same as misstatements. *U.S. v. Martin*, 615 F.2d 318, 328 (5th Cir. 1980). “Similarly, the Fourth Amendment forbids officers from omitting information from a search warrant affidavit if (1) the omission was knowingly and intentionally made or was made in reckless disregard for the truth, and (2) the inclusion of the omitted information would render the affidavit insufficient to support a finding of probable cause.” *U.S. v. Richardson*, 478 Fed. Appx. 82, 89 (5th Cir. 2012) (citing *U.S. v. Martin*, 615 F.2d 318, 328 (5th Cir. 1980)).

If the magistrate is to test probable cause by the "totality of circumstances" test required in *Illinois v. Gates*, 462 U.S. 213 (1983), then omitting material facts from search warrant affidavits deprives the magistrate of the opportunity to perform his function.

"The probable cause affidavit...merely stated that the car had been 'stopped'. Moreover, the affidavit merely states that the defendants 'gave a verbal consent to search the car'. ...Based upon this information ...Magistrate Vitunac issued a search warrant. ‘The sheriff had received an anonymous tip relaying information about the defendant's future conduct and officers did corroborate many innocent facts in the tip before running the defendant's car off the road, forcibly stopping the car, yelling at the defendant, forcing him to exit the car and lie on the ground while guns were pointed at him.’ The facts known to the officers at the time of the stop were from the anonymous tip, plus their investigation and surveillance of the defendants would not demonstrate probable cause to any reasonable law enforcement officer. In fact, there is considerable doubt that there was even reasonable suspicion sufficient to justify a Terry stop. ...[T]o excuse the officer's material omissions here would encourage the police to be less than candid in applying for warrants. It is not surprising that Magistrate Vitunac reversed herself in this case by invalidating the very warrants that she issued after she was presented with all the facts surrounding the arrest." *U.S. v. Solomon*, 728 F. Supp. 1544, 1550 (S.D. Fla. 1990).

Furthermore, where the omitted facts are critical to a showing of probable cause, "recklessness may be inferred from proof of the omission itself." *U.S. v. Martin*, 615 F.2d 318, 328 (5th Cir. 1981).

"More pertinent to our inquiry, the court noted that ‘[i]t is possible that when the facts omitted from the affidavit are clearly critical to a finding of probable cause the fact of recklessness may be inferred from

proof of the omission itself.' This recognition that the analytical concepts of materiality and recklessness are often bound together is significant in this case." *U.S. v. Namer*, 680 F.2d 1088, 1094 (5th Cir. 1982), *cert. denied*, 486 U.S. 1006 (1988).

See also U.S. v. Haimowitz, 706 F.2d 1549 (11th Cir. 1983), *cert. denied*, 464 U.S. 1069 (1984).

Although *Franks* dealt only with affirmative false statements, its principles also allow attacks on warrants allegedly different as a result of a misleading omission.

Although officer's affidavit for a search warrant failed to state that officer actually observed the defendant transport drugs, taken as a whole, the affidavit provided sufficient information that was reasonable for the officer to believe that there was probable cause for a search warrant. *See U.S. v. Sibley*, 448 F.3d 754 (5th Cir. 2006).

EVEN LITERAL TRUTHS MAY CONSTITUTE MISREPRESENTATION

Even literally true statements may be intentionally misleading. *State v. Olson*, 726 P.2d 1347, 1351 (1986) [affidavit reciting that informant had provided reliable information "in the past", when in fact affiant's only contact with informant was arrest six months before and discussion three hours before obtaining search warrant, while technically and literally true was misleading and should be excised under *Franks*]. *See also U.S. v. Solomon*, 728 F. Supp. 1544 (S.D. Fla. 1990) [good faith exception does not apply where agent omitted material details of how the evidence was obtained. No reasonable officer, when confronted with the facts of the tip, plus the limited amount of corroboration, could arrest].

MISREPRESENTATIONS AS TO ADDITIONAL REQUIREMENTS OF WIRETAP STATUTE

Misrepresentations as to 18 U.S.C. § 2518(1)(c)'s requirement that a wiretap warrant application contain "a full and complete statement as to whether or not investigative procedures had been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous" have been held to fall within the *Franks* proscription. *U.S. v. Simpson*, 813 F.2d 1462 (9th Cir. 1987); *U.S. v. Ippolito*, 774 F.2d 1482 (9th Cir. 1985); *U.S. v. Martinez*, 588 F.2d 1227 (9th Cir. 1978); *U.S. v. Lilla*, 699 F.2d 99 (2d Cir. 1983);

Contra U.S. v. Garcia, 785 F.2d 214 (8th Cir. 1986); *U.S. v. Abou-Saada*, 785 F.2d 1 (1st Cir. 1986).

TO CONSTITUTIONALLY MANDATE AN EVIDENTIARY HEARING TO CHALLENGE THE VERACITY OF A WARRANT THE DEFENDANT MUST:

- (1) State more than mere conclusions,
- (2) Allege "deliberate falsehood or ...reckless disregard for the truth", allegations of mere "negligence or innocent mistake are insufficient",
- (3) Make "Offer of Proof" specifically point out "...the portion of the warrant affidavit that is claimed to be false",
- (4) Which must be "accompanied by a statement of supporting reasons",
- (5) Furnish "affidavits or sworn or otherwise reliable statements of witnesses ...or [have] their absence satisfactorily explained",
- (6) Show that the impeachment is of the "Affiant, not of any non-governmental informant",
- (7) Show that if the "material that is the subject of the alleged falsity or reckless disregard is set to one side ...the remaining containing content is insufficient" to support a showing of probable cause. *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

See also U.S. v. Roth, 391 F.2d 507 (7th Cir. 1967); *U.S. v. Pearce*, 275 F.2d 318 (7th Cir. 1960).

Cases where defendant met the burden of challenging the veracity of a warrant:

U.S. v. Bowe, 698 F.2d 560 (2d Cir. 1983); *U.S. v. Wuagneuz*, 683 F.2d 1343 (11th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983).

Cases where *Franks* hearing denied:

U.S. v. Reed, 726 F.2d 339 (7th Cir. 1984); *U.S. v. McDonald*, 723 F.2d 1288 (7th Cir. 1983); *U.S. v. Orozco-Prada*, 732 F.2d 1076 (2d Cir.), *cert. denied*, 469 U.S. 845 (1984); *U.S. v. Erickson*, 732 F.2d 788 (10th Cir. 1984). *See also State v. Thetford*, 745 P.2d 496 (Wash. 1987) [recruited and paid informant was a government agent for purposes of the *Franks* analysis].

But see U.S. v. Ofshe, 817 F.2d 1508 (11th Cir. 1987) [a minor omission is not critical to a showing of probable cause].

GOVERNMENT'S RIGHT TO GO BEHIND THE FOUR CORNERS TO SHORE UP PROBABLE CAUSE

While FED. R. CRIM. P. Rule 41(c) expressly provides that a magistrate may receive and consider sworn testimony in addition to that set out in the affidavit, such information may not be relied upon in support of probable cause unless same is "...taken down by a court reporter or recording equipment and *made a part of the affidavit.*" Thus oral testimony may supplement a search warrant affidavit. *Boyer v. Arizona*, 455 F.2d 804 (9th Cir. 1972); *Frazier v. Roberts*, 441 F.2d 1224 (8th Cir. 1971). However, in order to be considered by a federal magistrate, same *must* be recorded, transcribed, and made a part of the affidavit. *U.S. v. Acosta*, 501 F.2d 1330, 1334 (5th Cir. 1974), *cert. denied*, 423 U.S. 891 (1975).

"Under the amended rule ...there can be no doubt that any oral additions to the affidavit must be recorded and made a part of the affidavit." *U.S. v. Acosta*, 501 F.2d at 1334.

Compare U.S. v. Copeland, 538 F.2d 639 (5th Cir. 1976) [failure to comply with Rule 41 in obtaining a warrant mandates suppression], *with U.S. v. Lehder-Rivas*, 955 F.2d 1510 (suggesting *Leon's* good faith exception could defeat suppression for failure to comply with transcription requirement); *U.S. v. Hittle*, 575 F.2d 799 (10th Cir. 1978). *See also* A MOORE'S FEDERAL PRACTICE ¶41.01[3], 41.05[1] (the 1972 Amendment to the rule was designed "to insure an adequate basis for determining the sufficiency of the evidentiary grounds for the issuance of the search warrant if that question should later arise").

Cf. U.S. v. Hill, 500 F.2d 315, 322 (5th Cir. 1974) [excusing the failure to provide sworn testimony]. *See also Miller v. State*, 736 S.W.2d 643 (Tex.Crim.App. 1987), *on motion for reh'g*, [if the prosecution wishes to rely upon additional evidence [affidavits] actually before the issuing magistrate, same must be offered and admitted at the suppression hearings or there will be nothing to consider on appeal].

CANNOT SUPPORT WITH POST-SEARCH TESTIMONY OF INFORMATION KNOWN TO OFFICERS AT TIME OF SEARCH

It is a truism that "a search warrant is valid only if probable cause has been shown to the magistrate and that an inadequate showing may not be rescued by post-search testimony on information known to the searching officers at the time of the search". *Rice v. Wolff*, 513 F.2d 1280 (8th Cir. 1975).

See also Coolidge v. New Hampshire, 403 U.S. 443, 450-51, 91 S.Ct. 2203, 29 L.Ed.2d 564 (1971); *Whiteley v. Warden*, 401 U.S. 560, 565, n. 8, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971); *Aguilar v. Texas*, 378 U.S. 108, 109, n.

1, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); *Jones v. U.S.*, 357 U.S. 493, 497-8, 78 S.Ct. 1253, 2 L.Ed.2d 151 (1958); *Giordenello v. U.S.*, 357 U.S. 480, 486, 78 S.Ct. 1245, 2 L.Ed.2d 1503 (1958); *Taylor v. U.S.*, 286 U.S. 1, 6, 52 S.Ct. 466, 76 L.Ed. 951 (1932); *Agnello v. U.S.*, 269 U.S. 20, 33, 46 S.Ct. 4, 70 L.Ed. 145 (1925).

Only items particularly described may be seized during the execution of a search warrant. *LeClair v. Hart*, 800 F.2d 692 (7th Cir. 1986) [documents outside residential search warrant improperly "seized" when contents dictated verbatim].

SUFFICIENT PARTICULARITY

The Fourth Amendment provides that "...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." U.S. Const., Amend. IV. [emphasis added].

See U.S. v. Young, 745 F.2d 733 (2d Cir. 1984); *In re Impounded Case (Law Firm)*, 840 F.2d 196 (3d Cir. 1988) [broadly described law office files and documents did not constitute overbreadth]; *U.S. v. Burke*, 784 F.2d 1090 (11th Cir. 1986) [despite incorrect address, warrant described place to be searched with sufficient particularity, because it contained a detailed physical description of the building and a unique apartment]; *Voss v. Bergsgaard*, 774 F.2d 402 (10th Cir. 1985) [warrant to seize "all business records" offended particularity requirement where target organization is pervasively criminal]; *U.S. v. Spilotro*, 800 F.2d 959 (9th Cir. 1986) [items relating to loan sharking and bookmaking generically described; not sufficiently particular]; *U.S. v. Robertson*, 21 F.3d 1030, 1034 (9th Cir. 1994) [a warrant authorizing the seizure of fruits and instrumentalities of a narrow and simple crime like carjacking was not overbroad, especially since the officers could not determine all household items taken with specificity]; *United States v. Oliverius*, 2011 U.S. Dist. LEXIS 110783 (D. Neb. August 5, 2011) [Computer searches: finding files with the same hash value as known child pornography is probable cause without opening the files].

But see Maryland v. Garrison, 480 U.S. 79, 107 S.Ct. 1013, 94 L.Ed.2d 72 (1987) [after seizing contraband, officers discovered that the third floor consisted of two apartments and that they were in Respondent's, not McWebb's apartment. The Supreme Court upheld as "honest mistake". The mistake was an objectively reasonable one. *Maryland v. Garrison*, 480 U.S. at 75.

See also U.S. v. Santarelli, 778 F.2d 609 (11th Cir. 1985) [warrant was sufficient where the term "evidence of loansharking" was used and was sufficient to reasonably ascertain and identify business papers searched for]; *U.S. v. Young*, 745 F.2d at 759-60 (2d Cir. 1984) ["...the use of the term 'other evidence' followed by the term 'money' was sufficient to permit the agents to seize such manifestations of wealth as furs, jewelry, and expensive automobiles"];

U.S. v. Dennis, 625 F.2d 782, 792 (5th Cir. 1980) ["certain" items of evidence relating to loansharking sufficiently particular]; *International Molder's and Allied Worker's Local Union No. 164 v. Nelson*, 799 F.2d 547 (9th Cir. 1986) [INS agents need not provide the names of illegal aliens they hope to find when applying for a search warrant to search factories and other places].

FIRST AMENDMENT MATERIALS TO BE DESCRIBED WITH "SCRUPULOUS EXACTITUDE"

When a warrant authorizes the content-based seizure of books or films, "the Constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude." *Stanford v. Texas*, 379 U.S. 476, 486, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965). *See New York v. P.J. Video, Inc.*, 475 U.S. 868, 106 S.Ct. 1610, 89 L.Ed.2d 871, 879 (1986); *U.S. v. Diamond*, 820 F.2d 10 (1st Cir. 1987) [the warrant for films depicting "children under the age of 18 years" in sexually explicit conduct held insufficiently particular].

"NEW INFORMATION"

Where executing officers "failed to present to magistrate new information discovered after issuance of search warrant and before its execution", same did not invalidate the warrant since even without the "new

information" the affidavit contained sufficient probable cause to support the search warrant. *U.S. v. Marin-Buitrago*, 734 F.2d 889, 895 (2d Cir. 1984).

"...[W]e hold as a matter of law that the addition of the new information here would not affect the finding of probable cause. The only new information to be added to the affidavit is Marin's and his companion's denials that he was Correa [the person named in the warrant] and the Columbian identifications issued in the name of 'Marin-Buitrago'. This information in no way proved that Marin was not Correa.... In addition, the new information did not affect the veracity of the majority of the statements made in the affidavit." *U.S. v. Marin-Buitrago*, 734 F.2d at 895.

STALENESS

The information relied upon to procure a warrant must be sufficiently recent to assure its reliability. The Ninth Circuit has held that where the information relied upon to obtain the warrant was six weeks old, it was too stale to support same. *U.S. v. Bailey*, 458 F.2d 408, 412 (9th Cir. 1977); *U.S. v. Neal*, 500 F.2d 305, 309 (10th Cir. 1979) [three months-too late]; *U.S. v. U.S. v. Cofer*, 444 F. Supp. 146 (W.D. Tex. 1978) [three months too stale]; *Lighter v. State*, 741 S.W.2d 568 (Tex.App.-1987) [no dates indicated].

But see USA Patriot Act, permitting execution of a warrant up to one year after its issuance from any district in the nation. Because the Act is premised upon domestic investigations of foreign agents and does not require standards for criminal investigations be met, it may not pass constitutional muster in the criminal courts. 18 U.S.C. §§ 3121-3127.

"MOTION TO SUPPRESS"

IS THE PROPER VEHICLE TO CHALLENGE THE VERACITY OF THE RECITALS IN A SEARCH WARRANT AFFIDAVIT

Franks v. Delaware, 438 U.S. 154, 985 S.Ct. 2674, 57 L.Ed.2d 667 (1978); *U.S. v. Upshaw*, 448 F.2d 1218, 1221-2 (5th Cir. 1971), *cert. denied*, 405 U.S. 934 (1972)

EXCEEDING THE SCOPE OF THE WARRANT

The scope of a warrant is limited by what the issuing magistrate authorizes agents to seize. *IMAW Local No. 164 v. Nelson*, 643 F. Supp. 884 (N.D. Cal. 1985) [holding where INS warrant naming suspected illegal aliens in work place and "others" does not authorize search and seizure of unnamed "others"].

OFF-SITE SEARCHES, KEEPING ONLY WHAT IS WITHIN THE SCOPE OF THE WARRANT

A practice which has emerged regarding execution of computer searches whereby agents seize the entire contents of computers and then conduct the search for matters within the scope of the warrant off site. Off site searches must be treated as an unusual measure because they are in fact searches out side the scope of the search warrant. While some courts have approved the practice as reasonable under the Fourth Amendment because it is less intrusive than culling through the documents on site, *U.S. v. Wuagneux*, 683 F.2d 1343 (11th Cir. 1982)[papers]; *U.S. v. Hargus*, 128 F.3d 1358, 1363-1364 (10th Cir. 1997)[computer]; *U.S. v. Santarelli* 778 F.2d 609, 615-616 (11th Cir. 1985)[computer], other courts have held that off site searches of computers must expressly be authorized by the warrant, *U.S. v. Tamura*, 694 F.2d 591, 595-596 (9th Cir. 1982), after the affiant establishes time needed to copy the data and the need to prevent the destruction of data require the measure, *People v. Gall*, 30 P.3d 145, 154 (Colo. 2001). The showing must be based upon more than conclusory allegations or a Magistrate's warrant will not be viewed as issued by an independent and neutral magistrate. *Aguilar v. Texas*, 378 U.S. 108, 111 (1964); *U.S. v. Hay*, 231 F.3d. 630, 637 (9th Cir. 2000)[detailed information about the suspect and computer system must justify off site computer search under the circumstances]. When an off site search is authorized, courts should also order that a sealed backup copy should be mainlined for the defense and his experts. *See U.S. v. Cox*, 190 F. Supp. 2d 330, 334 (N.D. N.Y. 2002). The magistrate should also impose time limits for the conduct of such off site searches. *U.S. v. Brunette*, 76 F. Supp. 2d 30, 42 (D. Me. 1999) or else the search

may be deemed unreasonable. *Cf. U.S. v. Place*, 462 U.S. 696, 709-10 (1983). *See also U.S. v. Villegas*, 899 F.2d 1324, 1334 (2d Cir. 1990); *U.S. v. Bedford*, 519 F.2d 650, 655 (3d Cir. 1975).

SEARCH WITHOUT A WARRANT

It has long been the law that the requirements for "probable cause" should be at least as stringent in a non-warrant search as where a warrant is obtained, lest we encourage authorities to circumvent the preferred Fourth Amendment warrant practice. *Wong Sun v. U.S.*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *Whitely v. Warden*, 401 U.S. 560, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971); *U.S. v. Ventresca*, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965).

U.S. v. Maez, 872 F.2d 1444 (10th Cir. 1989) [*Payton* violation may occur where show of force coerces defendant out of house to allow warrantless arrest].

STATE SEARCH IN FEDERAL COURT

Where arrest or search is conducted by state officers, court's have held that same must be tested by both state and federal law. *U.S. v. Di Re*, 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed.2d 210 (1948); *U.S. v. Chavez-Vernaza*, 844 F.2d 1368 (9th Cir. 1987) [holding must meet minimum standards set by Federal law]; *U.S. v. Pforzheimer*, 826 F.2d 200 (2d Cir. 1987); *U.S. v. Aiudi*, 835 F.2d 943 (1st Cir. 1987) [even when federal agent is aware of impending state search which turns out to violate state law the fruits of said search may be used in federal court]; *U.S. v. Ulrich*, 580 F.2d 765 (5th Cir. 1975); *U.S. v. Solomon*, 528 F.2d 88, 90 (9th Cir. 1975); *U.S. v. Lovenguth*, 514 F.2d 96, 98 (9th Cir. 1975); *U.S. v. Walling*, 486 F.2d 229, 235 (9th Cir. 1973), *cert.denied*, 415 U.S. 923 (1974); *U.S. v. Nicholson*, 355 F.2d 80, 83 (5th Cir. 1966); *U.S. v. Wynn*, 544 F.2d 786, 788 (5th Cir. 1977) ["where arrest is made under a state rather than a federal statute, the requisite standard of probable cause for a lawful arrest is determined by state law, provided such law meets federal constitutional standards"]; *U.S. v. Speaks*, 649 F. Supp. 1065 (E.D. Wash. 1986) [stating state judge issued warrant].

However, in *U.S. v. Mahoney*, 712 F.2d 956, 959 (5th Cir. 1983), dealing with state officers executing a federal warrant based on a federal indictment, the Court held that "because [the "exclusionary rule"] is a creature of the federal courts and because it ought to be applied in a manner that promotes uniformity in federal cases, federal law must guide our decision as to whether to apply the exclusionary rule and whether or not the legality of the evidentiary arrest or search turns on state law." *U.S. v. Mahoney*, 712 F.2d at 959.

"In determining whether there has been an unreasonable search and seizure by state officers [in a federal prosecution], a federal court must make an independent inquiry, whether or not there has been such an inquiry by a state court, and irrespective of how any such inquiry may have turned out. The test is one of federal law, neither enlarged by what one state may have countenanced, nor diminished by what another may have colorably suppressed." *U.S. v. Mahoney*, 712 F.2d at 959 n.3 [citing *Elkins v. U.S.*, 364 U.S. 1208, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960)].

See also U.S. v. Anderson, 618 F. Supp. 1335 (D.C. 1985) [search warrant obtained by state officer pursuant to state law need not meet requirements of FED. R. CRIM. P. Rule 41 governing search and seizures].

V. DIFFERENT TYPES OF SEARCHES

A. SEIZURES FROM THE PERSON:

PROBABLE CAUSE MUST BE INDIVIDUALIZED

Ybarra v. Illinois, 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979) ["...a person's mere propinquity to others individually suspected of criminal activity" or his "presence on premises lawfully being search"... "does not, without more, give rise to probable cause to search that person"].

"Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person happens to be. The Fourth and Fourteenth Amendments protect the legitimate expectation of privacy of persons, not places." *Ybarra*, 444 U.S. at 91.

See also Kennedy v. Los Angeles Police Department, 901 F.2d 702 (9th Cir. 1989) [no reasonable officer would have performed the body cavity search of the defendant who was holding household items of another to secure a debt therefore the officers' immunity was forfeited and they were liable under the Civil Rights act for their conduct].

But see U.S. v. Bonds, 829 F.2d 1072 (11th Cir. 1987) [with more than mere presence, like articulated fear of the person who came to the door of the premises being searched, a frisk is justified]; *U.S. v. Cole*, 628 F.2d 897, 898 (5th Cir. 1980) [*Ybarra* applied to a "family dwelling"]; *U.S. v. Sanchez-Jaramillo*, 637 F.2d 1094 (7th Cir. 1980) [where the agents searched the *apartment* of a co-defendant pursuant to his consent, same would not warrant arrest and search of another found on same premises]; *U.S. v. Clay*, 640 F.2d 157, 160-61 (8th Cir. 1981) [where court held "arrest of defendant on premises officers were authorized to search was without probable cause even though firearms, cocaine and heroin were found in the apartment"]; *U.S. v. Bryan*, 640 F. Supp. 1245 (D. Me. 1986) [probable cause to arrest held to have existed once defendant identified himself by name of one who had previously called residence then being searched pursuant to warrant]; *State v. Lambert*, 710 P.2d 693 (Kan. 1985) [police arrived with a search warrant for an apartment and its occupant were not entitled to search a guest's purse that they found on a table in the apartment]; *McVea v. State*, 635 S.W.2d 429, 433 n.6 (Tex. App.--San Antonio, 1982) [particularized probable cause "cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be"]; *State v. Broadnax*, 654 P.2d 96 (Wash. 1982) [searching residence]; *Cerna v. State*, 693 S.W.2d 570 (Tex.App.-San Antonio, 1985); *Lippert v. State*, 664 S.W.2d 712 (Tex.Cr.App. 1984) [applying *Ybarra* to "a residence" noting that "the private versus public distinction is fallacious and ignores the real teaching of *Ybarra*"].

"Regardless of the setting, *Ybarra* makes clear that constitutional protections are possessed individually. The Fourth and Fourteenth Amendments protects persons, not places." *Lippert v. State*, 664 S.W.2d at 718.

C.f. Maury v. State, 621 S.W.2d 619, 623 (Tex.Cr.App. 1981) [defendant's suspicious and "furtive" behavior when police entered lobby of doctor's office];

Evidentiary searches of person present upon such "compact premises" will not be permitted even "where the police 'reasonably believe' that such persons 'are connected with' drug trafficking and 'may be concealing or carrying away the contraband.'" *Ybarra*, 444 U.S. at 94.

The Courts have *split* as to whether boiler plate warrant language authorizing the search of certain named individuals and "any other person therein or thereat" will pass constitutional muster.

PRO: *People v. Betts*, 456 N.Y.S.2d 278 (N.Y. 1982 [approving such language on the theory that drug trafficking at the particular location was so prevalent that anyone present could be assumed to be a participant]; *People v. Nieves*, 330 N.E.2d 26 (N.Y. 1975); *State v. DeSimone*, 288 A.2d 849 (N.J. 1972).

CON: *Lippert v. State*, 664 S.W.2d 712 (Tex.Cr.App. 1984).

IMMIGRATION "FACTORY SURVEYS"

In a challenge to the Constitutionality of "factory surveys" by the Immigration and Naturalization Service, the Ninth Circuit has upheld a district court's finding of an "evident systematic practice of Fourth Amendment violations" by the Service.

International Molders' and Allied Workers' Local Union No. 164 v. Nelson, 799 F.2d 547, 555 (9th Cir. 1986).

The typical administrative warrant authorized "seizure of persons 'suspected of being aliens.'" INS conceded that the warrants could properly authorize only entry into the work place to question suspected aliens.

"Having now taken this position, INS cannot object to a permanent injunction that prohibits warrants to seize suspected aliens unless the warrants meet the particularity requirements applied to arrest warrants. To the extent the warrants authorize INS to seize employees, the Supreme Court's holding *Ybarra v. Illinois*, 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979), requires probable cause '*particularized with respect to that person*'. *Ybarra*, 444 U.S. at 91. (emphasis added). 'This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be.'" *Ybarra*, 444 U.S. at 91. *International Molders' and Allied Workers' Local Union No. 164*, 799 F.2d at 552 n.5.

CANNOT EVEN "FRISK" FOR WEAPONS WITHOUT REASONABLE SUSPICION DIRECTED AT A PARTICULAR PERSON

The Supreme Court noted in both *Ybarra* and *Michigan v. Summers*, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981), that officers cannot conduct even a *Terry*-type "frisk" or "pat-down" "unless the officers had '*individualized suspicion*' that said individual 'might be armed and dangerous.'" [emphasis supplied].

"The 'narrow scope' of the *Terry* exception does not permit a frisk for weapons on less than reasonable belief or suspicion *directed at the person* to be frisked, even though that person happens to be on premises where an authorized narcotics search is taking place." *Ybarra*, 444 U.S. at 94.

This frisk is limited to a frisk for weapons. Once the officer determines there are no weapons, further manipulation of object felt is impermissible without a showing of probable cause. *Minnesota v. Dickerson*, 508 U.S. 366, 113 S. Ct. 2130, 124 L.Ed.2d 334 (1993).

See also U.S. v. Cole, 628 F.2d 897, 899 (5th Cir. 1980) [the "officer's pat-down of appellant cannot be justified by [the accused's] mere presence on the premises during the execution of the warrant"].

"This [*Terry*] burden was not met by testimony that the officers involved had prior information about appellant, absent proof that the information was of a sort from which an inference of dangerousness could reasonably be drawn." *Cole*, 628 F.2d at 899.

U.S. v. Sporleder, 635 F.2d 809, 814 (10th Cir. 1980); *U.S. v. Tookes*, 633 F.2d 712, 714 (5th Cir. 1980) [the "seizure" went far beyond the limited on-the-street frisk for weapons upheld in *Terry*]; *U.S. v. Ward*, 682 F.2d 876, 881 (10th Cir. 1982) [frisk not upheld by probable cause]; *U.S. v. Clay*, 640 F.2d 157, 160 (8th Cir. 1981) [appellant's conduct alone was not suspicious where he merely hesitated and took a step or two backwards (but

did not turn around) when confronted at the door by an armed man]; *U.S. v. Welker*, 689 F.2d 167 (10th Cir. 1982) [no probable cause for a frisk where defendant aroused police officer's suspicions because he was a Spanish American in a black neighborhood and defendant removed a letter from a mailbox and did not act furtively]; *U.S. v. Henke*, 775 F.2d 641 (5th Cir. 1985) [probable cause to search vehicle supplied by officer's detection of marijuana odor]; [otherwise proper stop of man based on suspicion same was involved in counterfeit money scheme did not warrant frisk without belief that man was armed and dangerous]; *U.S. v. Seelye*, 815 F.2d 48 (8th Cir. 1987) [officer had reasonable suspicion that man at a crowded party was carrying a gun, and his actions in grabbing him by the collar and ordering him outside at gunpoint was a stop and not an arrest requiring probable cause]; *U.S. v. Lott*, 870 F.2d 778, 784 (1st Cir. 1989) [a law enforcement officer who conducts a protective search of a person or vehicle must have an actual subjective suspicion that weapons are present, not merely the fact that objectively one could justify a hypothetically reasonable officer in fearing for his safety].

However, the Supreme Court has distinguished the search of one merely found on the "compact premises", *Ybarra v. Illinois*, from the situation where the police have "detained" the *owner* or *resident* of a house being searched pursuant to a valid warrant, and subsequently searched his person after acquiring probable cause to place that individual under arrest. *Michigan v. Summers*, 452 U.S. 692, 101 S.Ct. 2587, 2590, 69 L.Ed.2d 340 (1981).

"The seizure issue in this case should not be confused with the 'search' issue presented in *Ybarra*. In *Ybarra*, the police executing a search warrant for a public tavern detained and searched all of the customers who happened to be present.... In this case, only the detention is at issue. *The police knew respondent lived in a house, and they did not search him until after they had probable cause to arrest and had done so.*" [emphasis added]. *Summers*, 452 U.S. at 696.

The Court there noted that detaining one in his own home while a search of that dwelling was completed, was not a significant intrusion into one's privacy, at least no more so that the search of that person's domicile.

"Indeed we may safely assume that most citizens ...would elect to remain in order to observe the search of *their premises*. . . . Moreover, because the detention of this case was *in respondent's own residence*, it could add only minimally to the public stigma associated with the search itself and would involve neither the inconvenience nor the indignity associated with a compelled visit to the police station.... If evidence that a *citizen's residence* is harboring contraband is sufficient to persuade a judicial officer that an invasion of the citizen's privacy is justified, it is constitutionally reasonable to require the citizen to remain while officers of the law execute a valid warrant to search *his home*." [emphasis supplied] *Summers*, 452 U.S. at 701-02, 704-05.

INFORMANTS

An informant's tip sufficed to establish probable cause for warrantless search of defendant's car where:

- (1) tip was based on informant's personal observations,
- (2) agent had known informant for over 2 years and considered him reliable,
- (3) the tip included numerous detailed facts, and
- (4) much of the tip was corroborated by the agent.

And, while there was no information as to the exact location of the contraband, probable cause to search a vehicle extends to any portion of that vehicle or containers located therein, including a zippered bag found containing another locked nylon bag in which the contraband was found.

But, if the informant is emotionally disturbed, and is under arrest when he gives the information, and has given false information in the past, the information may not be used to support a finding of probable cause. *U.S. v. Atkinson*, 653 F. Supp. 668 (S.D.N.Y. 1987); *U.S. v. Reyes*, 792 F.2d 536 (5th Cir. 1986) [informant's tip may also be corroborated by police].

However, when there is no indication that the informant is reliable then a substantial basis for determining probable cause does not exist. *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).

The minimal requirements for an unnamed citizen informant include: recitation that informant has no criminal record and has a good reputation in the community. *Avery v. State*, 545 S.W.2d 803, 804 (Tex.Crim.App. 1977).

SEARCH INCIDENT TO ARREST

In *Smith v. Ohio*, 494 U.S. 541, 108 L.Ed.2d 464, 110 S.Ct. 1288 (1990), the Supreme Court held that a warrantless search which supplies probable cause for an arrest cannot be justified as a search incident of that later arrest.

"The exception for searches incident to arrest permits the police to search a lawfully arrested person and areas within his immediate control. ...[I]t does not permit the police to search any citizen without a warrant or probable cause so long as an arrest immediately follows."

The Fifth Circuit has held that, where officers have probable cause, a search incident to an arrest may occur prior to the arrest, even where the arrest is *de facto* rather than formal. *U.S. v. Hernandez*, 825 F.2d 846 (5th Cir. 1987).

Maryland v. Buie, 494 U.S. 325, 108 L.Ed.2d 276, 110 S.Ct. 1093 (1990).

Distinguishing *Chimel v. California*, 395 U.S. 752 (1969), the Court held, in an opinion written by White, that:

"The ingredients to apply the balance struck in *Terry* and *Long* are present in this case. Possessing an arrest warrant and probable cause to believe Buie was in his home, the officers were entitled to enter and to search anywhere in the house in which Buie might be found. Once he was found, however, the search for him was over, and there was no longer that particular justification for entering any rooms that had not yet been searched.

"That Buie had an expectation of privacy in those remaining areas of his house, however, does not mean such rooms were immune from entry. ...The risk of danger in the context of an arrest in the home is as great as, if not greater than, it is in an on-the-street or roadside investigatory encounter. ...A protective sweep...occurs as an adjunct to the serious step of taking a person into custody for the purpose of prosecuting him for a crime. Moreover, unlike an encounter on the street or along a highway, an in-home arrest puts the officer at the disadvantage of being on his adversary's 'turf'. An ambush in a confined setting of unknown configuration is more to be feared than it is in open, more familiar surroundings.

"...We are quite sure, however, that the arresting officers are permitted in such circumstances to take reasonable steps to insure their safety after, and while making, the arrest. That interest is sufficient to outweigh the intrusion such procedures may entail.

"...We also hold that as an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. Beyond that, however, we hold that there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene. This is no more and no less than was required in *Terry* and *Long*, and as in those cases, we think this balance is the proper one.

"We should emphasize that such a protective sweep, aimed at protecting the arresting officers, if justified by the circumstances, is nevertheless not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found. The sweep lasts no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises." *Maryland v. Buie*, 494 U.S. 325, 108 L.Ed.2d 276, 110 S.Ct. 1093 (1990) [footnotes omitted].

A *Buie*-type search, however, must be based on articulable reasons indicating that there may be a threat to the officers. *U.S. v. Mata*, 517 F.3d 279 (5th Cir. 2008).

Any violation of this requirement will be deemed to be waived if the suspect subsequently consents to the search. *U.S. v. Delancy*, 502 F.3d 1297 (11th Cir. 2007).

But see State v. Davis, 742 P.2d 1356 (Az. 1987) [a search incident to arrest does not permit a later reading of a diary discovered during that search since the purpose of a search incident to arrest is to prevent the defendant from accusing a dangerous weapon or from destroying evidence].

But: *Virginia v. Moore*, 128 S.Ct. 1598 (2008) held that (1) police officers did not violate the Fourth Amendment by arresting motorist whom they had probable cause to believe had violated Virginia law by driving with suspended license, even though, as matter of Virginia law, this misdemeanor offense of driving with suspended license was one for which, under particular circumstances of motorist's case, officers should have issued summons rather than made arrest; and (2) Fourth Amendment did not require exclusion of evidence that police officers obtained as result of search that was incident to their constitutionally permissible arrest of motorist.

Routine collection of DNA from arrestees has been found to be reasonable. *U.S. v. Mitchell*, 652 F.3d 387 (3rd Cir. 2011)[“As arrestees have a diminished expectation of privacy in their identities, and DNA collection from arrestees serves important law enforcement interests, we conclude that such collection is reasonable and does not violate the Fourth Amendment.”].

STRIP SEARCH OF TEMPORARY DETAINEES AND PRISONERS

A federal district court has held that reasonable suspicion, not probable cause, is the appropriate standard for conducting a strip search of an arrestee being held temporarily in a detention center, and reasonable suspicion exists where the arrestee is being charged with a felony or a misdemeanor involving weapons or contraband, or where the arrestee has prior convictions or unresolved arrests for a felony or a misdemeanor involving weapons or contraband.

Smith v. Montgomery County, 643 F. Supp. 435 (D. Md., 1986); *Masters v. Crouch*, 872 F.2d 1248, 1255 (6th Cir. 1989)[a strip search of a person arrested for traffic violation or other minor offense not normally associated with violence (absent reasonable suspicion that the arrestee is carrying or concealing a weapon or other contraband) is unreasonable].

However, in a recent case decided by the Supreme Court of the United States, *Florence v. Board of Chosen Freeholders of the County of Burlington*, 132 S.Ct. 1510 (2012), Justice Anthony M. Kennedy, writing for a 5-4 majority, affirmed the lower court, holding that the strip searches for inmates entering the general population of a prison do not violate the Fourth Amendment. The Court concluded that a prisoner's likelihood of possessing contraband based on the severity of the current offense or an arrestee's criminal history is too difficult to determine effectively. The Court pointed out instances, such as the arrest of Ted Kaczynski, in which an individual who commits a minor traffic offense is capable of extreme violence. Correctional facilities have a strong interest in keeping their employees and inmates safe. A general strip search policy adequately and effectively protects that

interest. The Court did note that there may be an exception to this rule when the arrestees are not entering the general population and will not have substantial contact with other inmates. Further, the Court is careful to note that a petitioner alleging such searches are illegal must demonstrate with “substantial evidence” that the court should not defer to the institution’s judgment because their response to the issue is exaggerated. *Id* (citing *Block v. Rutherford*, 104 S. Ct. 3227 (1984)).

DEMAND THAT VISITORS COMING INTO A JAIL UNDERGO BODY CAVITY SEARCHES HELD UNCONSTITUTIONAL

Blackburn v. Snow, 771 F.2d 556 (1st Cir. 1985) [the Fourth Amendment prohibits a correctional institution from requiring that any person wishing to visit an inmate first submit to a highly intensive strip search].

PROBABLE CAUSE TO ARREST OR SEARCH IS SUM OF SHARED INFORMATION

See Woodward v. State, 668 S.W.2d 337 (Tex.Crim.App. 1984) [where there has been some cooperation between law enforcement agencies or between members of the same agency, the "sum of information known to the cooperating officers at the time of an arrest or search by any of the officers involved is to be considered in determining whether there was sufficient probable cause" therefore, the court upheld search incident to arrest despite fact that BOLO (be on the lookout) officer acted, upon warrant issued by police in another city, lacked probable cause for arrest].

See also Whitely v. Warden, 401 U.S. 560, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971).

MUST BE COMMUNICATION BETWEEN OFFICERS

Martinez v. State, 635 S.W.2d 629 (Tex.App.-Austin, 1982) ["[i]n determining whether reasonable suspicion exists, the cumulative knowledge of all the officers working on the case, rather than the information possessed by the officer who made the stop, is considered where there has been some degree of communication between them"]; *U.S. v. Michel*, 588 F.2d 986, 998 (5th Cir.), *cert. denied*, 444 U.S. 825 (1979) [emphasis supplied].

SEIZURE OF BLOOD

As defendant was involved in unexplained single car accident and smelled of alcohol, officer had probable cause to believe the defendant had been driving while intoxicated and therefore could, in compliance with Fourth Amendment, request blood sample be taken from unconscious defendant. *U.S. v. Berry*, 866 F.2d 887 (6th Cir. 1989).

DRUG TESTING CONSTITUTES A SEARCH

In two cases decided the same day, the Supreme Court upheld drug testing in the work place after finding same constitutes a search subject to Fourth Amendment protections. *Skinner v. Railway Labor Executives Ass'n.*, 489 U.S. 602, 103 L.Ed.2d 639, 109 S.Ct. 1402 (1989); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 103 L.Ed.2d 685, 109 S.Ct. 1384 (1989).

STRIP SEARCHES IN JAILS

County jail and prison officials can strip search inmates entering their facility, irrespective of the severity of the offense, without probable cause or reasonable suspicion. *Florence v. Board of Chosen Freeholders of County of Burlington*, 135 S. Ct. 1510 (2012). This ostensibly extends to body cavity searches as well. *Id* at 1520 (“Something small might be tucked or taped under an armpit, behind an ear, between the buttocks, in the instep of a foot, or inside the mouth or some other body cavity.”).

BODILY INTRUSIONS

Police officers did not violate the Fourth Amendment by assisting medical personnel in the warrantless administration of a laxative to an arrestee who the officers had seen swallow a baggie of suspected heroin, the Wisconsin Supreme Court held. After determining that the administration of the laxative and subsequent search of the defendant's stool were covered by the "search incident to arrest" exception to the warrant requirement, the court applied a balancing test to determine the reasonableness of the search's intrusion on the defendant's bodily integrity. *See State v. Payano-Roman*, 714 N.W.2d 548 (Wis. 2006).

However, other forms of bodily intrusion, such as a blood draw in a Driving While Intoxicated investigation, are covered by the 4th Amendment's warrant requirement. *Missouri v. McNeely*, 133 S. Ct. 141 (2013). Furthermore, while exceptions to the warrant requirement may apply, such as exigent circumstances, the mere fact that drugs and alcohol metabolize and are ultimately eliminated from the body cannot in and of itself form the basis for applying the exigency exception. *Id* at 1568.

B. FROM AN AUTOMOBILE:

REQUIREMENT OF A WARRANT FOR CONTAINERS

While it is still the law that where there is probable cause *only* to search a closed or sealed "repository of personal effects", the mere fact such container is placed into a vehicle does not in itself bring that container's search within the "automobile exception," to the warrant requirement. *Carroll v. U.S.*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed.2d 543 (1925); *U.S. v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977) [searching locked footlockers in auto trunk]; *U.S. v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982).

In *California v. Acevedo*, 500 U.S. 565 (1982), the court rejected the holding in *Sanders*, 442 U.S. at 767.

"Here, as in *Chadwick*, the mere fact that the suitcase had been placed in the trunk of the vehicle did not render the automobile exception of *Carroll* applicable ...it was the *luggage* being transported by respondent at the time of the arrest, not the automobile in which it was being carried, that was the suspected locus of the contraband. The relationship between the automobile and the contraband was surely incidental, as in *Chadwick*. The fact that the suitcase was resting in the trunk of the automobile at the time of respondent's arrest does not turn this into an 'automobile exception' case." *Sanders*, 442 U.S. at 767.

Where the probable cause relates to the vehicle itself, then officers may "conduct a probing search of compartments and containers within the vehicle" wherever they may be found. *U.S. v. Ross*, 456 U.S. 798, 825, 102 S.Ct. 2157, 2171, 72 L.Ed.2d 572, 594 (1982) [probable cause to believe a particularly described individual known as "Bandit" was selling drugs from a paper bag in the trunk of a particularly described vehicle].

"We hold that the scope of the warrantless search authorized by (the automobile exception) is no broader and no narrower than a magistrate could legitimately authorize by warrant. If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." *U.S. v. Ross*, 456 U.S. at 825.

See also U.S. v. Freire, 710 F.2d 1515 (11th Cir. 1983) [applying *Ross* retroactively]; *U.S. v. Floyd*, 681 F.2d 265 (5th Cir. 1982); *U.S. v. Badolato*, 710 F.2d 1509 (5th Cir. 1983) [where officers assisted in placing cocaine in suitcase and suitcase in trunk, they had probable cause to stop vehicle and conduct warrantless search of closed suitcase in locked trunk]; *Osban v. State*, 726 S.W.2d 107 (Tex.Crim.App. 1986), *overruled in part by Heitman v. State*, 815 S.W.2d 681 (Tex.Crim.App. 1991) [officer's discovery of small amount of contraband and large amount of cash during search of passenger compartment pursuant to arrest amounted to probable cause to search truck].

Ross does not authorize general exploratory searches merely because container is located in an automobile.

See *Linnett v. State*, 647 S.W.2d 672 (Tex.Cr.App. 1983) [searching paper bag on front seat]; *Oklahoma v. Castleberry*, 678 P.2d 720 (Okla.). *aff'd*, 105 S.Ct. 1859 (1985) [search incident to lawful arrest did not justify search of defendant's locked car or suitcases]; *People v. Nicholson*, 207 Cal. App. 3d 707 (Cal. Ct. App. 1989) [warrant requirement for containers only applies when police do not have probable cause to search the vehicle or anything within it except a particular container].

See also *State v. Kock*, 725 P.2d 1285 (Or. 1986) [the inherent mobility of "parked, immobile, and unoccupied" car not enough to justify warrantless search, under Oregon constitution].

But see *California v. Carney*, 471 U.S. 386, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985) [an automobile exception extended to stationary but operational vehicle in a public parking lot]; *U.S. v. Bagley*, 772 F.2d 482 (9th Cir. 1985); *U.S. v. Alexander*, 835 F.2d 1406 (11th Cir. 1988).

BRIGHT LINE RULE: SEARCH INCIDENT TO AUTO ARREST

A search incident to one arrested in an automobile [where no probable cause relates to the vehicle], nevertheless, warrants a search of the entire passenger compartment under the fiction same is within the "zone" of the arrestees reach under *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1979). See also *Vale v. Louisiana*, 399 U.S. 30, 90 S.Ct. 1979, 26 L.Ed.2d 409 (1970).

"Our reading of the cases suggests the generalization that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary item.'...Accordingly, we hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident to that arrest, search the passenger compartment of that automobile." *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768, 774-5 (1981). See also, *Thornton v. U.S.*, 541 U.S. 615 (2004) [When a police officer makes a lawful custodial arrest of an automobile's occupant, the Fourth Amendment allows the officer to search the vehicle's passenger compartment as a contemporaneous incident of arrest. Once an officer determines that there is probable cause to make an arrest, it is reasonable to allow officers to ensure their safety and to preserve evidence by searching the entire passenger compartment.

A court has applied *Belton's* "bright line rule" to a piece of luggage near a custodial arrestee at the police office. *U.S. v. Porter*, 738 F.2d 622, 626-27 (4th Cir. 1984).

"We agree with the district court, regardless of the point at which Miss Porter's arrest in fact occurred, that the warrantless search of her carry-on bag in the DEA office was lawful as incident to the arrest. The defendant argues that the bag was within the exclusive control of Detective Dawley after her arrest, that there were no exigent circumstances, and therefore that a warrant was necessary for Dawley to search the bag. This argument fails for two reasons. First, the Supreme Court has specifically rejected the argument. *New York v. Belton*, 453 U.S. 454, 461-62 (1981), *abrogation recognized by Davis v. U.S.*, 131 S. Ct. 2419 (2012). . . . The Court has established a 'bright-lines' rule, *see id.* at 463-72, . . . that a lawful custodial arrest justifies a contemporaneous search without a warrant of the person arrested and the immediately surrounding area, *id.* at 457(citing *Chimel v. California*, 395 U.S. 752, 763 (1969)); *U.S. v. Litman*, 739 F.2d 137 (4th Cir. 1984) (en banc); Miss Porter had been lawfully arrested, and it is undisputed that the bag was within her reach. The Supreme Court has rejected the suggestion that more need be litigated, in particular, the issue of whether one of the reasons supporting the search-incident-to-arrest exception is present. *New York v. Belton*, 453 U.S. 459 (citing *U.S. v. Robinson*, 414 U.S. 218, 235 (1973)). We also do not believe that the bag was within the exclusive control of Detective Dawley. Again, the bag was

within reach of Miss Porter, and any evidence within it was easily accessible. A primary rationale of the search-incident-to-arrest exception to the warrant requirement is that the arrestee may attempt to conceal or to destroy evidence, *Chimel v. California*, 395 U.S. 763 . . . and we think that even if such an inquiry were necessary the rationale of that search warrant exception is applicable in this case.

The fact that Miss Porter may have been arrested on the way to the DEA office and searched after she arrived there is irrelevant. We have upheld, as incident to arrest, a search of items within the reach of the arrestee even where the person had been arrested and driven to an FBI field office 30 minutes away before being searched. *U.S. v. McEachern*, 675 F.2d 618, 622 (4th Cir. 1982). Here, only 15 minutes passed between the time Miss Porter left the plane and the time her bag was searched." *Porter*, 738 F.2d at 626-27.

At least one court has extended to dwellings *Belton's* "bright line" rule allowing searches of the entire passenger compartment of a vehicle, incident to the occupant's arrest, irrespective of any reasonable fear that the arrestee might obtain a weapon or destroy evidence. *State v. Murdock*, 445 N.W.2d 319 (Wisc. App. 1989).

NEW YORK V. BELTON'S "BRIGHT LINE RULE" GETTING DIMMER

One court held that where a suspect was hand-cuffed and in custody, a warrantless search by police of a hand gun case three feet from him was not a lawful incident of arrest since the seizure was not necessary in order to disarm the defendant, protect the safety of the officers, or preserve evidence from destruction. *U.S. v. Bonitz*, 826 F.2d 954 (10th Cir. 1987). *See also U.S. v. Arango*, 879 F.2d 1501 (7th Cir. 1989) [court upheld search of vehicle even though defendant was apprehended a block away and brought back to vehicle]. *Contra U.S. v. Vasey*, 834 F.2d 782, 787 (9th Cir. 1987) [where search was 30 to 45 minutes after arrest and accused was hand-cuffed and placed in patrol car, same lacked "contemporaneity" requirement of a search incident to arrest. Moreover, the search was not properly limited to the area within the defendant's immediate control]. The Supreme Court in *Arizona v. Gant*, 556 U.S. 332 (2009) took a closer look at the rationale supporting the brite line rule. The *Belton* rule stemmed from the idea in *Chimel* that an officer is permitted to search the immediate surrounding area of the arrestee for contraband or weapons within his reach. However, to extend this rationale to the vehicle that an arrestee recently occupied when he is no longer in reach, or capable of reaching the vehicle, is a stretch the Supreme Court was no longer willing to allow. The "police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." Absent these circumstances, "a search of an arrestee's vehicle will be unreasonable unless police obtain a search warrant." *Gant*, 556 U.S. at 351.

COURTS RETICENT TO ACCEPT POLICE JUSTIFICATION PRETEXT

Moreover, in *Bonitz*, the Tenth Circuit found the fire arms agents' claim of exigent circumstances based on their discovery of twenty-one cans of gunpowder "smack[ed] of pure unadulterated pretext." *U.S. v. Bonitz*, 826 F.2d 954, 957 (10th Cir. 1987).

"CUSTODIAL ARREST" REQUIREMENT

For an arrest to warrant a full search incident thereto, that arrest must be "custodial" in nature. *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), *abrogation recognized by Davis v. U.S.*, 131 S. Ct. 2419 (2012). "Our holding today does no more than determine the meaning of *Chimel's* principles in this particular and problematic content. It in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful *custodial arrests*." *Belton*, 453 U.S. at 460.

Ordinary traffic stops do not involve custody for purposes of the *Miranda* rule. Thus, evidence of statements that driver made during roadside questioning were admissible. The case involved one police officer asking the driver

a few questions and to perform a balancing test in a visible location to passing motorists. *Pennsylvania v. Bruder*, 488 U.S. 9, 109 S.Ct. 205, 102 L.Ed.2d 172 (1988) [*per curiam*].

U.S. v. Robinson, 414 U.S. 218, 220-21, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973) [arresting officer "had probable cause to arrest the respondent, and he effected a full-custody arrest"]; *Gustafson v. Florida*, 414 U.S. 260, 262, 94 S.Ct. 488, 38 L.Ed.2d 456 (1973) [officer "took petitioner into custody in order to transport him to the station-house"]; *U.S. v. Ceballos*, 812 F.2d 42 (2d Cir. 1987) [a police request that defendant accompany them to the station coupled with a refusal to allow him to drive there in car that he is authorized to drive amounts to custody and probable cause is required]; *Chimel v. California*, 395 U.S. 752, 763, 89 S.Ct. 2034, 23 L.Ed.2d 685, 694 (1969).

"...a lawful custodial arrest creates a situation which justifies the contemporaneous search without a warrant of the person arrested and the immediately surrounding area." *Chimel v. California*, 395 U.S. at 763.

The well-reasoned opinion in *U.S. v. Parr*, 843 F.2d 1228 (9th Cir. 1988), explains that the prosecution's claim that a detention based on a traffic stop was an arrest justifying a search incident thereto can backfire. The defense, taking the posture that a custodial arrest had not taken place succeeded in defeating the legality of the search. Noting that detention in a police car does not constitute an arrest per se and that traffic stops are analogous to *Terry* stops the court stated that:

"Although there is no 'bright line' for determining when a stop becomes an arrest, a distinction between stops and arrests may be drawn at the point of transporting the defendants to the police station."

Citing cases involving various restrictive measures by police where no arrest was found, the court concluded the *Parr* search, where the accused was placed in the police car after a traffic stop and his auto searched, could not be upheld as one incident to an arrest.

Adams v. State, 634 S.W.2d 785, 789 (Tex.App. Austin, 1982); *Thomas v. State*, 572 S.W.2d 507 (Tex.Cr.App. 1980).

"The search of appellant's automobile was not a search incident to arrest. . . . [A]ppellant was being detained while a traffic ticket was being written and was not placed under arrest until after the pills were found. *Cf. Wussow v. State*, 507 S.W.2d 792 (Tex.Cr.App. 1976). Appellant was not in custody at the time of the search, and thus the search was not incident to arrest for the traffic violation." *Thomas*, 572 S.W.2d at 509.

"The arrest that justifies a search incident must now qualify as a 'custodial' one." *Christian v. State*, 572 S.W.2d 507, 629 (Tex.Cr.App. 1976).

"As appellant turned left in front of [his] police vehicle, Malone noticed the rear license plate on the Pontiac had expired. Officer Malone stopped appellant to give him a traffic ticket. Appellant who was alone, got out of his car and came back towards the officer who parked behind appellant's vehicle.... He appeared nervous to [Officer] Malone and kept walking back towards his car ...the officer observed a brown canvas zipper bag laying open in the front seat. Malone reached in and pulled the bag over and looked in it. The bag contained ...a little black film canister. Malone removed the canister from the bag and opened it. The canister contained pills.... Whatever its impact in other factual situations, we find it inapplicable in the case at bar because appellant was not in 'custodial arrest' at the time of the search in question." *Linnett v. State*, 647 S.W.2d 672 (Tex.Crim.App. 1983).

Detention of vehicle and occupants for fifty minutes while awaiting the arrival of a drug sniffing dog was held to be minimally intrusive detention and not an illegal arrest even though no probable cause existed for the lengthy detention. *Hardy v. U.S.*, 855 F.2d 753 (11th Cir. 1988).

The Texas Court of Criminal Appeals has indicated that it is not at all clear that such searches would pass muster under Art. 1, Section 9 of the Texas Constitution. *Morr v. State*, 631 S.W.2d 517, 519 (Tex.Crim.App. 1982).

"The other issue is whether officers may search the interior of a vehicle as a routine incident to a custodial arrest for a traffic violation, even though they have no reasonable belief that the search is necessary to prevent the occupants from reaching a weapon or destroying evidence." The panel held that they may not, following *Branch v. State*, 599 S.W.2d 32 (Tex.Crim.App. 1980). *Branch* is no longer a viable statement of Fourth Amendment law, for, while this case has been pending on rehearing, the Supreme Court has decided that such searches do not violate the Fourth Amendment. *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981). *But Belton does not alter our holding that such a search violates Section 9 of the Texas Bill of Rights.* *Beck v. State*, 547 S.W.2d 266 (Tex.Cr.App. 1976) (stating "[a]ll searches incidental to arrest cannot be justified on this theory, for to do so would allow wholesale fishing expeditions whenever a legal [traffic] arrest is made").

See also *Linnett v. State*, 647 S.W.2d 672 (Tex.Cr.App. 1983) [*en banc*].

"Appellant did not claim the intrusions are barred by our own law of search and seizure bottomed on Article I, Section 9 of the Bill of Rights and TEX. R. CRIM. P. 1.06, so we have no reason to address that question. Nor do we decide that the *Belton* rule is consistent with State law. Our conclusion is that the rule is not applicable to the facts of this cause." *Linnett v. State*, 647 S.W.2d 672,675 (Tex.Cr.App. 1983) [*en banc*].

PROTECTIVE TERRY SEARCH OF VEHICLE'S PASSENGER COMPARTMENT

Police may however, conduct a limited *Terry*-type weapons frisk of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, if the police officer has a reasonable belief, based on specific and articulable facts, which taken together with the rational inferences from those facts would warrant the officer to believe that the suspect is dangerous and may gain immediate control of weapons. *Michigan v. Long*, 459 U.S. 1098, 103 S.Ct. 3469, 74 L.Ed.2d 945 (1983).

"In *Terry v. Ohio*, 392 U.S. 1 (1968), we upheld the validity of a protective search for weapons in the absence of probable cause to arrest because it is unreasonable to deny a police officer the right 'to neutralize the threat of physical harm, when he possesses an articulable suspicion that an individual is armed and dangerous.'" *id.*, at 24. "We did not, however, expressly address whether such a protective search for weapons could extend to an area beyond the person in the absence of probable cause to arrest. In the present case, respondent David Long was convicted for possession of marijuana found by police in the passenger compartment and trunk of the automobile that he was driving. The police searched the automobile that he was driving. The police searched the passenger compartment because they had reason to believe that the vehicle contained weapons potentially dangerous to the officers. We hold that the protective search of the passenger compartment was reasonable under the principles articulated in *Terry* and other decisions of this Court." *Long*, 459 U.S. 1098 (1983).

"...*Terry* need not be read as restricting the preventive search of the person of the detained suspect." [footnote omitted]. *Long*, 459 U.S. at 3479.

"...If, while conducting a legitimate *Terry* search of the interior of the automobile, the officer should, as here, discover contraband other than weapons, he clearly cannot be required to ignore the contraband, and the Fourth Amendment does not require its suppression in such circumstances." *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971); *Michigan v. Tyler*, 436 U.S. 499, 509 (1978); *Texas v. Brown*, 460 U.S. 730 (1983). *Long*, 459 U.S. at 3481 [Powell, J., concurring].

See also New York v. Class, 475 U.S. 106 (1986).

In *Class*, the police had stopped the defendant for speeding and having a cracked windshield. While looking for the VIN number, officer saw the butt of a gun protruding from under the front seat. In holding the search permissible, the Court reasoned that the intrusion was minimal, there was no expectation of privacy in the VIN number, and the safety of the officers outweighed the intrusiveness.

U.S. v. Lott, 870 F.2d 778 (1st Cir. 1989) [law enforcement officer who conducts a protective search of a person or vehicle must have an actual suspicion that weapons are present. The fact that it may be later argued that an objectively reasonable officer would have been justified in conducting the search is not determinative. Rather, the conduct of the officers in the field must be evaluated, and where their conduct does not show a concern for safety, the search is not justifiable].

A police officer who, during a search of a car stopped for a traffic violation, found cash in the glove compartment and a sizeable quantity of drugs hidden behind the back-seat armrest had the probable cause required by the Fourth Amendment to arrest everyone in the car, including a front-seat passenger. The fact that the occupants were in the small space of an automobile, their denials of ownership of the drugs, and the quantities of drugs and cash involved supported a reasonable belief that all of the occupants were involved in a common drug trafficking enterprise, the court concluded. *See Maryland v. Pringle*, 540 U.S. 366 (2003).

INVESTIGATIVE STOP OF A MOTOR VEHICLE

"[I]n determining when an investigative stop is unreasonably pretextual, the proper inquiry is not whether the officer *could* validly have made the stop but whether under the same circumstances a reasonable officer *would* have made the stop in the absence of an invalid purpose." *U.S. v. Smith*, 799 F.2d 704, 708 (11th Cir. 1986) [emphasis added].

See U.S. v. Smith, 799 F.2d 704, 708 (11th Cir. 1986) [officers decide to follow automobile based on an inadequate drug courier profile and pulled car over for slight weaving. They then argue stop for drug search valid since they could have stopped the car to investigate whether the driver was intoxicated]; *U.S. v. Kohler*, 836 F.2d 885 (5th Cir. 1988) [the defendants were close to the U.S. Border coupled with the facts that the area had a history of smuggling, the defendant's motor home changed from an open and lightly loaded vehicle to a closed and heavily loaded vehicle and the change in the defendant's behavior to strained and agitated gave the officers a reasonable suspicion].

A traffic stop, like any other temporary investigative detention, is limited by the scope of the investigation at its inception. Thus, if an officer has acquired only reasonable suspicion or probable cause to justify a traffic violation, the officer must effectuate that legal purpose in a reasonably timely fashion. Unless the officer otherwise acquires additional reasonable suspicion for some other offense during the course of the traffic stop, he cannot delay or stall the completion of the traffic stop to secure a drug-sniffing dog or try to gain additional evidence. *Rodriguez v. United States*, 575 U.S. 348, 350 (2015) ("We hold that a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures. A seizure justified only by a police-observed traffic violation, therefore 'become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission' of issuing a ticket for the violation." (quoting *Illinois v. Caballes*, 543 U.S. 405, 407 (2005))).

SOBRIETY CHECKPOINT APPROVED

Without describing or defining what procedures or guidelines are required, the Supreme Court recently approved roadside "sobriety checkpoints, conducted pursuant to "guidelines", noting that same are "minimally intrusive" and serve a "grave and legitimate interest" of the state, indistinguishable from the border stops approved in *U.S. v. Martinez-Fuerte*, 428 U.S. 543 (1976).

Michigan Department of State Police v. Sitz, 496 U.S. 444, 110 L.Ed.2d 412, 110 S.Ct. 2481 (1990); *State v. Van Natta*, 805 S.W.2d 40, 42 (Tex.App.-Ft. Worth 1991) [state must prove effectiveness of DWI roadblocks in preventing accidents caused by drunk drivers otherwise the roadblock will be a Fourth Amendment violation]; *Meeks v. State*, 692 S.W.2d 504 (Tex.Cr.App. 1985) [a roadblock license check will be permitted *only* where the "sole purpose in stopping all traffic on the highway ...was ...to check driver's licenses"]; *State v. Barcia*, 562 A.2d 246 (N.J. 1989) [roadblock stopping every twentieth car to catch cocaine purchasers violated U.S. and New Jersey Constitutions -- only 59 vehicles were directed away from the main thoroughfare and only nine persons were arrested]; *Webb v. State*, 739 S.W.2d 802 (Tex.Cr.App. 1987); *Green v. State*, 744 S.W.2d 313 (Tex.App.-Dallas, 1988) [brief visits between drivers of vehicles in parking lot do not amount to reasonable suspicion].

Contra Illinois v. Lidster, 540 U.S. 419 (2004) [brief stops of motorists at highway checkpoint where police are seeking information about a recent crime on that highway are not unreasonable].

MUST AN "INVENTORY SEARCH" BE LIMITED TO ITS PURPORTED PURPOSE?

One Court has held that officers may "impound" and thoroughly "inventory" a vehicle legally parked in a "company" parking lot, incident to the owner's arrest inside the adjoining business premises. *U.S. v. Kornegay*, 885 F.2d 713 (10th Cir. 1989).

However, that same Court has held that where:

1. Arresting officers know the identity of the arrestee and where he or she lives,
2. Arrestee is accompanied by another capable of securing, taking custody, or removing the vehicle,
3. Vehicle's place of origin is known,
4. Vehicle's owner will be able to return in the near future to retrieve the car.

An "inventory search" may not be conducted, since the underlying justification for permitting such an intrusion, that of protecting the citizen's property and the police from claims of pilferage, are not present. *U.S. v. Pappas*, 735 F.2d 1232 (10th Cir. 1984) [searching vehicle parked in lounge parking lot].

INVENTORY SEARCH

It would seem an inventory search of a vehicle should be warranted only when the driver is arrested... and no other person is available to drive the vehicle or "no other alternatives are available other than impoundment to insure the protection of the vehicle."

South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976); *U.S. v. Lyons*, 706 F.2d 321 (D.C. Cir. 1983) [warrantless search of closet could not be justified as "inventory" search nor search incident to arrest]; *U.S. v. Laing*, 708 F.2d 1568 (11th Cir. 1983); *U.S. v. Griffin*, 729 F.2d 475 (7th Cir.), *cert. denied*, 105 S.Ct. 117 (1984) [a car impounded for traffic violation may be searched to prevent hazard to passing motorists]; *U.S. v. Long*, 705 F.2d 1259 (10th Cir. 1983); *Smyth v. State*, 634 S.W.2d 721 (Tex.Cr.App. 1982); *Benavides v. State*, 600 S.W.2d 809, 811 (Tex.Cr.App. 1980) ["[a]n automobile may be impounded if ...no alternatives are

available other than impoundment to ensure the protection of the vehicle"]; *Evers v. State*, 576 S.W.2d 46 (Tex.Cr.App. 1978); *Christian v. State*, 592 S.W.2d 625 (Tex.Cr.App. 1980); *Gill v. State*, 625 S.W.2d 307 (Tex.Cr.App. 1981).

"A true inventory search of an automobile, occurring outside the legal concepts of probable cause or search incident to a lawful arrest, is just that and nothing more. It means that, using a standard inventory form prepared pursuant to standard police procedure, a police officer or his agent lawfully inventories the contents of a lawfully impounded motor vehicle. *E.g. Daniels v. State*, 600 S.W.2d 813 (1980); *Benavides v. State*, 600 S.W.2d 809 (1980). Because the officer or his agent is doing nothing more than *taking stock* of loose items of personal property found in the vehicle, items of personal property found in plain view or in unlocked compartments of the vehicle may be seized." *Gill*, 625 S.W.2d at 319.

U.S. v. Judge, 864 F.2d 1144 (5th Cir. 1989) [police may open closed containers in an inventory search of an automobile *if* they are following standard procedures that mandate the opening of such containers in every impounded vehicle], *Clark v. State*, 643 S.W.2d 723 (Tex.Crim.App. 1982) [so-called inventory search was illegal where vehicle was in residential area, could have been easily locked, and did not need safekeeping]; *Rodriguez v. State*, 644 S.W.2d 200 (Tex.App. -- Amarillo, 1982) [so-called inventory search was illegal where there was no connection between defendant's arrest and impoundment of his car]; *See also Higgins v. State*, 422 So.2d 81, 82 (Fla. 1982) ["an arresting officer must advise an arrestee of possible alternatives to impoundment"]; *Randall v. State*, 656 S.W.2d 487 (Tex.Crim.App. 1983) ["[f]or an inventory to be legal, the impoundment must be lawful"].

However, the Texas Court of Criminal Appeals has approved the opening of locked glove compartments and trunks with a key as part of a routine inventory, so long as *no force is used to gain access*. *Kelley v. State*, 677 S.W.2d 34 (Tex.Cr.App. 1984); *Stephens v. State*, 677 S.W.2d 42 (Tex.Cr.App. 1984); *Guillett v. State*, 677 S.W.2d 46 (Tex.Cr.App. 1984).

FROM AUTOMOBILE TO INVENTORY AND BACK AGAIN

In *Florida v. Meyers*, 466 U.S. 380, 104 S.Ct. 1852, 80 L.Ed.2d 381 (1984) [per curiam], the Supreme Court reaffirmed "the teaching of *Michigan v. Thomas*, 458 U.S. 259, 102 S.Ct. 3079, 73 L.Ed.2d 750 (1982) and prior decisions that a vehicle may be searched under the 'automobile exception' even after it has been immobilized and reduced to police custody." The Court reiterated that *Michigan* upheld a warrantless search of an automobile even though the car was already in police custody [no mobility] and even though a prior inventory search had already been made. *See Michigan v. Thomas*, 458 U.S. 259, 102 S.Ct. 3029 (1982). *See also U.S. v. Iredia*, 866 F.2d 114 (5th Cir. 1989) [under the plain view doctrine].

POLICE REGULATIONS REGARDING IMPOUNDING AND INVENTORYING VEHICLES

The Supreme Court has approved impounding and inventorying vehicles where their operators are taken into custody, so long as same is not for the "sole" purpose of general criminal investigation, and is accomplished according to previously established departmental directives.

"In the present case, as in *Opperman* and *Lafayette*, there was no showing that the police, who were following standardize procedures, acted in bad faith or for the sole purpose of investigation. In addition, the governmental interests justifying the inventory searches in *Opperman* and *Lafayette* are nearly the

same as those which are obtained here. In each case, the police were potentially responsible for the property taken into their custody. By securing the property, the police protected the property from unauthorized interference. Knowledge of the precise nature of the property helped guard against claims of theft, vandalism, or negligence. Such knowledge also helped to avert any danger to police or others that may have been posed by the property." *Colorado v. Bertine*, 479 U.S. 367, 372-3, 107 S.Ct. 738, 93 L.Ed.2d 739, 748 (1987).

The Supreme Court, however, required that the police be following a previously prescribed "police regulation" for inventorying vehicles.

"We conclude that here, as in *Lafayette*, reasonable police regulations relating to inventory procedures administered in good faith satisfy the Fourth Amendment, even though courts might, as a matter of hindsight be able to devise equally reasonable rules requiring a different procedure." *Bertine*, 479 U.S. at 374.

MUST BE STANDARD POLICY OR REGULATION

However, the Court has insisted that there be a real policy or regulation and that same be directed at producing an inventory, not an exploratory criminal investigation. In *Florida v. Wells*, 495 U.S. 1, 109 L.Ed.2d 1, 110 S.Ct. 1632 (1990), a defendant was stopped for speeding and arrested for DWI. Drug related items were subsequently found in the interior of the auto. The inventory search was not sufficiently regulated to satisfy the Fourth Amendment therefore evidence found in locked suitcase was subject to suppression.

"Our view that standardized criteria ...or established routine ...must regulate the opening of containers found during inventory searches, is based upon the principle that an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence. The policy or practice governing inventory searches should be designed to produce an inventory. The individual officer must not be allowed so much latitude that inventory searches are turned into 'a purposeful and general means of discovering evidence of crime' ..." *Florida v. Wells*, 495 U.S. 1, 109 L.Ed.2d 1, 110 S.Ct. 1632 (1990) [citations omitted].

See also U.S. v. Young, 825 F.2d 60 (5th Cir. 1987) [officers followed established local police and DEA regulations; no evidence that search was a pretext]; *U.S. v. Hahn*, 922 F.2d 243 (5th Cir. Jan. 16, 1991) [IRS agents had not promulgated standard guidelines for conducting an inventory search, therefore their unknowing compliance with local police department guidelines did not validate the search under *Florida v. Wells*. To be a valid inventory search the IRS agents must follow their *own* standard procedure].

But see U.S. v. Woolbright, 831 F.2d 1390 (8th Cir. 1987) [even though standard procedures followed and search was seven hours after arrest the search was invalid]; *Commonwealth v. Sullo*, 532 N.E.2d 1219 (Mass. App. Ct. 1989) [perusal of an arrestee's papers was not a proper inventory search where the search was not conducted pursuant to any established procedure. The reading of the papers extended beyond what was necessary to protect the property and insure safety and where it was apparent the officer was using the inventory as a pretext to search for evidence of uncharged crime].

The Fifth Circuit, however, seems to depart from the *Bertine* rationale by allowing a seizure, which was not the product of a standard procedure inventory search, based on the bad testimony of an officer that earlier, during a *Belton* search, it was "immediately apparent" to him that the item was incriminating. The officer failed

to explain why the item [address book] had not been seized at that earlier time. *U.S. v. Iredia*, 866 F.2d 114, 119 (5th Cir. 1989).

"If the address book's evidentiary value was noted at the time of the *Belton* search, its seizure would be justified." *U.S. v. Iredia*, 866 F.2d at 119.

See also U.S. v. Seals, 987 F.2d 1102 (5th Cir. 1993) [combining inventory search with the principle of inevitable discovery to permit the use of evidence obtained from the search of a car was not permissible under search incident to arrest or the *Acevedo* doctrine].

INFORMANT'S TIP MAY DISPATCH WITH WARRANT REQUIREMENT

U.S. v. Reyes, 792 F.2d 536 (5th Cir. 1986).

An informant's tip sufficed to establish probable cause for warrantless search of defendant's car where:

- 1) tip was based on informant's personal observation,
- 2) agent had known informant for over 2 years and considered him reliable,
- 3) the tip included numerous detailed facts, and
- 4) much of the tip was corroborated by the agent.

And, while there was no information as to the exact location of the contraband, probable cause to search a vehicle extends to any portion of that vehicle or containers located therein, including a zippered bag found containing another locked nylon bag in which the contraband was found.

COMPOUNDING INFERENCES: ANONYMOUS TIP CORROBORATED BY INNOCENT ACTIVITY

The Supreme Court held that "innocent", innocuous behavior may be sufficient to imbue an "anonymous tip" with sufficient indicia of reliability to constitute "reasonable suspicion" for an "investigative stop". *Alabama v. White*, 496 U.S. 325, 110 L.Ed.2d 301, 110 S.Ct. 2412 (1990).

However, an anonymous tip alleging that someone is on his way to kill someone else can be enough to justify a police detention even if the police do not corroborate the reliability of the tip to the extent ordinarily required by the Fourth Amendment to justify an investigative detention. The court held that the emergency aid doctrine justified a vehicle stop on the basis of an anonymous tip that would not have provided reasonable suspicion under *Florida v. J.L.*, 529 U.S. 266 (2000).

Also see U.S. v. Hernandez, 477 F.3d 210 (5th Cir. 2007) [in which an anonymous tip that a red truck smuggling aliens would be at a certain location, it was not sufficient corroboration that a red truck was seen in the vicinity. 477 F.3d 210 (5th Cir. 2007).

CONTAINERS NOT INSIDE A VEHICLE

What the Supreme Court did not disturb in *Ross* was *Chadwick* and *Saunders* requirements that a warrant be obtained prior to searching any container reduced to the effective control of law enforcement officers where no automobile or other exception to the warrant requirement exists.

"In [*Chadwick*] the Court reaffirmed the general principle that closed packages and containers may not be searched without a warrant." *U.S. v. Ross*, 456 U.S. 798, 812, 102 S.Ct. 2157, 72 L.Ed.2d 572, 585 (1982).

"First, it is unquestioned that to search Royer's luggage and in the absence of probable cause and exigent circumstances, the validity of the search depends on Royer's purported consent." *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983).

"STATION HOUSE" INVENTORY

Routine administrative procedure of inventorying and/or searching the personal effects of a person incident to being booked and jailed at the police STATION HOUSE after his or her lawful arrest is constitutional. *Illinois v. Lafayette*, 462 U.S. 640, 103 S.Ct. 2605, 77 L.Ed.2d 65 (1983) [allowing search of a "purse-type" "shoulder bag" carried by the arrestee "upon reaching [the] police station but prior to being placed in confinement"].

"The governmental interests underlying a STATION HOUSE search of the arrestee's person and possessions may in some circumstances be even greater than those supporting a search immediately following arrest." *Lafayette*, 462 U.S. at 645.

Interestingly, the Chief Justice recognized that it "is not unheard of for persons employed in police activities to steal property taken from arrested persons." *Lafayette*, 462 U.S. 646.

See also Lockhart v. McCotter, 782 F.2d 1275, 1280 (5th Cir. 1986) [personal effects in arrestee's property envelope already inventoried, not protected against warrantless "second look"].

RIGHT TO BE ADVISED OF ALTERNATIVES

State v. Small, 483 So.2d 783 (Fla.App. 1985) [inventory search results are inadmissible if officer does not advise driver of the right to provide a reasonable alternative to impoundment].

But see Perez v. State, 103 S.W.3d 466 (Tex. App. -San Antonio 2003) [even though police were not impounding car, cocaine discovered in dollar bill in wallet while police were securing car on side of road was properly seized because police had authority to impound the vehicle and were performing "caretaking function"].

WHAT TYPE OF CONTAINERS ARE PROTECTED?

Nor did the Court in *Ross* overrule the holding in *Robbins* that "all containers are equally protected by the Fourth Amendment unless their contents are in plain view."

"This rule applies equally to all containers, as indeed we believe it must. One point on which the Court was in virtually unanimous agreement in *Robbins* was that a constitutional distinction between "worthy" and "unworthy" containers would be improper. Even though such a distinction perhaps could evolve in a series of cases in which paper bags, locked trunks, lunch buckets, and orange crates were placed on one side of the line or the other, the central purpose of the Fourth Amendment forecloses such a distinction. For such as the most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion so also may a traveler who carries a toothbrush and a few articles of clothing

in a paper bag or knotted scarf claim an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attache case." *U.S. v. Ross*, 456 U.S. at 822.

In *California v. Acevedo*, 114 L.Ed.2d 619, 111 S.Ct. 1982 (1991), the Court extended *Ross* to allow the warrantless search of all containers that could accommodate the items that officers had probable cause to believe were in the vehicle. Noting that in *Chadwick*, the Government had not relied upon the automobile exception to the warrant requirement³, the *Acevedo* Court adopted a "clear-cut rule," eliminating any warrant requirement for closed containers located anywhere in a vehicle lawfully searched.

Acknowledging that the Court appears to have abandoned its responsibility to check Executive abuses, Justice Stevens noted in dissent:

"[D]ecisions like the one the Court makes today will support the conclusion that *this Court has become a loyal foot soldier in the Executive's fight against crime.*"...Moreover, the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment. The investigation of crime would always be simplified if warrants were unnecessary. But the Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law." *California v. Acevedo*, [emphasis supplied] [quoting *Mincey v. Arizona*, 437 U.S. 385, 393 (1978)].

The distinction made between containers "immediately associated with the person of the arrestee" as opposed to "repositories of personal effects" which may be utilized to transport items was not addressed in *Acevedo*.

"Once law enforcement officers have reduced luggage or other personalty *not immediately associated with the person of the arrestee* to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest." [emphasis added]. *U.S. v. Chadwick*, 433 U.S. at 15.

See *U.S. v. Porter*, 738 F.2d 622 (4th Cir. 1984) [the fact of lawful arrest, without more justifies a warrantless search of the arrestee's bag]; *Stewart v. State*, 611 S.W.2d 434 (Tex.Cr.App. 1981) [searching woman's purse].

"As a matter of common usage, a purse is an item carried on an individual's person in the sense that a wallet or items found in pockets are, and unlike luggage that might be characterized as a repository for personal items when one wishes to transport them, a purse is carried with a person at all times." *Stewart*, 611 S.W.2d at 438.

"A 'full search of the person', however, has recently been held, under the *Chadwick* progeny to exclude briefcases, *United States v. Presler*, 610 F.2d 1206 (4th Cir. 1979), attache cases, *Araj v. State*, 592 S.W.2d 603 (Tex.Cr.App. 1979), guitar cases, *United States v. Bella*, 605 F.2d 160 (5th Cir. 1979), cardboard boxes closed and sealed with tape, *United States v. Dien*, 615 F.2d 10 (2d Cir. 1980), unlocked backpacks, *United States v. Meier*, 602 F.2d 253 (10th Cir. 1979), and duffel bags, *United States v. Johnson*, 588 F.2d 147 (5th Cir. 1979), but has been held [to] include wallets. see *U.S. v. Passaro*, 624 F.2d 938 (9th Cir. 1980); *U.S. v. Ziller*, 623 F.2d 562 (9th Cir. 1980); *U.S. v. Matthews*, 615 F.2d 79 (10th Cir. 1980); *U.S. v. Phillips*, 607 F.2d 808 (8th Cir. 1979); *U.S. v. Castro*, 596 F.2d 674 (5th Cir. 1979)." *Stewart*, 611 S.W.2d at 438.

³ The Court rejected the Government's argument that "the search of movable luggage could be considered analogous to the search of an automobile".

See *U.S. v. Carnejo*, 598 F.2d 554 (9th Cir. 1979) [purse]; *U.S. v. Rigaks*, 630 F.2d 364 (5th Cir. 1980) [zippered leather case]; *Dunn v. State*, 653 P.2d 1071 (Alaska App. 1982) ["[c]losed containers which are not, by their nature, immediately associated with the person of the arrestee, but which are merely seized from the arrestee's proximity at the time of the arrest, cannot be opened and inspected without a search warrant after they have been removed from the arrestee's control and secured by the police"].

C. FROM A MOTORCYCLE :

Police may not search a saddle bag on a motorcycle without a warrant where stop is an investigatory one for traffic violations. *U.S. v. Vinson*, 662 F. Supp. 431 (M.D. Tenn. 1987).

D. FROM VESSELS:

With possible exception of searches conducted at an international border, the Fourth Amendment's protections are probably nowhere else weaker than under warrantless, suspicion-less, stops of seagoing vessels.

Recently, the Supreme Court considered the validity of the incredibly broad search authority conferred upon customs authorities by 19 U.S.C. § 1581(a) which provides, in part:

"Any officer of the customs may at any time go on board of any vessel...at any place in the United States or within the customs waters...and examine, inspect, and search the vessel... and every part thereof..." 19 U.S.C. § 1581(a).

In *U.S. v. Villamonte-Marquez*, 462 U.S. 579, 103 S.Ct. 2573, 77 L.Ed.2d 22 (1983), a majority of the Supreme Court upheld a Customs Agent's "suspicionless" boarding of a sailboat in a channel leading to open sea for the purpose of examining the vessel's documentation pursuant to 19 U.S.C. 1581(a). The Court held that while such boarding was no less "random" than highway stops condemned in earlier cases, e.g. *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607; *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660, such was, nonetheless, "reasonable" under the Fourth Amendment in light of the First Congress' clearly expressed understanding that such stops are valid [the First Congress having promulgated both 19 U.S.C. 1581(a)'s predecessor or "lineal ancestor" and the Fourth Amendment] the water borne setting that precludes the use of fixed checkpoints or roadblocks, the complexity of the system of registering seagoing vessels as compared to the motor vehicle registration system, the strength of the government's interest in assuring compliance with the registration requirements, and the limited nature of the intrusion. *Villamonte-Marquez*, 462 U.S. at 584.

"It seems clear that if the customs officer in this case had stopped an automobile on a public highway near the border, rather than a vessel in a ship channel, the stop would have run afoul of the Fourth Amendment because of the absence of articulable suspicion... But under the overreaching principle of 'reasonableness' ...we think that the important factual differences between vessels located in waters offering ready access to the open sea and automobiles on principal thoroughfares in the border area are sufficient to require a different result here." *Villamonte-Marquez*, 462 U.S. at 588.

Although the language of 19 U.S.C. § 1581(a) would seem to authorize a thorough search, the Court in *Villamonte-Marquez* stressed the limited nature of the intrusion in the case before it ["the type of intrusion made in this case while not minimal, is limited."]. The officers there were in the process of checking the boat's paperwork when they detected the odor of marijuana, thus giving them probable cause. The Court's emphasis on the intrusion's limited nature at least suggests that at some point an intrusion, while apparently authorized by 19 U.S.C. § 1581(a), might be so intrusive as to be unreasonable under the Fourth Amendment.

Relying on *U.S. v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572, the Court held that:

"Even the courts have recognized what has been obvious from time immemorial to seafarers: that ships are not the same as houses.... In *Ross*, 102 S.Ct. at 2162, the Court noted that historically warrantless searches of vessels ...as opposed to fixed premises such as a home or other building -had been considered reasonable by Congress. '[T]he guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained and a search of a ship (or) motorboat ...where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality of jurisdiction in which 'the warrant must be sought'. The bottom line is, that those who go down to the sea in ships have 'a lesser expectation of privacy (in their ships) than in their homes, obviating the usual Fourth Amendment requirements of a warrant.'" *U.S. v. Burke*, 540 F. Supp. 1282, 1286 (D.P.R. 1982).

VESSELS ON THE HIGH SEAS

In *U.S. v. Cilley*, 785 F.2d 651 (9th Cir. 1985), the court held that the Coast Guard's high seas boarding of American vessel for multiple purposes of detecting drug smuggling, and document and safety check promotes sufficient government interests to outweigh intrusion. The *Villamonte-Marquez* balancing test extends beyond domestic waters.

See also *U.S. v. Luis-Gonzalez*, 719 F.2d 1539 (11th Cir. 1983) [the statute empowers Coast Guard to stop and board American vessels on high seas even in complete absence of suspicion of criminal activity]; *U.S. v. Bent*, 707 F.2d 1190 (11th Cir. 1983), *cert. denied*, 104 S.Ct. 2174 (1984) [the Coast Guard, by statute, may stop U.S. vessel in international waters for safety and inspection absent suspicion].

FOREIGN VESSELS

See *U.S. v. Reeh*, 780 F.2d 1541 (11th Cir. 1986) [the Coast Guard search of foreign vessel held reasonable under totality of circumstances]; *U.S. v. Alfonso*, 759 F.2d 728 (9th Cir. 1978) [reasonable suspicion that contraband was aboard Colombian ship sufficiently supported search of private living quarters aboard ship during valid extended border search]; *U.S. v. Gonzalez*, 776 F.2d 931 (11th Cir. 1985) [U.S. may obtain foreign nation's consent informally at time of the offense in order to extend "customs waters" to specific boats].

WHEN IS A VEHICLE/VESSEL A HOME

Applying the *Katz v. U.S.*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), "reasonable expectation of privacy" rationale some courts have looked to the specialized nature and purpose of different vehicles and vessels in determining whether they fall within the *Carroll v. U.S.*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed.2d 543 (1925), "automobile exception" to the Fourth Amendment's warrant requirement. See *U.S. v. Cadena*, 588 F.2d 100, 101 (5th Cir. 1979) [just as a "ship is a sailor's home", the court recognized the "ever increasing number of vacation vehicles and mobile homes ...designed to be used as residences"].

"[J]ust as there are similarities in the mobility of automobiles and vessels, there are differences in their uses. Save for the ever increasing number of vacation vehicles, and mobile homes, motor vehicles are not designed to be used as residences. The ship is the sailor's home. There is hardly the expectation of privacy even in the curtained limousine or the stereo equipped van that every mariner or yachtsman expects aboard his vessel." *U.S. v. Cadena*, 588 F.2d at 101.

In *California v. Carney*, 471 U.S. 386 (1985), the majority refused to distinguish motor homes from ordinary automobiles simply because the former are capable of functioning as dwellings. For Fourth Amendment purposes, motor homes are automobiles unless "situated in a way or place that objectively indicates that it is being used as a residence." Courts have looked to the "use" to which the "mobile home" is put in deciding whether same should fit within the automobile exception to the warrant requirement. *U.S. v. Holland*, 740 F.2d 878, 880 (11th Cir. 1984) [In rejecting defendant's argument that his motor home deserves the same privacy expectation as at home, the Court noted that the motor home was being used at the time for transportation].

"The use of the vehicle, not its shape, should control the standard that applies." *U.S. v. Holland*, 740 F.2d at 880.

Courts have also looked to the purpose to which particular areas of the vehicle or vessel are put.

U.S. v. Whitmire, 595 F.2d 1303 (5th Cir. 1979); *U.S. v. Williams*, 589 F.2d 210, 214 (5th Cir. 1979).

"Relatively high levels of privacy must be accorded ...a houseboat ...or to the crews living quarters ...at sea ...whereas it is difficult to see that a crew member might legitimately claim privacy on the open deck of a fishing shack or in the hold of a cargo vessel available for hire. ...A harder case to assess, reserved for another day, is the enclosed area of a yacht or large sailboat which might be in use as a living area during an extended cruise or might also serve as a mere cargo container for an illicit drug run." *U.S. v. Whitmire*, 595 F.2d at 1312.

The courts have also acknowledged that passenger cabins on a cruise ship are more like an individual's home than an automobile finding that "[j]ust as individuals seek privacy in hotel rooms or another's home to sleep, cruise ship passengers seek out privacy in their sleeping cabins and expect that they will not be opened or intruded upon without consent." *U.S. v. Whitted*, 541 F.3d 480 (3rd Cir. 2008).

AN AIRPLANE IS NOT AN AUTOMOBILE

In *U.S. v. Amuny*, 767 F.2d 1113 (5th Cir. 1985), the Fifth Circuit distinguished an airplane from an automobile:

"Although an automobile and an airplane are similar in that they both are mobile, they share few other attributes with respect to the relative privacy interests the owners of each possesses... Although an airplane, like a car, technically travels in the public space, the public space in which each vehicle travels is quite different. A car is driven upon frequently traveled highways and roads where passengers in adjacent cars may have a view of the interior of the car. A plane, by contrast, is flown in relatively sparsely traveled air space where other airplanes do not have a view of the interior of the vehicle." *U.S. v. Amuny*, 767 F.2d at 1128.

E. FROM PREMISES:

CONTAINERS WITHIN THE HOME:

A lawful search of fixed premises generally includes the authority to open and search any rooms, closets, cabinets, chests, drawers or containers upon those particular premises.

U.S. v. Ross, 456 U.S. 798, 820-21, 102 S.Ct. 2157, 2170, 72 L.Ed.2d 572, 591 (1982) [relying on dicta].

"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 [particular items] also provides authority to open closets, chests, drawers, and containers in which the [items] might be found." *U.S. v. Ross*, 456 U.S. at 820-21.

STATE STATUTES MAY LIMIT WHAT ITEMS MAY BE SEARCHED FOR

For example, in Texas, TEX. R. CRIM. P. Art. 18.02, sets out the "grounds for issuance" of a search warrant in Texas, and same expressly "except[s] the personal writings of the accused". TEX. R. CRIM. P. Art. 18.02

While the Court of Criminal Appeals has never specifically addressed this issue⁴, it has in the past held that an item not listed as a "grounds for issuance" of search warrant cannot properly be the object of a search. *Smith v. State*, 557 S.W.2d 299 (Tex.Cr.App. 1977); *Escamilla v. State*, 556 S.W.2d 796 (Tex.Cr.App. 1977).

If an item not listed in TEX. R. CRIM. P. Art. 18.02 as a "Grounds for Issuance" of a search warrant cannot be the object of a search, then surely an item specifically and expressly excluded by that very statute should not be fair game. Thus "personal writings", often seized in order to connect the accused to the searched premises or seized contraband should be excluded under TEX. R. CRIM. P. Art. 18.02(10)'s express prohibition when specified in the warrant or pursuant to TEX. R. CRIM. P. Art. 18.01(d) if they are not:

TEX. R. CRIM. P. Art. 18.01 Search Warrant:

(d)"only the specifically described property or items set forth in a search warrant issued under Subdivision (10) of Article 18.02 of this code or property or items enumerated in Subdivisions (1) through (9) of Article 18.02 of this Code may be seized." [emphasis supplied]

However, Article 18.02(10) does not exclude from seizure, as a personal writing, a list of stolen property. *Nikrasch v. State*, 698 S.W.2d 443 (Tex.Crim.App. 1985).

WARRANTLESS ENTRY AND SECURING OF HOME

U.S. v. Perez, 700 F.2d 1232 (8th Cir. 1983) [warrantless entry into and securing of home for 13 ½ hours until search warrant could be obtained after Defendants were arrested was not justified]; *U.S. v. Griffin*, 502 F.2d 959, 961 (6th Cir. 1974); *But see Segura v. U.S.*, 468 U.S. 796 (1984) ("The valid search warrant was a 'means sufficiently distinguishable' to purge the evidence of any 'taint' arising from the entry." (quoting *Wong Sun*, 417 U.S. at 488))).

Officers may not enter a suspect's home to effectuate an arrest without an arrest warrant and exigent circumstances making it impossible or impractical to obtain a warrant. Whether "hot pursuit" of a fleeing suspect justifies warrantless entry into the home, is a fact intensive question, which necessitates consideration of how severe the offense in question truly is. A misdemeanor offense is less likely to justify warrantless entry. *Lange v. California*, 141 S. Ct. 2011, 2024 (2021) ("The flight of a suspected misdemeanant does not always justify a warrantless

⁴ The "personal writings" exception to the "grounds for issuance" of a search warrant has been mentioned in passing by the Court in *Gentry v. State*, 629 SW2d 77 (Tex.Cr.App. 1981); *Aliff v. State*, 627 SW2d 166 (Tex.Crim.App. 1982); *Doescher v. State*, 578 S.W.2d 385 (Tex.Cr.App. 1978).

entry into a home. An officer must consider all of the circumstances in a pursuit case to determine whether there is a law enforcement emergency. On many occasions, the officer will have good reason to enter – to prevent imminent harms of violence, destruction of evidence, or escape from the home. But when the officer has time to get a warrant, he must do so – even though the misdemeanor has fled.”).

Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); *U.S. v. Morgan*, 743 F.2d 1158 (6th Cir. 1984) [that encircling a home, flooding it with search light and coercing occupants out with a bullhorn amounted to a warrantless entry]; *U.S. v. Maez*, 872 F.2d 1444 (10th Cir. 1989) [where police surround home and order defendant to come out same vitiates consent given and taints statements given]; *U.S. v. Edmondson*, 791 F.2d 1512 (1986);

See also New York v. Harris, 495 U.S. 14, 109 L.Ed.2d 13, 110 S.Ct. 1640 (1990) [stamp of permiture upon a custodial statement obtained from a suspect detained outside his home after he had been illegally arrested, without a warrant in violation of *Payton v. New York*, explaining that *Payton* was designed to protect the physical integrity of one's home, not to give the defendant additional protection for statements made outside his home]. The Fourth Amendment permits police officers to conduct a post-arrest, protective sweep of a home even if the officers' fear of an ambush is not based on concern about a particular, identifiable person. The court decided that, in combination with other circumstances, a defendant's "casual, inviting response" from the top of the stairs to police officers who had just burst into his home justified a search of the basement for any possible confederates planning an ambush or escape. *See United States v. Winston*, 444 F.3d 115 (1st Cir. 2006).

However, an "arrest" within [one's own home] does not provide a license for the police to search the entire residence for evidence."

U.S. v. Satterfield, 743 F.2d 827, 845 (11th Cir. 1984); *U.S. v. Cueto*, 611 F.2d 1056 (5th Cir. 1980).

Nor will same authorize entry of another's home to effectuate that arrest, without a search warrant for the third party's home or exigent circumstances.

Steagald v. U.S., 451 U.S. 204, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981).

However, in *Segura v. U.S.*, 468 U.S. 796, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984), the Chief Justice, in a portion of his majority opinion joined only by Justice O'Connor, stated that:

"We conclude that, assuming that there was a seizure of all the contents of the petitioner's apartment when agents secured the premises from within, that seizure did not violate the Fourth Amendment. Specifically, we hold that where officers, having probable cause, enter premises, and with probable cause, arrest the occupants who have legitimate possessory interests in its contents and take them into custody and, for no more than the period here involved, secure the premises from within to preserve the status quo while others, in good faith, are in the process of obtaining a warrant, they do not violate the Fourth Amendment's proscription against unreasonable seizures." *Segura v. U.S.*, 468 U.S. at 798.

See also Griswold, Criminal Procedure, 1969 -- Is It A Means Or An End, 29 MD. L. REV. 307, 317 (1969); *See generally* 2 W. LAFAVRE, SEARCH AND SEIZURE ' 6.5 (1978); *U.S. v. Munoz-Guerra*, 788 F.2d 295, 298 (5th Cir. 1986) [Government's knowledge of the presence of firearms and destructible evidence within a home does not, by itself, justify a warrantless entry into that residence. There must be "reason to believe that a criminal suspect was aware of police surveillance"]].

But see U.S. v. Morales, 868 F.2d 1562 (11th Cir. 1989) [drug agent's seizure of defendant's apartment was justified by the defendant's statements and the possibility of destruction of evidence].

FORCIBLE ENTRY OF PREMISES

Forcible entry for the purpose of executing a search warrant is Constitutional only as a last resort.

Dalia v. U.S., 441 U.S. 238, 247, 99 S.Ct. 1682, 60 L.Ed.2d 177 (1979); *Payne v. U.S.*, 508 F.2d 1391, 1394 (5th Cir. 1975).

Where the manner of entry is potentially dangerous to the occupants or their neighbors, such as the deployment of a motorized battering ram, one court has required more than a valid warrant to justify such entry. The California Supreme Court in *Hangford v. Superior Court*, 729 P.2d 822 (Cal. 1987), held that a motorized battering ram could be used only upon:

- 1) obtaining a warrant upon probable cause;
- 2) receiving the magistrate's authorization to use the ram, upon his weighing the risks against society's interests; and
- 3) prior determination by police of either an immediate threat of injury to the officers executing the warrant or reasonable grounds to suspect destruction of evidence.

KNOCK AND ANNOUNCE

[18 U.S.C. 3109]

Noncompliance with knock and announce requirement not justified by possibility that Defendant might destroy narcotics where there was no evidence or suspicion drugs would be destroyed. *See also U.S. v. Morino*, 701 F.2d 815 (9th Cir. 1983); *Sabbath v. U.S.*, 391 U.S. 585, 88 S.Ct. 1755, 20 L.Ed.2d 828 (1968); *U.S. v. Whitney*, 633 F.2d 902 (9th Cir. 1980).

FAILURE TO COMPLY WITH

"KNOCK AND ANNOUNCE" REQUIREMENT NOT EXCLUDED

The Court in *Hudson v. Michigan*, 547 U.S. 586 (2006), ruled that evidence need not be excluded when police violate the "knock-and-announce" rule. The opinion by Justice Scalia reaffirmed the validity of both the knock-and-announce rule and the "exclusionary rule" for evidence obtained by police in most cases of Fourth Amendment violation. However, the majority held that the exclusionary rule could not be invoked for evidence obtained after a knock-and-announce violation, because the interests violated by the abrupt entry of the police "have nothing to do with the seizure of the evidence." Justice Scalia wrote that the knock-and-announce rule was meant to prevent violence, property-damage, and impositions on privacy, not to prevent police from conducting a search for which they have a valid warrant. The Court also found that the social costs of the exclusionary rule as applied to the knock-and-announce rule outweighed any possible "deterrence benefits", and that alternative measures such as civil suits and internal police discipline could adequately deter violations. Justice Stephen Breyer wrote a dissenting opinion, and was joined by Justices Stevens, Souter, and Ginsburg. The dissent noted the Court's long history of upholding the exclusionary rule and doubted that the majority's cited precedents supported its conclusion. The dissent also expressed doubt that knock-and-announce violations could be deterred without excluding the evidence obtained from the searches.

TEXAS ADOPTS RULING IN HUDSON V. MICHIGAN

Citing Hudson, the Texas Court of Criminal Appeals upheld the search of a safe which prosecutor conceded was not described in the warrant. "Assuming that the seizure of the safes by the police violated appellee's Fourth Amendment possessory rights in these safes, we believe that the 'massive' remedy of exclusion of the methamphetamine in this case is not required under the United States Supreme Court's decision in *Hudson v. Michigan*." *State v. Powell* 306 S.W.3d 761 (Tex.Crim.App. 2010).

F. AT AIRPORTS:

DRUG COURIER PROFILE:

Agent Paul Markonni has had an illustrious career, especially with respect to the drug courier profile, which he is given credit for developing while working in the Detroit DEA Office. The feats of Agent Markonni are well known. Consider the very first statement in *U.S. v. Berd*, "[t]his case presents yet another chapter in the life of DEA Special Agent Paul Markonni", 634 F.2d at 981. Agent Markonni's exploits are described as "legendary" in *U.S. v. Ehlibracht*, 693 F.2d 333, 335-66 n.3 (5th Cir. 1982).

With increasing frequency, law enforcement officers have come to rely upon certain characteristics claimed to constitute a composite profile of a "drug courier" as justification for "engaging" airline passengers at terminals.⁵ An overview of these cases and the inconsistencies produced reveals strong potential for abuse.

The Supreme Court exacerbated the problem by placing its stamp of approval upon the use of such profiles so long as the underlying facts relied upon by the agent, objectively constitute "reasonable suspicion" or "probable cause". *U.S. v. Sokolow*, 490 U.S. 1, 104 L.Ed.2d 1 (1989).

Therefore, an intensive fact-bound inquiry of an agent professing to be an expert on "drug courier characteristics" will reveal whether the articulated factors consistently support the agent's conclusion or whether they change to support the agent's hunch and are therefore pretextual. *U.S. v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 947 (1980).

Agent's initial contact with an airline passenger, based upon a "drug courier profile", did not violate the passenger's Fourth Amendment rights.

The plurality was comprised of three separate analyses (accordingly not binding precedent).

(1) Two Justices (Stewart and Rehnquist) took positions that asking for identification and airline ticket did not constitute a "seizure", as passenger had no objective reason to believe she was not free to go;

⁵ The "drug courier profile" is a list of characteristics composed by Agent Markonni for drug agents' use in identifying drug couriers in airports. The list includes seven "primary characteristics" and four "secondary characteristics", as noted in *US v. Emlore*, 595 F. 2d 1036 n.3 (5th Cir. 1979).

The seven primary characteristics are (1) arrival from or departure to an identified source city; (2) carrying little or no baggage, or large quantities of empty suitcases; (3) unusual itinerary, such as a rapid turnaround time for a lengthy airplane trip; (4) use of an alias; (5) carrying unusually large amounts of currency in the many thousands of dollars, usually on their person in briefcases or bags; (6) purchasing airline tickets with a large amount of small denomination currency; and (7) unusual nervousness beyond that ordinarily exhibited by passengers.

The secondary characteristics are (1) almost exclusive use of public transportation, particularly taxicabs in departing from the airport; (2) immediately making a telephone call after deplaning; (3) leaving a false or fictitious call-back telephone number with the airline being utilized; and (4) excessively frequent travel to source or destination cities.

(2) Three Justices (Powell with Burger and Blackman) took the position that regardless of whether there was a seizure, one would be justified because such facts constituted a reasonable founded suspicion which would warrant any such intrusion; and;

(3) Four Justices (White, Brennan, Marshall and Stevens) concluded that Mendenhall had been seized unlawfully.

A majority held that the passenger's subsequent "consent" to accompany the agents to the DEA Office and to search her person was voluntary.

See *U.S. v. Glass*, 741 F.2d 83, 85-86 (5th Cir. 1984) [an airport stop not justified by (1) information that two individuals of particular description would be arriving, (2) defendant's arrival, (3) defendant's recognition of another deplaning passenger, (4) other passenger's use of an assumed name and (5) other passenger's nervousness upon questioning]; *U.S. v. Aguilar*, 825 F.2d 39 (4th Cir. 1987) [drug courier profile characteristics along with a bulge and white plastic showing at ankle constituted probable cause].

MERELY APPROACHING INDIVIDUAL IN PUBLIC PLACE NOT FOURTH AMENDMENT "SEIZURE" AND THEREFORE REQUIRES NEITHER "PROBABLE CAUSE" NOR "REASONABLE SUSPICION"

Compare *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983).

"Law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in any other public place, and asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions." *Florida v. Royer*, 460 U.S. at 497.

With *U.S. v. Gonzalez*, 728 F. Supp. 185 (S.D.N.Y. 1989) [as defendant was about to board, agents approached her displaying their shields. The agents were taller than the defendant; the court found she was seized for Fourth Amendment purposes]; *U.S. v. Tavolacci*, 895 F.2d 1423 (D.C.Cir. 1990) [three officers were present in the doorway and aisle blocking defendant's way out of passenger train "roomette," but defendant was "free to leave"].

See also *INS v. Delgado*, 466 U.S. 210, 104 S.Ct. 1758 80 L.Ed.2d 247 (1984) [approving "factory surveys" by INS Agents entering work place under warrant or with employer's consent to question employees about their citizenship, as questioning is "mere consensual encounter" and not detention or seizure]; *U.S. v. Collins*, 699 F.2d 832 (6th Cir. 1983); *Florida v. Rodriguez*, 469 U.S. 1, 5, 105 S.Ct. 1517, 83 L.Ed.2d 165, 170-71 (1984).

"The initial contact between the officers and respondent, where they simply asked if he would step aside and talk with them, was clearly the sort of consensual encounter that implicates no Fourth Amendment interest." *Florida v. Rodriguez*, 469 U.S. at 5.

See also *U.S. v. Wiggins*, 828 F.2d 1199 (6th Cir. 1987) [no arrest where brief interview and person was told could they could leave at any time]; *U.S. v. Barnes*, 496 A.2d 1040 (D.C. App. 1985) [the Supreme Court has established a relatively high threshold for finding a seizure, indicating that asking a suspect to take his hands out of his pockets and inquiring what he was doing and whether he had prior convictions did not constitute a Fourth Amendment seizure]; *U.S. v. Castellanos*, 731 F.2d 979, 983-84 (D.C. Cir. 1984) [no seizure when officer asks for identification]; *U.S. v. Notorianni*, 729 F.2d 520, 522 (7th Cir. 1984) [no seizure when agents identify themselves, ask questions, and announce that narcotics investigation is being conducted]; *U.S. v. Hendrix*, 726 F.2d 433, 434 (8th Cir. 1984) [no seizure when individual told of freedom to refuse to answer questions and to

leave]. *But see U.S. v. Quinn*, 815 F.2d 153 (1st Cir. 1987) [seizure, but not arrest, where numerous officers blocked defendant's car and questioned him for 20-25 minutes].

However, asking defendant to empty his pockets constituted an arrest. *U.S. v. Willis*, 759 F.2d 1486 (11th Cir. 1984).

Additional factors such as a language barrier, significant difference in size between the officers and the defendant, and the officer's continued repetition of the word drugs in increasingly loud tones while pointing at the defendant's bag constitutes a seizure subject to Fourth Amendment scrutiny. *U.S. v. Gonzalez*, 728 F. Supp. 185 (S.D.N.Y. 1989).

TAKING A JOG

The Supreme Court has held that an "investigatory pursuit" of a person was not a seizure unless, under the *Mendenhall* test, a reasonable person viewing all of the circumstances would not feel free to leave. Reaching this conclusion, the Court found that when a marked police car drives along side a running person for a short distance, a reasonable person would believe he or she was free to leave at least when the police had used no show of authority to make the individual stop. *Michigan v. Chesternut*, 486 U.S. 567 (1988).

But see Garza v. State, 771 S.W.2d 549 (Tex.Crim.App. 1989) [holding that the protection of the Fourth Amendment are involved at the point the law enforcement officer turned on the overhead flashing lights of his vehicle, as a reasonable person would not feel free to drive away. . . .The driver of a motor vehicle who "flees or attempts to elude a pursuing police vehicle when give a *visual* or *auditory* signal to bring the vehicle to a stop commits a misdemeanor."].

EVEN OFFICER'S STATEMENT "I'M A POLICEMAN", WITHOUT MORE DOES NOT CONVERT THE ENCOUNTER INTO A SEIZURE

Florida v. Royer, 460 U.S. 491, 497, 103 S.Ct. 1319, 75 L.Ed.2d 229, 236 (1983).

"Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification." *Florida v. Royer*, 460 U.S. at 497.

NOR DOES BRIEFLY QUESTIONING PASSENGER AND REQUESTING CONSENT TO SEARCH CONVERT THE ENCOUNTER INTO A SEIZURE

U.S. v. Jensen, 689 F.2d 1361 (11th Cir. 1982).

However, even a "momentary detention" of the individual requires at least "reasonable suspicion".

Florida v. Royer, 460 U.S. 491, 498, 103 S.Ct. 1319, 75 L.Ed.2d 229, 236 (1983).

"[An individual] may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds." *Florida v. Royer*, 460 U.S. at 498.

ACCUSATORY STATEMENT CONSTITUTES "SEIZURE"

Seizure occurs when officer tells defendant he suspects him of carrying drugs since [reasonable persons] would not feel they are thereafter free to go.

"Although we intimate no view with respect to whether a police officer's statement to a suspect that he has reason to believe the suspect is carrying drugs would justify a reasonable person in believing that he was not free to go, we think that such a statement would, at minimum, be a significant factor in the *Elmore* analysis.

"We stated in *Elmore* that the question whether a seizure has occurred 'often requires a "refined judgment", especially when no force, physical restraint, or blatant show of authority is involved.'" 595 F.2d at 1041-42.

See also U.S. v. Robinson, 625 F.2d 1211 (5th Cir. 1980); *U.S. v. Burgos*, 720 F.2d 1520, 1524 (11th Cir. 1983) [seizure occurs when suspect believes he or she is not free to leave].

DEFENDANT MUST BE HALTED BEFORE HE IS SEIZED

Upsetting a long line of precedence to the contrary, the Supreme Court in *California v. Hodari*, 499 U.S. 621, 111 S. Ct. 1547, 113 L.Ed.2d 690 (1991), held that a defendant who flees at the sight of a police officer chasing him and commanding him to stop is not seized before the defendant's flight has been halted.

Dissenting, Justice Stevens points out the absurdity of the majority opinion:

"[T]he Court now adopts a definition of 'seizure' that is unfaithful to a long line of Fourth Amendment cases. Even if the Court were defining seizure for the first time, which it is not, the definition that it chooses today is profoundly unwise. In its decision, the *Court assumes*, without acknowledging, that *a police officer may now fire his weapon at an innocent citizen and not implicate the Fourth Amendment-as long as he misses his target.*" [emphasis supplied].

The more reasoned standard had been, until *Hodari*, that any time there is the slightest restraint of movement a seizure has occurred.

"As Detective Glover pursued Bowles, he passed his quarry, held out his credentials and turned to face defendant, blocking his path and stopping him from proceeding further. Clearly at this point Bowles' movement had been restrained. *U.S. v. Bowles*, 625 F.2d 526, 532 (5th Cir. 1980).

Courts had recognized before *Hodari* that an invitation by one claiming police authority does not have the "option attendant upon a bid to a ball".

"To codify 'arrest' by requiring such prerequisites as the laying on of hands or the use of magic words would be to defy reality. An invitation of one claiming police authority does not have the options attendant upon a bid to a ball. Even assuming that the inspectors did not intend to arrest Alexander to obtain evidence, the period of interrogation could have been a putative arrest from Alexander's viewpoint. Alexander's fear of police power is certainly as reasonable an explanation for his docility as innate friendliness." *Alexander v. U.S.*, 390 F.2d 101, 108 (5th Cir. 1968).

See also U.S. v. Morgan, 743 F.2d 1158 (6th Cir. 1984) [coercive tactics of officers who, encircled home, flooded it with spotlights and used a bullhorn to call defendant out was arrested and accomplished same purpose as

entering house in violation of *Payton v. New York*, 445 U.S. 573 (1980)]; *U.S. v. Robinson*, 625 F.2d 1211 (5th Cir. 1980); *U.S. v. Santora*, 619 F.2d 1052 (5th Cir. 1980) [agents approach two men sitting at airport terminal coffee shop, identifying themselves and asking for identification - held to be Fourth Amendment seizure]; *Earley v. State*, 635 S.W.2d 528 (Tex.Crim.App. 1982) [defendant was arrested when his liberty of movement was restricted]; *Hardinge v. State*, 500 S.W.2d 870 (Tex.Crim.App. 1973); *Hayes v. Florida*, 470 U.S. 811, 105 S.Ct. 1643, 84 L.Ed.2d 705 (1985) [removal and transportation of a suspect to the police station for fingerprinting requires probable cause and a warrant, no matter how brief the station house interrogation].

But see U.S. v. Tovolacci, 895 F.2d 1423 (D.C.Cir. 1990) [three officers blocking the way out of a train passenger roomette did not make a reasonable person believe he was not free to leave, the dissent says that the "free to leave" test is rendered "virtually meaningless" by majority opinion]; *Burkes v. State*, 830 S.W.2d 957 (Tex.App. - Tyler 1990), *rev'd*, 830 S.W.2d 922 (Tex.Crim.App. 1991), *on remand*, 830 S.W.2d 959 (Tex.App. Tyler, 1992) [handcuffed defendant who was forced to lie on his stomach while being searched was subject only to an investigative stop and not an arrest, the stop was at night, the officers could not see the defendant's hands and the suspects in the area outnumbered the officers originally held only a *Terry Stop*, on appeal ruled an arrest and on remand for probable cause to arrest].

LENGTH OF STOP MUST BE BRIEF

An investigatory stop must be brief.

See U.S. v. Cortez, 449 U.S. 411, 101 S.Ct. 690, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981); *U.S. v. Brignoni-Ponce*, 422 U.S. 873, 95 L.Ed.2d 2574, 45 L.Ed.2d 607 (1975); *Dunn v. United States*, 442 U.S. 100, (1979).

In *U.S. v. Place*, 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983), a traveler's luggage was seized for ninety (90) minutes for the purpose of subjecting it to a "canine sniff" by a narcotics detention dog. The Court held:

"The length of the detention of respondent's luggage alone precludes the conclusion that the seizure was reasonable in the absence of probable cause." *U.S. v. Place*, 462 U.S. at 709.

See also U.S. v. Chamberlin, 644 F.2d 1262 (1980) [twenty minute detention on reasonable suspicion unlawful]; *U.S. v. Perez-Esparaza*, 609 F.2d 128 (1979) [a 3 hour detention during valid investigatory stop was illegal arrest].

But see U.S. v. Sharpe, 470 U.S. 675, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985).

"We reject the contention that a 20 minute stop is unreasonable when the police have acted diligently and a suspect's actions contribute to the added delay about which he complains." *U.S. v. Sharpe*, 470 U.S. 675, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985).

C.f. Two hour detention of Federal Express parcel to enable a "dog sniff" was not precluded by *Pace*. Detaining a parcel not like detaining luggage at airport, which had the effect of detaining the passenger. *U.S. v. LaFrance*, 879 F.2d 1 (1st Cir. 1989).

Also See Kothe v. State, 152 S.W.3d 54 (Tex.Crim.App.2004). [Viewed in the totality of the circumstances, continued detention of a driver for an additional three to twelve minutes while waiting for the results of a routine computer driver's license check when the officer's original articulable suspicion had already been resolved was not a violation of the Fourth Amendment.].

DETAINING LUGGAGE FOR ANY SIGNIFICANT PERIOD OF TIME CONSTITUTES A SEIZURE

More than a "momentary" detention of a passenger's luggage may constitute a "seizure" requiring probable cause. *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) ["the officers without his consent had retrieved and checked his luggage from the airline"]; *U.S. v. Place*, 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983); *Peschel v. State*, 770 P.2d 1144 (Alaska App. 1989) ["special obligation to diligently minimize inconvenience to the traveler" requires "least intrusive means."].

In *U.S. v. Place*, 462 U.S. 696, 698, 706, 103 S.Ct. 2637, 2639, 77 L.Ed.2d 110, 114, 120 (1983), the Supreme Court considered "whether the Fourth Amendment prohibits law enforcement authorities from detaining personal luggage for exposure to a trained narcotics detection dog on the basis of reasonable suspicion that the luggage contains narcotics." The Court concluded that a "sniff test" by a well trained narcotics detection dog does not constitute a "search" requiring probable cause under the Fourth Amendment, and "that when an officer's observations lead him to believe that a traveler is carrying luggage that contains narcotics, the principles of Terry and its progeny would permit the officer to detain the luggage briefly to investigate the circumstances that aroused his suspicion, provided that the investigative detention is properly limited in scope." [emphasis added]. *U.S. v. Place*, 462 U.S. at 706.

As to the "scope" of such detentions the Court concluded that "the limitations applicable to investigative detentions of the person should define the permissible scope of the investigative detention of the person's luggage on less than probable cause". *U.S. v. Place*, 462 U.S. at 709.

Relevant factors to be considered in determining whether the detention exceeds the limitations applicable to investigative detentions include the "brevity of the invasion", and "whether the police diligently pursue their investigation." *U.S. v. Place*, 462 U.S. at 709.

"Although we have recognized the reasonableness of seizures longer than the momentary ones involved in *Terry*, *Adams*, and *Brignoni-Ponce*, the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion. Moreover, in assessing the effect of the detention, we take into account whether the police diligently pursue their investigation." *U.S. v. Place*, 462 U.S. at 709.

"In sum, we conclude that when an officer's observations lead him reasonably to believe that a traveler is carrying luggage that contains narcotics, the principles of Terry and its progeny would permit the officer to detain the luggage briefly to investigate the circumstances that aroused his suspicion, provided that the investigative detention is properly limited in scope..."

[Such a seizure [of luggage] can effectively restrain the person since he is subjected to the possible disruption of his travel plans in order to remain with his luggage or to arrange for its return...]

The length of the detention of respondent's luggage [90 minutes] above precludes the consideration that the seizure was reasonable in the absence of probable cause." *U.S. v. Place*, 462 U.S. at 706, 708-09.

See U.S. v. Gutierrez, 849 F.2d 940 (5th Cir. 1988) [abandoned suitcase could be searched]; *U.S. v. Cagle*, 849 F.2d 924 (5th Cir. 1988) [more than an investigative detention of suit case as agent's actions caused same to miss being loaded on passenger's flight]; *U.S. v. Garcia*, 849 F.2d 917 (5th Cir. 1988) [compressing and sniffing baggage is not a search or a seizure]; *U.S. v. Hahn*, 849 F.2d 932 (5th Cir. 1988); *U.S. v. Belcher*, 685 F.2d 289, 290 (9th Cir. 1982) [that at least where "bag was in [defendant's] physical possession" at the time it was seized]; *U.S. v. Moore*, 786 F.2d 1308, 1311 (5th Cir. 1986) [handguns found in "plain view", and seized, may be retained

and used as evidence of extortion, despite immediate lack of probable cause linking the guns to the crime. Such retention is not effective detention of the owner under *U.S. v. Place*, 462 U.S. 696, 708-709 (1983)]; *Peschel v. State*, 770 P.2d 1144 (Alaska Ct. App. 1989); *U.S. v. LaFrance*, 879 F.2d 1 (1st Cir. 1989) [two hour detention of Federal Express parcel to enable a "dog sniff" was not precluded by]; *U.S. v. Place*, 462 U.S. 696 (1983) [detaining a parcel is not like detaining luggage at airport which had the effect of detaining the passenger].

See *United States v. Goodwin* 449 F.3d 766, 2006 WL 1409424 (7th Cir. 2006) [Law enforcement officers' seizure of a traveler's luggage five minutes before the only daily train to his destination was scheduled to depart did not exceed the lawful scope of an investigative detention permitted by the Fourth Amendment as interpreted in *Terry v. Ohio*, 392 U.S. 1 (1968). Causing an intrusion greater than that occasioned by a run-of-the-mill *Terry* stop did not convert the stop into a de facto arrest requiring probable cause; instead, it simply required more justification to show that the detention was "reasonable," the court said.].

ASKING PASSENGER TO ACCOMPANY OFFICER TO "OFFICE" CONSTITUTES AN ARREST

However, requesting a passenger to accompany an officer to an office after the passenger has given his name and refused consent to search cannot be characterized as "brief ...on the spot questioning" and distinguishes these facts from *Mendenhall* as not being consensual.

U.S. v. Hill, 626 F.2d 429, 435-36 (5th Cir. 1980).

"The absence of consent distinguishes this case from *Mendenhall* ...though the facts of *Mendenhall* are similar ...*unlike* Sylvia Mendenhall, Hill flatly refused to be searched without a warrant. In our view, that fact provides a basis for upholding the district court's factual conclusion that Hill did not consent to accompany Markonni to the Delta office." *U.S. v. Waksal*, 709 F.2d 653 (11th Cir. 1983).

In *Florida v. Royer*, 460 U.S. 491 (1983), the Supreme Court stated:

"Asking for an examining of Royer's ticket and his driver's license were no doubt permissible in themselves, but when the officers identified themselves as narcotic agents, told Royer he was suspected of transporting narcotics, and asked him to accompany them to the police room, while retaining his ticket and driver's license and without indicating in any way he was free to depart, Royer was effectively seized for purposes of the Fourth Amendment... What had begun as a consensual inquiry in a public place had escalated into an investigatory procedure in a police interrogation room... The officers had Royer's jacket, they had his identification and they had seized his luggage... As a practical matter Royer was under arrest." *Florida v. Royer*, 460 U.S. at 501.

However, the Supreme Court has indicated in this context that where a suspect "agree[d] to talk with the police, move[s] over to where his cohorts and the other detective were standing, and ultimately grant[s] permission to search his baggage", such "seizure", if any, requires only "reasonable suspicion." *Florida v. Rodriguez*, 469 U.S. 1, 6, 105 S.Ct. 308, 83 L.Ed.2d 165, 171 (1984).

See also *U.S. v. Alvarez-Sanchez*, 774 F.2d 1036 (11th Cir. 1985) [the court applies totality of circumstances test and holds that because defendant consented to accompany border patrol agents to an administrative office fifteen feet away, no illegal arrest occurred].

STOPS AT TWO DIFFERENT AIRPORTS "PRESUMES" AN ARREST REQUIRING PROBABLE CAUSE

U.S. v. Morin, 665 F.2d 765 (5th Cir. 1982).

EVEN WHERE INDIVIDUAL TRAVELING UNDER AN "ASSUMED NAME", DRUG COURIER PROFILE ALONE DOES NOT CONSTITUTE "PROBABLE CAUSE"

In *Florida v. Royer*, 460 U.S. 4912 (1983), the Supreme Court said, "we cannot agree ...that every nervous young man paying cash for a ticket to New York City [a 'target city'] under an assumed name and carrying two heavy American Tourister bags may be arrested" or searched. *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983).

See also *U.S. v. Belcher*, 685 F.2d 289, 291 (9th Cir. 1982).

FLIGHT

Even where initial arrest was unlawful some courts have held a suspect's subsequent conduct may provide probable cause. *U.S. v. Bailey*, 691 F.2d 1009 (11th Cir. 1982) [approach of Agent Markonni, individual fled, attempted to climb the gate and began "swinging, striking Markonni in the head"]. However, "flight" should not raise suspicions where it comes in response to the approach of plain clothed officers who fail to identify themselves. But where one flees approaching law enforcement in a crime ridden neighborhood, the Supreme Court held, he raises officers' suspicions justifying his further investigation. *Illinois v. Wardlow*, 528 U.S. 119, 124. 120 S.Ct. 623, 676, 145 L.Ed.2d 570 (2000). See *Wong Sun v. U.S.*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) ["when an officer insufficiently or unclearly identifies himself or his mission, the [person's] flight from the (site of confrontation) must be regarded as ambiguous conduct"]; *U.S. v. Jones*, 619 F.2d 494, 498 (5th Cir. 1980) [a defendant's "evasive actions and flight from two strange men riding in an unmarked car and exhibiting no indicia of lawful authority were only natural reactions to the circumstance"]; *U.S. v. Amuny*, 767 F.2d 1114, 1124-5 (5th Cir. 1985).

"If a police officer identifies himself while approaching a suspect and the suspect flees, the suspect's conduct suggests that he knowingly seeks to evade questioning or capture... Such conduct ordinarily supplies another element to the reasonable suspicion calculus, ...but may occasionally serve as the catalyst to confer mere reasonable suspicion to probable cause... In cases where investigating officers do not identify themselves, however, flight alone is, at best, ambiguous conduct...

[W]e view the appellants' flight from the scene of the plane as ambiguous conduct and insufficient to support a finding of probable cause.... [six unmarked vehicles carrying approximately twelve plainclothes law enforcement officers converged, in unison, upon the site of the aircraft. None of the vehicles had sirens blaring or lights flashing, and the officers did not announce either their purpose or identity in any other way. Some of the officers apparently had their weapons drawn. Flight under these circumstances was as much reasonable as it was suspicious. It added nothing to the officers' determination of probable cause. We therefore reject the government's claim that the appellant's flight from the area of the plane supported their determination of probable cause. The search of the aircraft cannot be sustained upon this basis." *U.S. v. Waksal*, 709 F.2d 653 (11th Cir. 1983).

But the accused may lack "standing" to complain that an illegal stop or arrest precipitated another's "flight".

U.S. v. Johnson, 496 A.2d 592 (D.C. App. 1985) [a defendant's detention justified where third party's flight could be imputed; no standing to exclude third party's flight in justifying defendant's stop].

EXPLOITATION OF AIRPORT SECURITY POINTS

U.S. v. Politano, 491 F. Supp. 456, 461 (W.D. N.Y. 1980); *U.S. v. Gorman*, 637 F.2d 352 (5th Cir. 1981); *U.S. v. Lopez-Pages*, 767 F.2d 776 (11th Cir. 1985).

THREE LEVELS OF POLICE CITIZEN CONTACT

In *U.S. v. Berry*, 670 F.2d 583 (5th Cir. 1982) [en banc], the Fifth Circuit outlined three levels of police citizen contacts:

ARREST: Requires probable cause;

SEIZURE: Requires reasonable suspicion and the presence of particular characteristics of drug courier profile are of no legal significance; and

INITIAL CONTACT: Extremely restrictive in scope, must be conducted in completely non-coercive manner, does not require reasonable suspicion, does not invoke Fourth Amendment.

See U.S. v. Barnes, 496 A.2d 1040 (D.C. App. 1985) [applying what it considers the Supreme Court's relatively high threshold for finding a seizure, the D.C. Circuit holds that asking the accused to take his hands out of his pockets and inquiring what he was doing and whether he had prior convictions did not constitute a "seizure" for Fourth Amendment purposes].

FOURTH AMENDMENT REQUIRES DETERMINATION OF PROBABLE CAUSE TO DETAIN INDIVIDUAL ARRESTED WITHOUT A WARRANT

The Fourth Amendment requires that a neutral judicial officer determine probable cause for any significant pretrial restraint shortly after the arrest of a person arrested without a warrant.

Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975) [a state prosecutor's filing of "information" did not constitute such a probable cause determination by a neutral judicial officer]. *See also Irardi v. Gunter*, 528 F.2d 929 (1st Cir. 1976) [*Gerstein's* probable cause determination is a prerequisite to interstate extradition]; *Moss v. Weaver*, 525 F.2d 1258 (5th Cir. 1976) [applying *Gerstein* to juvenile detention]; *Robertson v. Riddle*, 402 F. Supp. 144, 146 (W.D. Va. 1975) [the magistrate conducting such probable cause determinations need not be an attorney]; *Coleman v. Frantz*, 754 F.2d 719 (7th Cir. 1985) [the defendant's eighteen day detention without an appearance before a judge or magistrate was a violation of defendant's Fourth Amendment right to be brought before a magistrate without unreasonable delay].

A warrantless arrest by a law officer is reasonable under the Fourth Amendment if, given the facts known to the officer, there is probable cause to believe that a crime has been or is being committed. *See Devenpeck v. Alford*, 543 U.S. 146, 125 S.Ct. 588, 160 L.Ed 2d 537 (2004).

However, although officer's affidavit for a search warrant failed to state that officer actually observed the defendant transport drugs, taken as a whole, the affidavit provided sufficient information that was reasonable for the officer to believe that there was probable cause for a search warrant. *See U.S. v. Sibley*, 448 F.3d 754 (5th Cir. 2006).

Also see Torres v. State, 182 S.W.3d 899 (Tex.Crim.App.2005) [Given the totality of the circumstances, the state failed to carry its burden to justify a warrantless arrest for DWI where the arresting officer was told by deputies on the scene that the defendant was drunk. The deputy's unexplained opinions about whether defendant was intoxicated did not give the officer personal knowledge of, or reliable information about, facts or circumstances sufficient to justify the arrest. The deputies did not articulate supporting facts upon which their opinions were based. Rather, they merely asserted that defendant appeared intoxicated.]

RETURN TO McNABB/MALLORY RULE

Additionally, it has been held that a 6 hour delay in presenting an arrestee before the magistrate is unreasonable, rendering the fruits of such illegal detention inadmissible.

U.S. v. Perez, 733 F.2d 1026 (2d Cir. 1984).

See also U.S. v. Wilson, 838 F.2d 1081, 1085 (9th Cir. 1988) [where arraignment was postponed until questioning was complete the court found that the delay was solely to obtain a confession and therefore not reasonable even though 18 U.S.C. ' 3501(c) sometimes allows delays for more than six hours]. *But see U.S. v. Montoya De Hernandez*, 473 U.S. 531, 105 S.Ct. 3304, 87 L.Ed.2d 381 (1985) [16 hour detention at border waiting for defendant to excrete contraband was reasonable]. *But see U.S. v. Onyema*, 766 F.Supp 76, remanded by, 952 F.2d 393 (2d Cir. 1991) [defendant incommunicado for 78 hours until he passed contraband from his alimentary canal violated the Fourth Amendment, officers never took evidence supporting reasonable suspicion before a judge during the detention].

"DRUG COURIER PROFILE" DOES NOT CONSTITUTE "REASONABLE SUSPICION"

A Drug Courier Profile is a checklist of reoccurring characteristics which can do no more than alert the agent to initiate surveillance. *U.S. v. Rico*, 594 F.2d 320, 326 (2d Cir. 1979); *U.S. v. Hanson*, 801 F.2d 757 (5th Cir. 1986) [profile match alone cannot create reasonable suspicion].

The Supreme Court has recognized the potentially great harm of totally arbitrary and random stops of citizens in public airports. *See also U.S. v. Allen*, 644 F.2d 749 (9th Cir. 1980); *U.S. v. Berry*, 636 F.2d 1075, 1080 n. 8 (5th Cir. 1981); *U.S. v. Berd*, 634 F.2d 979, 984 n.6 (5th Cir. 1981).

Because of the potential for including innocent citizens as profiled drug couriers, courts critically view the use of the drug courier profile to establish reasonable suspicion.

"The fact that many of the drug courier profiles characteristics are consistent with innocent behavior convinces this court that the profile characteristics should be used only sparingly, if at all, as a justification for questioning citizens." *U.S. v. Berry*, 636 F.2d 1075, 1080 n.8 (5th Cir. 1981).

See also U.S. v. Allen, 644 F.2d 749 (9th Cir. 1980); *U.S. v. Buenaventura-Ariza*, 615 F.2d 29 (2d Cir. 1981); *U.S. v. Berry*, 636 F.2d 1075 (5th Cir. 1981); *U.S. v. Pulvano*, 629 F.2d 1151, 1155 n. 1 (5th Cir. 1980); *U.S. v. Andrews*, 600 F.2d 563 (6th Cir. 1980); *U.S. v. McCaleb*, 552 F.2d 717 (6th Cir. 1977); *U.S. v. Scott*, 545 F.2d 38 (8th Cir. 1976); *U.S. v. Gonzalez*, 728 F. Supp. 185 (S.D.N.Y. 1989) [clutching bag in protective manner the outline of a rectangular object in the bag, nervously looking around and being in line with another person who also acted nervous all was "wholly consistent with lawful activity." "It is certainly true that there could be a compilation of 'wholly lawful conduct' [which] might justify the suspicion that criminal activity was afoot", but this is not such a case... There was nothing about the [rectangular] shape [of the package] that distinguished it as uniquely drug packaging. Indeed, Gary [the officer] "'didn't know what it was at all', but because his mind was

focused on his professional responsibilities, namely finding and arresting those trafficking in narcotics, he was more apt to see the package as drugs than as a lawful possession, such as a book or a gift of some sort. It is a form of tunnel vision, entertained in good faith or perhaps even subconsciously, but nonetheless limiting. Without more particularized and objective facts, the carrying of an unidentified object with a rectangular shape which protrudes from a person's handbag cannot, even in combination with the other equally innocent circumstances cited by the government, give rise to that level of reasonable suspicion required by the fourth amendment... Interdicting the flow of drugs is of primary public importance; but an officer seizing a citizen must articulate reasons which pass constitutional scrutiny.] *Valcarcel v. State*, 765 S.W.2d 412 (Tex. 1986) [en banc] [courier profile testimony is irrelevant, inherently prejudicial and equals reversible error].

But see U.S. v. Cordell, 723 F.2d 1283, 1285 (7th Cir.), cert. denied, 104 S.Ct. 1291 (1984) [reasonable suspicion when individual arrived from identified source city, name on airline ticket purchased for cash not the same as on driver's license, and nervousness increased as questioning progressed]; *U.S. v. Albano*, 722 F.2d 690, 692-931 (11th Cir. 1984) [reasonable suspicion when every act of - those under surveillance consistent with drug trafficking]; *U.S. v. Ilazi*, 730 F.2d 1120, 1124 (8th Cir. 1984) [reasonable suspicion when most of facts giving rise to agent's suspicions based on suspects's conduct, rather than on circumstances describing "very large category of presumably innocent travelers"]; *U.S. v. Smith*, 574 F.2d 882 (2d Cir. 1978); *U.S. v. Hays*, 825 F.2d 32 (4th Cir. 1987) [suspects had "some" drug courier profile characteristics, took circuitous route through airport, and then fled when police identified themselves. This court held same was reasonable suspicion that elevated to probable cause]. See also *U.S. v. Vasquez*, 612 F.2d 1338 (2d Cir. 1979); *U.S. v. Smith*, 574 F.2d 882 (2d Cir. 1978).

The Supreme Court has recognized the potentially great harm of totally arbitrary and random stops of citizens in public airports.

Reid v. Georgia, 448 U.S. 438, 100 S.Ct. 2752, 65 L.Ed.2d 890 (1980).

Therefore, the Court in *Mendenhall* did not resolve the issue of whether the initial contact constituted a seizure. See also *U.S. v. Allen*, 644 F.2d 749 (9th Cir. 1980); *U.S. v. Berry*, 636 F.2d 1075 n.8 (5th Cir. 1981); *U.S. v. Berd*, 634 F.2d 979 n.6 (5th Cir. 1981); *U.S. v. Robinson*, 625 F.2d 1211 (5th Cir. 1980).

A DEA Agent's stop of an airline passenger on his belief the passenger's conduct "fit the so-called drug courier profile, a somewhat informal compilation of characteristics believed to be typical of persons unlawfully carrying narcotics, is violative of the passenger's Fourth Amendment rights, as same does not constitute reasonable suspicion". Such "circumstances describe a very large category of presumably innocent travelers who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure". *Reid v. Georgia*, 448 U.S. at 443.

Although not a complete rejection of the drug courier profile, the Supreme Court has implicitly admonished lower courts to carefully consider cases decided on the basis of the profile, ascribing little weight to characteristics that describe a large number of travelers. *Reid v. Georgia*, 448 U.S. at 443.

EVEN WHEN COUPLED WITH AN "ANONYMOUS TIP" PROFILE DOES NOT CONSTITUTE "PROBABLE CAUSE"

Anonymous tip accurately describing defendant coupled with elements of drug courier profile is insufficient to provide probable cause. And such a tip, even alleging illegal possession of a firearm, is not sufficient for even a *Terry* stop where the tip lacked enough predictive information to render it reliable. Thus, information which merely identifies an individual at a particular location lacks such reliability. *Florida v. J.L.*, 529 U.S. 266, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000). *U.S. v. Ballard*, 573 F.2d 913 (5th Cir. 1978); *U.S. v.*

Garrett, 627 F.2d 14 (6th Cir. 1980); *Adrow v. Johnson*, 623 F. Supp. 1085 (D. Ill. 1983) [uncorroborated anonymous tip that prison guard was carrying narcotics did not establish probable cause or reasonable suspicion].

Where the anonymous tip contains information predicting a subject's future behavior, which police work confirms occurred as predicted, then the tip increases in reliability and justifies a Terry stop. *Alabama v. White*, 496 U.S. 325, 110 S.Ct. 2410, 110 L.Ed.2d 301 (1990) [an anonymous person, stating that Vanessa White would be leaving 235-C Lynwood Terrace Apartments at a particular time in a brown Plymouth station wagon with the right taillight lens broken, that she would be going to Dobey's Motel, and that she would be in possession of about an ounce of cocaine inside a brown attache case]; *U.S. v. Large*, 729 F.2d 636 (8th Cir. 1984) [probable cause when suspect fit description by confidential informant, pattern of activity consistent with innocence but suggestive, and nervousness increased during Terry stop]. Short visits in countries which are known drug sources has also been acknowledged as a factor in arousing suspicion. *U.S. v. Dorsey*, 641 F.2d 1213 (7th Cir. 1981); *U.S. v. Klein*, 592 F.2d 909 (5th Cir. 1979); *U.S. v. Himmelwright*, 551 F.2d 991 (5th Cir. 1977); *U.S. v. Kallevic*, 534 F.2d 411 (1st Cir. 1976). As has presence in a high crime area and flight upon the approach of law enforcement. *Illinois v. Wardlow*, 528 U.S. 119, 124. 120 S.Ct. 623, 676, 145 L.Ed.2d 570 (2000).

G. AUTO "DRUG COURIER" STOPS:

Courts have been just as reluctant to allow auto stops in the vicinity of the border on such "drug courier profiles". *U.S. v. Smith*, 799 F.2d 704, 707 (11th Cir. 1986).

"Here, relying on a drug courier profile, Trooper Vogel stopped a car because two young men were traveling at 3:00 A.M. in an out-of-state car... Trooper Vogel stopped the car because the appellants matched a few non-distinguishing characteristics contained on a drug courier profile and, additionally, because Vogel was bothered by the way the driver of the car chose not to look at him. Vogel's suspicion therefore was not the result of 'reasonable inferences' from 'unusual conduct' ...but was instead a classic example of those 'inarticulate hunches' that are insufficient to justify a seizure under the Fourth Amendment." *U.S. v. Smith*, 799 F.2d at 707.

See *U.S. v. Solomon*, 728 F. Supp. 1544 (S.D.Fla. 1990). The sheriff had received an anonymous tip relaying information about the defendant's future conduct and officers did corroborate many innocent facts in the tip before running the defendant's car off the road, forcibly stopping the car, yelling at the defendant, forcing him to exit the car and lie on the ground while guns were pointed at him. "...[T]he police officers observed a white male meeting [the tipster's] description get into the El Camino. A white female matching the description of the tip's Debbie then exited apartment 102. She joined the man in the car. ...After stopping at an Amoco station, the El Camino turned onto the Florida Turnpike and headed north." "...The facts known to the officers at the time of the stop from the anonymous tip plus their investigation and surveillance of the defendants would not demonstrate probable cause to any reasonable law enforcement officer. In fact, there is considerable doubt that there was even reasonable suspicion sufficient to justify a Terry stop." "Applying *Gates* to the case at bar, the police only corroborated the innocent activity of a couple who lived at a certain address, owned certain personalty, and who happened to take an early morning trip northward. Unlike the short trip to another state in *Gates*, a trip northward on the Florida Turnpike is not suspicious. Unlike *Gates*, [the defendants] reside in Florida. Their trip was as readily explainable as a pleasure excursion as a drug run." "...Indeed, had the police officers herein done their homework, the compelling evidence discovered and seized here would have been admissible." *U.S. v. Solomon*, 728 F. Supp. 1544 (S.D.Fla. 1990).

Testimony about a drug courier profile was found by at least one court to be irrelevant and inherently prejudicial and thus reversible error. *Valcarcel v. State*, 765 S.W.2d 412 (Tex.Cr.App. 1989) [en banc] [holding that it was noted in a concurring opinion that the Eleventh Circuit denounced the use of such testimony in *U.S. v. Hernandez-Cuartas*, 717 F.2d 552 (11th Cir. 1983)].

ADAPTING THE FACTS SOURCE OF DISTRIBUTION CITY

More than one court has noticed that according to the DEA, virtually every U.S. city with air service fits their criteria for either a "source" or "distribution" center. *U.S. v. Andrews*, 600 F.2d 563, 566-67 (6th Cir. 1979).

"Our experience with DEA Agent testimony in other cases makes us wonder whether there exists any city in the country which a DEA agent will not characterize as either a major narcotics distribution center or a city through which drug couriers pass on their way to a major narcotics distribution center." *U.S. v. Andrews*, 600 F.2d at 566-67.

U.S. v. Pulvano, 629 F.2d 1151 (5th Cir. 1980) [a DEA agent testimony "convinces us of the tragic fact that every major population center in this country has become a home for drug traffickers]; *U.S. v. Westerbann-Martinez*, 435 F. Supp. 690 (E.D.N.Y. 1977).

"Although Chicago has been classified as a primary source city, no evidence was introduced in support of that classification. It appears safe to assume that the overwhelming percentage of travelers from Chicago are not in any way connected with the heroin trade. *U.S. v. Westerbann-Martinez*, 435 F. Supp. 690 (E.D.N.Y. 1977). Cf. *United States v. Brignoni Ponce*, 422 U.S. at 882.

FIRST/LAST OFF AIRCRAFT

Whether one was first to deplane, [*U.S. v. Herbst*, 641 F.2d 1165,] or last to deplane, [*U.S. v. Mendenhall*, 466 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980); *U.S. v. Berry*, 636 F.2d 1075 (5th Cir. 1981); *U.S. v. Fry*, 622 F.2d 1218 (5th Cir. 1980).

WALKING FAST OR WALKING SLOW

The manner in which a person walks through an airport can be viewed as suspicious regardless of whether it is fast or slow. *Reid v. Georgia*, 448 U.S. 438, 100 S.Ct. 2752, 65 L.Ed.2d 890 (1980) [refusing to "agree 'that the manner in which the petitioner ...walked through the airport reasonably could have led the agent to suspect (him) of wrong doing'"]; *U.S. v. Allen*, 644 F.2d 749 (9th Cir. 1980); *U.S. v. Chambliss*, 425 F. Supp. 1330 (D. Mich. 1977).

Whether one walks fast:

U.S. v. Jefferson, 650 F.2d 854 (6th Cir. 1981) [Markoni followed the defendant who he thought "walked quickly"]; *State v. Key*, 375 S.2d 1354 (La. 1979).

U.S. v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980), the agents will find same significant as a characteristic of the "drug courier profile".

NERVOUSNESS/CALMNESS DURING POLICE ENCOUNTER

"Nervousness" during an encounter with the police is neither suspicious nor unusual. *Reid v. Georgia*, 448 U.S. 438, 100 S.Ct. 2752, 65 L.Ed.2d 890, 894 (1980) ["according to the agent's testimony, the men appeared nervous during the encounter"]; *U.S. v. McCaleb*, 552 F.2d 717, 720 (6th Cir. 1977); *U.S. v. Ballard*, 573 F.2d

913 (5th Cir. 1978); *U.S. v. Pope*, 561 F.2d 663 (6th Cir. 1977); *U.S. v. McClain*, 452 F. Supp. 195 (E.D. Mich. 1977); *U.S. v. Rogers*, 436 F. Supp. 1 (E.D. Mich. 1977); *U.S. v. Westerbann-Martinez*, 435 F. Supp. 690 (E.D. N.Y. 1977); *Kaser v. State*, 505 S.W.2d 806, 806-07 (Tex.Crim.App. 1974); *U.S. v. Allen*, 644 F.2d 749, 752 (9th Cir. 1980).

“Allen's conformity to some of the drug courier profile factors and his nervous behavior when stopped were insufficient to 'warrant a prudent [person] in believing that [he] had committed or was committing an offense'... Innocent travelers may be apprehensive when told by narcotics officers that they are suspected traffickers.” *U.S. v. Allen*, 644 F.2d at 752.

And, in *U.S. v. Himmelwright*, 551 F.2d 991, 992 n.1 (5th Cir. 1977), the officer found that an accused's "calm demeanor was a suspicion-arousing factor". See also *Pace v. Beto*, 469 F.2d 1389, 1390 (5th Cir. 1972). "Pace's nervous conduct is not surprising in view of the fact that he had just been arrested." *Pace v. Beto*, 469 F.2d at 1390.

This would seem especially true where the officer has "provoked" same by affirmatively misrepresenting facts to the suspect. *Wong Sun v. U.S.*, 371 U.S. 471, 484, 83 S.Ct. 407, 9 L.Ed.2d 441, 452-3 (1963).

"It is not universally true that a man, who is conscious that he has done no wrong, 'will pursue a certain course not in harmony with the conduct of a man who is conscious of having done an act which is innocent, right and proper'; since it is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties or from the unwillingness to appear as witnesses. Nor is it true as an accepted axiom of criminal law that 'the wicked flee when no man pursueth, but the righteous are as bold as a lion.'" *Wong Sun v. U.S.*, 371 U.S. at 484. See also *Gouged v. U.S.*, 255 U.S. 298, 41 S.Ct. 261, 65 L.Ed.2d 374 (1920); *Hoffa v. U.S.*, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966); *Lewis v. U.S.*, 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed.2d 312 (1966); *U.S. v. Berryman*, 717 F.2d 651 (1st Cir. 1983) [First Circuit suppresses contraband where drug courier characteristics not amount to reasonable suspicion].

STARING AT NON-UNIFORMED OFFICERS

"Staring" or looking at two non-uniformed officers as to whom there is no evidence the suspect had reason to recognize, is not an articulable fact giving rise to probable cause. Furthermore, appearing to be "suspicious" is the very kind of conclusory statement continually condemned by the courts.

It has been held that "staring" or looking at an agent nervously, even when coupled with other characteristics will not give rise even to "reasonable suspicion", much less probable cause.

Reid v. Georgia, 448 U.S. 438, 441, 100 S.Ct. 2752, 65 L.Ed.2d 890 (1980) ["Petitioner occasionally looked backward" even coupled with other suspicious and nervous behavior did not constitute even reasonable suspicion"]; *U.S. v. Allen*, 644 F.2d 749, 752 (6th Cir. 1980) [several factors including defendant's "nervous behavior ... were insufficient to 'warrant a prudent (person) in believing that petitioner had committed or was committing an offense'"]; *U.S. v. Jefferson*, 650 F.2d 854, 856-7 (6th Cir. 1981) [the fact that individual arrived from known source city for narcotics, "appeared nervous", looked about terminal "with unusual intensity", and matched the description of a drug carrier traveling the same itinerary, were "not sufficient to create a well founded suspicion"]; *U.S. v. McCaleb*, 552 F.2d 717, 719-720 (6th Cir. 1977) [the fact that defendant "appeared nervous", even when coupled with other factors does "not provide specific and articulable facts" which would warrant even an "investigative stop"]; *U.S. v. Ballard*, 573 F.2d 913, 916 (5th Cir. 1978) ["appearing to be nervous", even when coupled with other factors does not amount to "reasonable suspicion"]; *U.S. v. Smith*, 799 F.2d 704, 707 (11th Cir. 1986).

"The culminating factor behind Trooper Vogel's decision to stop the car appears, then, to have been the failure of the driver to look at Vogel's patrol car. Such an action is, however, fully consistent with cautious driving: safety, after all, requires keeping one's eye on the road. More significantly, to the extent that such an action is suspicious, it in no way gives rise to a reasonable suspicion of illegal activity either alone or in combination with the other circumstances surrounding the stop of appellant's car." *U.S. v. Smith*, 799 F.2d at 707.

DAMNED IF YOU DO - DAMNED IF YOU DON'T

It appears to matter not whether one looks at an agent or away from him, acts nervously or remains calm, the officer may characterize same as suspicious.

In *U.S. v. Himmelwright*, 551 F.2d 991, 992 n.2 (5th Cir. 1977), the officer found that an accused's "calm demeanor was a suspicion- arousing factor." In *U.S. v. Mallides*, 473 F.2d 859, 861 (9th Cir. 1973), the officers relied upon the fact that the occupants of the vehicle were "sitting erectly and none turned to look at a passing patrol car":

"The 'furtive gesture' syndrome has been overextended ...Here the officers concluded that not looking was suspicious. In *People v. Williams*, 97 Cal.Rptr. 815 (1971), the officer testified that defendant's looking at an approaching police car was suspicious". *U.S. v. Mallides*, 473 F.2d at 861 n.4.

In *U.S. v. Westerbann-Martinez*, 435 F. Supp. 690, 699 (E.D.N.Y. 1977), the court noted with respect to an officer's characterization "that defendants were looking to see if they were watched".

In *U.S. v. Berry*, 636 F.2d 1075, 1077 (5th Cir. 1981), the defendant "stared intently at the drug enforcement officers" and "looked back nervously at the agents" as he deplaned. Yet the court held "the nervous side glances" and "stares at the agents" supported only a finding of "reasonable suspicion" even when coupled with the fact that he was "traveling under an alias" and gave "false identification to the drug enforcement officer" a violation of Georgia law committed in the officers' presence. *U.S. v. Berry*, 636 F.2d at 1081. The court held such facts would not amount to probable cause to search their luggage without their consent. *U.S. v. Berry*, 636 F.2d at 1081. On rehearing, the *en banc* Fifth Circuit (Unit B) reiterated the distinction between "reasonable suspicion" and probable cause, holding that "trying to hide their joint travels", "traveling under assumed names" and nervously "staring" at the agent, even when coupled with the fact the agent had been "told to watch" for a drug suspect named Berry, gave rise only to a "reasonable suspicion" to make an investigative stop, not probable cause to arrest or search. *U.S. v. Berry*, 670 F.2d 583, 603-04 (5th Cir. 1982) [en banc].

See also U.S. v. Bowles, 625 F.2d 526, 535-36 n.13 (5th Cir. 1980) [the fact that in addition to several other factors, three suspects "in unison turned to stare at officers", while "not provid[ing] probable cause" constituted "reasonable suspicion of criminal activity" sufficient to warrant the "quite modest" intrusion to warrant an investigative stop which is "less intrusive than a traditional arrest"]; *U.S. v. Robinson*, 625 F.2d 1211, 1213, 1217-19 (5th Cir. 1980) [remanding to the trial court to determine whether "appearing to be nervous and perspiring, and looking around" and pausing to "stare at (agent) Markoni" constituted even "reasonable suspicion" when coupled with some twelve (12) other factors].

NERVOUSLY LOOKING AROUND

It has been held that nervously looking around, even when coupled with other drug courier characteristics will not warrant a stop.

Reid v. Georgia, 448 U.S. 438, 100 S.Ct. 2752, 65 L.Ed.2d 890, 894 (1980) [Apetitioner occasionally looked backward"]; *U.S. v. Allen*, 644 F.2d 749 (9th Cir. 1980); *U.S. v. Jefferson*, 650 F.2d 854 (6th Cir. 1981); *U.S. v. Westerbann-Martinez*, 435 F. Supp. 690, 699 (E.D.N.Y. 1977).

"In describing his conclusion that defendants were looking about 'nervously ...as though they were looking to see if they were watched'.

When pressed as to how the 'look' would be different 'if you are looking for someone who is not there, like a person who is supposed to pick you up and is not there?' the agent admitted: 'I can't really answer that. '...*This court is not prepared to usher in the day in this country when, without stronger objective incriminatory evidence, any person may be subject to a police stop after arriving by plane in an airport merely because an agent subjectively concludes that repeated looking around is a manifestation of nervousness.* It is not too difficult to see the eventual result of such a decision. *Cf. United States v. Mallides*, 473 F.2d 859, 860 (9th Cir.), *reh'g denied*, (1973) (occupants of automobile were 'sitting very erect' and 'did not turn to look at the marked patrol car as it passed'); *United States v. Himmelwright*, 551 F.2d 991, 992 n.1 (5th Cir. 1977) (agent's attention directed at defendant because she appeared 'extremely calm')."

"SUSPICIOUS MINDS" AT THE BORDER

No matter what the objective facts are, the government always contends that they militate towards establishing "reasonable suspicion".

SUSPICIOUS TIMES

The government often contends that the time of day a particular vehicle is observed contributes to its "reasonable suspicion".

DAYTIME

See U.S. v. Villarreal, 565 F.2d 932, 934 n 2 (5th Cir. 1978)[sensor devices detected vehicles at 7:00 A.M. in an area where local traffic did not move at such an early hour]; *U.S. v. Lamas*, 608 F.2d 547, 548 (5th Cir. 1979) [vehicle stopped shortly after noon].

NIGHTTIME

See U.S. v. Gorden, 712 F.2d 110 (5th Cir. 1983) ["...after dark..."]; *U.S. v. Rogers*, 719 F.2d 767 (5th Cir. 1983) ["...near midnight..."]; *U.S. v. Henke*, 775 F.2d 641, 642 (5th Cir. 1985) [vehicle observed at 11:30 PM and again at 12:15 AM in an area where traffic is generally light after 10:00 PM.]; *U.S. v. Garcia*, 732 F.2d 1221 (5th Cir. 1984) [11:30 PM]; *U.S. v. Melendez-Gonzales*, 727 F.2d 407 (5th Cir. 1984) [4:57 AM]; *U.S. v. George*, 567 F.2d 643 (5th Cir. 1978)[1:45 AM]; *U.S. v. Estrada*, 526 F.2d 357, 358 (5th Cir. 1976) [suspect "was traveling at night on a road over which transportation of illegal aliens often took place"]; *U.S. v. Dewitt*, 569 F.2d 1338, 1339 (5th Cir. 1978) [vehicle observed at "night when the checkpoint was not operating, at about 10:00 P.M...."]; *U.S. v. Macias*, 546 F.2d 58 (5th Cir. 1977) [4:15 AM]; *U.S. v. Aguirre-Valenzuela*, 700 F.2d 161, 162 (5th Cir. 1983) [sensor triggered at 8:30 PM].

RIDING HIGH OR RIDING LOW

The government often contends that vehicles which appear to be riding low because of excess weight or riding high because of the use of air shocks or heavy-duty suspensions are suspicious. Consequently, in *U.S. v. Lopez*, 564 F.2d 710 (5th Cir. 1977) where an officer's suspicions were aroused when he noticed a vehicle with Harris County license plates (indicating that the vehicle was registered over 300 miles away) and when he noticed the vehicle was riding high in the rear and had air shock absorbers that appeared to be new, Judge Goldberg was prompted to comment: "Yet the border patrol's position seems to be 'riding high or riding low, either way a searching we will go...." *U.S. v. Lopez*, 564 F.2d at 713. See also *U.S. v. Garcia*, 732 F.2d 1221, 1222 (5th Cir. 1984) [an agent's suspicion aroused when they observed a pickup truck camper travelling unusually slow, with its headlights angled up, with a low bumper, tires which "were squashed down", where the wheel wells were covering part of the tires, and heavily loaded in the rear]; *U.S. v. Melendez-Gonzalez*, 727 F.2d 407, 409 (5th Cir. 1984) [an agent's suspicion aroused by an automobile that appeared to the agents to be "heavily loaded"]; *U.S. v. Gordon*, 712 F.2d 110, 112 (5th Cir. 1983) [the agent's suspicion was aroused when they noticed a stakebed truck with a hidden compartment underneath the bed, the bed of the truck higher than normal, and where the agents did not recognize the truck as belonging to any area residents]; *U.S. v. Lamas*, 608 F.2d 547, 548 (5th Cir. 1979) [the officers' suspicion aroused when they noticed the car that did not "look like the typical tourist's car" and which appeared to be heavily loaded and had Colorado license plates]; *U.S. v. Orona-Sanchez*, 648 F.2d 1039, 1041 (5th Cir. 1981) [officer's suspicions aroused when he noticed a three quarter ton pickup "with a camper shell [that] appeared to have a heavy load, the windows of the camper were either covered by a curtain or painted over and the truck had California license plates ...with wide tread tires"]; *U.S. v. Escamilla*, 560 F.2d 1229, 130 (5th Cir. 1977) [officer's suspicions aroused when he noticed a truck with out-of-country license plates in proximity to a Continental Trailways bus and a 1973 Hornet car, and that the truck was loaded with bails of hay which were clumsily stacked suggesting that the truck contained secret compartments with gaps between bails to provide air for illegal aliens]; *U.S. v. Frisbie*, 550 F.2d 335, 337 (5th Cir. 1977) [officer's suspicion aroused when he noticed a pickup truck with box type camper and noticed that the truck was riding low on its springs and was also difficult for the driver to stop, "causing the officer to believe that it was heavily loaded"]; *U.S. v. Sarduy*, 590 F.2d 1355 (5th Cir. 1979); *U.S. v. Hosch*, 577 F.2d 963, 966 (5th Cir. 1978) [rear end "riding very low"]; *U.S. v. Gandara-Nunez*, 564 F.2d 694 (5th Cir. 1977) [car riding low]; *U.S. v. Payne*, 555 F.2d 475, 477-78 (5th Cir. 1977) [El Camino camper looked and handled as if heavily loaded]; *U.S. v. Barnard*, 553 F.2d 389 (5th Cir. 1977) [vehicle heavily loaded]; *U.S. v. Garza*, 544 F.2d 222 (5th Cir. 1976); *U.S. v. Walker*, 522 F.2d 194 (5th Cir. 1975).

OUT-OF-STATE LICENSE PLATES

Courts have held that the fact the accused's auto has out-of-state plates is "virtually meaningless". *U.S. v. George*, 567 F.2d 643, 645 (5th Cir. 1978) [the fact a vehicle has out-of-state license plates adds nothing to other circumstances and is "virtually meaningless"]; *U.S. v. Smith*, 799 F.2d 704, 707 n.3 (11th Cir. 1986); *U.S. v. Lopez*, 564 F.2d 710, 713 (5th Cir. 1977).

"[W]e view the fact that the car was old, with a large trunk and out-of-county license plates, as having only minor importance. We would have thought it obvious that citizens may leave their state or county without having their purposes questioned. Our concept of the border has become somewhat expansive, but it has not yet attained continental proportions. We are a people on the move, and nary an eyebrow should be raised by seeing a Harris County license plate over 50 miles from our neighbor to the south. It should take more than the elevation of an eyebrow to justify the stop in question here. *U.S. v. Lopez*, 564 F.2d at 713.

"Garza testified that appellant's car did not look like the typical tourist's car, appeared to be heavily loaded, and had Colorado license plates. These observations were colored by Garza's knowledge that the area was not visited frequently by tourists and that 48% of the cars in which illegal aliens had been found in the

area had Colorado plates. Although under such circumstances we might hold that Garza could have reasonably suspected that the car was not carrying "typical tourists", it is too much to ask that we go one step further and conclude that this was enough to arouse a reasonable suspicion that the car was carrying illegal aliens. To hold otherwise would render suspect all citizens of the State of Colorado traveling the roads of New Mexico or Texas in other than late model cars." *U.S. v. Lamas*, 608 F.2d 547, 549 (5th Cir. 1979).

OTHER SUSPICIOUS VEHICLES

See U.S. v. Rogers, 719 F.2d 767, 760 (5th Cir. 1983) [officers suspicions aroused by a Ford sedan with Texas plates "which did not belong to any resident of the area, all of those vehicles he knew well"]; *U.S. v. George*, 567 F.2d 643 (5th Cir. 1978) [the officer's suspicion aroused by a "1973 Buick Electra, a car "larger than a compact", and it had Georgia license plates"]; *U.S. v. Saenz*, 578 F.2d 643, 646 (5th Cir. 1978) [Officer Newberry's suspicions aroused in another case where "vehicles had out-of- county license plates and there was only one occupant in each car, which was uncommon in case of tourists"]; *U.S. v. Barnard*, 553 F.2d 389, 391 (5th Cir. 1977) [officer's suspicion aroused by two vehicles when the first vehicle, an MG, was equipped with a CB antenna and the driver appeared to be speaking into a microphone as he passed. Moreover, both vehicles had the same three letter prefix on its license plates indicating to the officer that they were registered in the same county, a county other than the one through which they were traveling, and the Mercury automobile appeared to be riding low, suggesting to the officer that it might be transporting illegal aliens in its trunk]; *U.S. v. Almond*, 565 F.2d 927, 928 (5th Cir. 1978) [officer's suspicion aroused when they observed a pickup truck with overhead camper with Georgia license plates].

Police Officers have probable cause to stop a vehicle that failed to comply with a statute that prohibits a license plate from being obscured by a license plate frame. *See U.S. v. Contreras-Trevino*, 448 F. 3d 821 (5th Cir. 2006).

SUSPICIOUS MODUS OPERANDI

The government has contended in many other cases that observing what, in their experience, is a recognizable modus operandi has contributed to their reasonable suspicion.

U.S. v. Barnard, 553 F.2d 389, 392 (5th Cir. 1977) ["lead car - load car" modus operandi "whereby two cars travel together during a smuggling venture with the first car operating primarily as a scout car"]; *U.S. v. Saenz*, 578 F.2d 643,645 (5th Cir. 1978) [officer observed two vehicles and then articulated his suspicion of the "lead car - load car" method of operation]; *U.S. v. Orona-Sanchez*, 648 F.2d 1039, 1041 (5th Cir. 1981) ["lead car - load car" operation].

SUSPICIOUS DRIVING CHARACTERISTICS

Yet, another factor frequently advanced by the government as contributing to an agent's reasonable suspicion is a vehicle's driving patterns. *U.S. v. Henke*, 775 F.2d 641, 642-43 (5th Cir. 1985) [where surveillance revealed a truck parked at a roadside park known to be used by smugglers to avoid a fixed checkpoint for two hours, later meeting another vehicle and its occupants]; *U.S. v. Garcia*, 732 F.2d 1221, 1222 (5th Cir. 1984) [where the agents spotted a pickup truck camper traveling northbound unusually slowly with its headlights angled up]; *State v. Huddleston*, 164 S.W. 3d 711 (Tex. App-Austin 2005) [Officer stops defendant for driving over the center line. At the suppression hearing, the only justification offered for stopping defendant was officer's belief that she had violated the Traffic Code by failing to remain within a single lane. Under the statute, a violation

occurs only when a vehicle fails to stay within its lane and such movement is not safe or is not made safely. Officer testified that defendant never crossed the fog line in an unsafe manner. Instead, he said that defendant's repeated crossings of the line established a "pattern" in violation of the statute. The Traffic code requires drivers to remain in a single lane "as nearly as practical," but allows lane changes if "that movement can be made safely." Witnessing the defendant safely cross the fog line five times over a stretch of six miles did not give the officer a reason to suspect that she was unsafely failing to remain in a single lane in violation of the Traffic Code.]

U.S. v. Melendez-Gonzalez, 727 F.2d 407, 409 (5th Cir. 1984) [where two vehicles were observed driving only fifty yards apart]; *U.S. v. Salazar-Martinez*, 710 F.2d 1087, 1087-88 (5th Cir. 1983) ["when the driver saw [the INS agents] vehicle on the embankment, he decelerated"]; *U.S. v. Aguirre-Valenzuela*, 700 F.2d 160, 162 (5th Cir. 1983) [where the agents observed that a vehicle traveled erratically]; *U.S. v. Saenz*, 578 F.2d 643, 645 (5th Cir. 1978) [the defendant driving appeared nervous and the car swerved]; *U.S. v. Almand*, 565 F.2d 927, 929 (5th Cir. 1978) [the border patrol agent knew that the vehicle he was investigating had stopped or turned off the highway]; *U.S. v. Barnard*, 553 F.2d 389, 391 (5th Cir. 1977) [one of two vehicles was driving erratically, at speeds ranging from 35 - 60 MPH while the other vehicle acted accordingly to "maintain a constant distance between it and the Mercury"]; *U.S. v. Macias*, 546 F.2d 58, 59 (5th Cir. 1977) [where two vehicles approaching a checkpoint executed u-turns in the middle of the highway at approximately 300 to 350 yards from the checkpoint]; *U.S. v. Orona-Sanchez*, 648 F.2d 1039, 1041 (5th Cir. 1981) [pickup "slowed down considerably"]; *U.S. v. Frisbie*, 550 F.2d 335, 337 (5th Cir. 1977) [driver had difficulty in stopping his vehicle]; *U.S. v. Smith*, 799 F.2d 704 (11th Cir. 1986) [vehicle weaving slightly did not justify stop].

SUSPICIOUS PASSENGERS

The government has contended in other cases that the driver's or passengers' actions upon noticing they are being followed has often contributed to their reasonable suspicion. *U.S. v. Garcia*, 732 F.2d 1221, 1222 (5th Cir. 1984) ["according to the agents, the male passengers attempted to conceal themselves by ducking and scrambling down below the window"]; *U.S. v. Salazar-Martinez*, 710 F.2d 1087, 1088 (5th Cir. 1983) ["the driver of the Lincoln looked over at Molina 'nervously,' but the three passengers continued to look ahead"]; *U.S. v. Lamas*, 608 F.2d 547, 548 (5th Cir. 1979) [the occupants seemed to avoid eye contact with the agent and the passengers appeared to "slouch down to avoid being seen"]; *U.S. v. Saenz*, 578 F.2d 643, 647 (5th Cir. 1978) [Agent Newberry "observed nervous behavior on the part of appellant exhibited by frequent glances at the rear view mirror and a swerving driving pattern"]; *U.S. v. Villareal*, 565 F.2d 932, 836 (5th Cir. 1978) [the officer observed passengers duck beneath the dash when their vehicle approached the border patrol car]; *U.S. v. Barnard*, 553 F.2d 389, 391-392 (5th Cir. 1977) [the "driver glanced repeatedly and nervously at (the border patrol agent) as he passed and then drove erratically while [the border patrol agent] followed"]; *U.S. v. Escamilla*, 560 F.2d 1229, 1231 (5th Cir. 1977) ["as appellants proceeded through the intersection [they did not] "acknowledged the presence of the agent's vehicle parked at the intersection i.e. appellants stared straight ahead"].

SUSPICIOUS WAVE

The Supreme Court held that odd waving by children could be considered with the totality of circumstances to justify a Terry stop of a vehicle. *U.S. v. Arvizu*, 534 U.S. 266, 122 S.Ct. 744, 752, 151 L.Ed.2d 740 (2002)[characterized the waving as "methodical," "mechanical," "abnormal," and "certainly ... a fact that is odd and would lead a reasonable officer to wonder why they are doing this"].

SUSPICIOUS ROADS

Similarly, the government has frequently contended that reasonable suspicion exists when a vehicle is observed traveling on a road frequently used by smugglers. *U.S. v. Melendez-Gonzalez*, 727 F.2d at 411 [the

automobile traveling on Highway 67, some 60 miles from the Mexican border, making it possible that the appellant had begun his trip south of the border]; *U.S. v. Lamas*, 608 F.2d 547, 548 (5th Cir. 1979) [automobile stopped in New Mexico on Highway 180 "a major artery for transporting illegal aliens from Mexico to Colorado ...not visited frequently by tourists]; *U.S. v. Pena-Cantu*, 639 F.2d 1228, 1229 (5th Cir. 1981) ["[t]he travelers were proceeding in a northerly direction away from Mexico towards Houston..."]; *U.S. v. George*, 567 F.2d at 644-45 [vehicle proceeding north on Highway 118 within 9 ½ miles of the Mexican border where "the transportation of a illegal aliens is "relatively heavy" ...and there is usually little traffic..."]; *U.S. v. Estrada*, 526 F.2d 357, 358 (5th Cir. 1976) [vehicle "was traveling at night on a road over which the transportation of illegal aliens often took place"]; *U.S. v. Gordon*, 712 F.2d 110, 113 (5th Cir. 1983) [the vehicle was stopped "after dark on a section of roadway which leads directly north from the border"]; *U.S. v. Rogers*, 719 F.2d 767, 769 (5th Cir. 1983) [the vehicle was stopped on Highway 170 at a time when it was rare to see cars traveling on that remote and sparsely settled an area at such a late hour]; *U.S. v. Almond*, 565 F.2d at 929 [the officer knew that the vehicle had stopped or turned off Highway 385]; *U.S. v. Aguirre-Valenzuela*, 700 F.2d at 162 [the vehicle had apparently traveled on a dirt road running north and south connecting the banks of the Rio Grande to FM]; *U.S. v. Salazar-Martinez*, 710 F.2d 1087 (5th Cir. 1983) [vehicle traveling on IH 10 "a major interstate highway traversing the southern United States from Florida to California" which the agent was aware "is a frequently used route for the smuggling of people and contraband from Mexico to Houston and points beyond"]; *U.S. v. Villarreal*, 565 F.2d 932, 934 (5th Cir. 1978) [two vehicles "coming from an un-patrolled border area were traveling together north on Highway 118 towards Alpine, Texas"]; *U.S. v. Macias*, 546 F.2d 58 (5th Cir. 1977) [stop and search of the vehicle was valid where site was in close proximity to border and the surrounding area was desolate and barren with rough terrain and when stop occurred at a hour when few travelers were about and much illegal activity occurred]; *U.S. v. Frisbie*, 550 F.2d 335, 336 (5th Cir. 1977) [two vehicles were traveling east on Highway 170 from the area of the Mexican border and the location of the vehicles "indicated to the officers a substantial possibility that they were coming from an un-patrolled river area to the west on Highway 170"].

The Court did not resolve the issue of whether the initial contact constitutes a seizure. *See also U.S. v. Allen*, 644 F.2d 749 (9th Cir. 1980); *U.S. v. Berry*, 636 F.2d 1075, n. 8 (5th Cir. 1981); *U.S. v. Berd*, 634 F.2d 979, n. 6 (5th Cir. 1981); *U.S. v. Robinson*, 625 F.2d 1211 (5th Cir. 1980).

A Drug Courier Profile is a checklist of reoccurring characteristics which can do no more than alert the agent to initiate surveillance. *U.S. v. Rico*, 594 F.2d 320, 326 (2d Cir. 1979).

U.S. v. Allen, 644 F.2d 749 [innocent travelers nervous and apprehensive]; *U.S. v. Buenaventura-Ariza*, 615 F.2d 29 (2d Cir. 1980); *U.S. v. Berry*, 636 F.2d 1075 (5th Cir. 1981); *U.S. v. Pulvano*, 629 F.2d 1151 n.1 (5th Cir. 1980); *U.S. v. Andrews*, 600 F.2d 563 (6th Cir. 1980); *U.S. v. McCaleb*, 552 F.2d 717 (6th Cir. 1977); *U.S. v. Scott*, 545 F.2d 38 (8th Cir. 1976); *U.S. v. Cordell*, 723 F.2d 1283, 1285 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 1291 (1984) [reasonable suspicion when individual arrived from identified source city, name on airline ticket purchased for cash not the same as on driver's license, and nervousness increased as questioning progressed]; *U.S. v. Albano*, 722 F.2d 690, 692-931 (11th Cir. 1984) [reasonable suspicion when every act of those under surveillance consistent with drug trafficking].

But see U.S. v. Ilazi, 730 F.2d 1120, 1124 (8th Cir. 1984)[reasonable suspicion when most of facts giving rise to agent's suspicions based on suspects's conduct, rather than on circumstances describing "very large category of presumably innocent travelers"]; *U.S. v. Smith*, 574 F.2d 882 (2d Cir. 1978). *See also U.S. v. Vasquez*, 612 F.2d 1338 (2d Cir. 1979).

Although not a complete rejection of the drug courier profile, the Supreme Court has implicitly admonished lower courts to carefully consider cases decided on the basis of the profile, ascribing little weight to characteristics that describe a large number of travelers. *Reid v. Georgia*, 448 U.S. 438, 100 S.Ct. 2752, 65 L.Ed.2d 890 (1980).

SUSPICIOUS CHICKEN

Presence of Kentucky Fried Chicken has been noted as a factor in the drug courier profile. *See U.S. v. Amuny*, 767 F.2d 1113, 1117 (5th Cir. 1985) [agents noted the "Colonel's world-famous chicken"]; *State v. Anderson*, 754 P.2d 542 (N.M. App. 1988) ["[a]t the hearing, Garley testified that the presence of the Kentucky Fried Chicken and the carry on bag, the travel in an easterly direction, defendant's admission of having slept at a rest area, and defendant's nervousness made him feel that he had 'a reasonable suspicion based on articulable facts to believe that defendant was carrying drugs' ...this was courier profile taught to him in a law enforcement class"].

INVESTIGATIVE STOP AMOUNTS TO SEIZURE

Drug Courier Profile characteristics alone do not create a "reasonable" or "articulable suspicion" required for such brief investigative detention:

"[Elements of the profile] separately or in combination would include such a number of presumably innocent persons as to approach a subjectively administered, random basis for stopping and interrogating passengers. Seizure on any such random basis are ...one of the precise evils at which the fourth amendment was aimed." *U.S. v. Gooding*, 695 F.2d 78, 83 (4th Cir. 1982).

"DRUG PACKAGE PROFILE"

Holding of an express mail package by postal inspectors who found that the package met the "drug package profile" was reasonable under the Fourth Amendment for a dog to sniff same for contraband. *U.S. v. Hill*, 701 F. Supp. 1522, 1526 (D. Kan. 1988).

"As part of a nationwide drug interdiction program, postal inspectors and DEA officials make random investigations of United States Express Mail packages, matching them against an Express Mail Profile, which is used to detect express mail packages likely to contain illegal drugs. This 'Drug Package Profile' includes the following elements:

1. Size and shape of the mailing.
2. Package heavily taped and attempts to close or seal all openings.
3. Hand printed or written labels.
4. Unusual return name and addresses.
5. Unusual odors coming from package.
6. Fictitious return addressee.
7. Destination of parcel.

In addition to these elements, the inspectors also pay close attention to the city of origination and to the addressee's name (e.g., if multiple packages are sent to a single address but each package is addressed to a different individual. If a package matches one or more of the elements of the profile, the package is detained and subjected to a canine sniff, if the dog alerts to the package, the package is sent to its destination city under controlled conditions. Upon arrival, the package is once again subjected to a canine sniff. If the dog alerts to the package, the postal inspector obtains a search warrant. The package is then searched pursuant to a warrant. If illegal drugs are found, the inspector generally obtains authorization for a signaling device to be placed in the package. After the package is delivered to the addressee (or to the person to whom the addressee delivers the package), a search warrant for the residence is obtained and executed." *U.S. v. Hill*, 701 F. Supp. at 1526. *But see U.S. v. Gonzalez*,

728 F. Supp. 185 (S.D.N.Y. 1989) [nothing about a rectangular shaped package that distinguished it as uniquely drug packaging]. "Indeed [the officer] didn't know what it was at all, but because his mind was focused on his professional responsibilities, namely finding and arresting those trafficking in narcotics, he was more apt to see the package as drugs than as a lawful possession, such as a book or gift of some sort. It is a form of tunnel vision, entertained in good faith or perhaps even subconsciously, but nonetheless limiting. Without more particularized and objective acts...carrying of an unidentified object with a rectangular shape...cannot...give rise to that level of reasonable suspicion required by the fourth amendment." *U.S. v. Gonzalez*, 728 F. Supp. 185 (S.D.N.Y. 1989).

H. BORDER SEARCHES:

FUNCTIONAL EQUIVALENT OF THE BORDER

It is well settled law that warrantless searches of aircraft and luggage are permitted at an international border or its "functional equivalent". *Almeida-Sanchez v. U.S.*, 413 U.S. 266, 272, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973).

However, "there has [to be] no time or opportunity for the object to have changed materially since the time of crossing, and the search is conducted at the earliest practicable point after the border was crossed". *U.S. v. Niver*, 689 F.2d 520, 526 (5th Cir. 1982); *U.S. v. Emmens*, 893 F.2d 1292 (11th Cir. 1990) [agents could lawfully enter private hangar on residential curtilage as same was functional equivalent of border].

"The extended border search still requires a showing beyond reasonable certainty both that the border has been crossed and that conditions have remained unchanged since the time of the border crossing." *U.S. v. Richard*, 638 F.2d 765 (5th Cir.), cert. denied, 454 U.S. 1097 (1981). See also *Almeida-Sanchez v. U.S.*, 413 U.S. 266, 272, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973); *U.S. v. Amuny*, 767 F.2d 1114 (5th Cir. 1985) [proof that vehicle had mere opportunity to cross border is not adequate to demonstrate to reasonable certainty that vehicle has, in fact, crossed international border and therefore may be searched without showing of probable cause at functional equivalent of border]. But see *U.S. v. Henke*, 775 F.2d 641 (5th Cir. 1985) [that border crossing not necessary to justify border stop where other factors are sufficient]; *U.S. v. Mayer*, 620 F. Supp. 249 (D. Utah 1985) [border search of airplane justified by low altitude and constant course inconsistent with usual traffic patterns in the area and hanger containing airplane reasonably certain to have crossed the border may be searched under same rationale as car, not known to have crossed the border, reasonably certain to contain parcel that has crossed the border]; *U.S. v. Moreno*, 778 F.2d 719 (11th Cir. 1985) [that border search exception applies even if determination to search is made before actual border crossing was ascertained].

The mere fact that an investigatory stop is effectuated near the border by border patrol agents does not require application of the *Brignoni-Ponce* "roving Border Patrol" standard in lieu of the *Terry* standard. *U.S. v. Miranda-Perez*, 764 F.2d 285 (5th Cir. 1985).

FIXED CHECKPOINTS

The Fifth Circuit held that permanent highway checkpoints located on highways that do not cross the U.S.-Mexico border are not the "functional equivalent" of the border for purposes of Fourth Amendment searches, even where the highway closely parallels the border. *U.S. v. Jackson*, 825 F.2d 853 (5th Cir. 1989).

JUST ROUTINE

Disassembly of a gas tank as part of a “routine” border search does not require reasonable suspicion where the practice is just considered “routine.” *U.S. v. Flores-Montano*, 541 U.S. 149 (2004); *U.S. v. Chacon*, 330 F.3d 323 (5th Cir. 2003) [A routine stop may blossom and extend a normal immigration stop to a search for drugs so long as this extension is based upon consent or probable cause].

BORDER PATROL STOP

U.S. v. Alvarado-Garcia, 781 F.2d 422, 425 (5th Cir. 1986), *overruled on other grounds by U.S. v. Bengivenga*, 845 F.2d 593 (1988). Roving border patrol stop of a dump truck was justified where the agents:

"[R]easonably inferred from the absence of gravel-hauling activity in the area, the usual patterns of traffic there, the proximity to the border, information about recent smuggling activities involving dump trucks, Alvarado's attempt to evade them, and the large storage capacity of the dump truck. ..." *U.S. v. Alvarado-Garcia*, 781 F.2d at 425.

Since the stop did not constitute a custodial arrest, the driver's admission as to truck's contents could provide probable cause for driver's arrest and the search of that truck. *U.S. v. Alvarado-Garcia*, 781 F.2d at 425-27.

U.S. v. Pallares-Pallares, 784 F.2d 1231, 1233-34 (5th Cir. 1986).

The Fifth Circuit held that the *Brignoni-Ponce* test for "reasonable suspicion" to stop was satisfied, despite lack of evidence of recent border crossing, where two vehicles, appearing heavily loaded, were traveling in close proximity on a highway frequented by smugglers of undocumented aliens on the Fourth of July, and one driver frequently observed the officers in his rear view mirror. *U.S. v. Pallares-Pallares*, 784 F.2d at 1233-34.

Brignoni-Ponce test was held not to be satisfied, however, where occupants of unevenly painted, early model car were Hispanic and "kind of dirty looking" and appeared nervous as the agent's unmarked patrol car quickly approached, then pulled along side at the same speed. *U.S. v. Ortega-Serrano*, 788 F.2d 299, 301-302 (5th Cir. 1986).

The Ninth Circuit has held the border patrol in the State of Washington to have engaged in "a pattern" of such illegal stops. *Nicacio v. I.N.S.*, 797 F.2d 700 (9th Cir. 1986).

A border patrol agent had probable cause to arrest defendant as an illegal alien where agent saw defendant emerge from frequently used conduit of illegal entry, other aliens identified the defendant as undocumented, and defendant claimed to have left his resident alien card at home. *U.S. v. Tarango-Hinojos*, 791 F.2d 1174 (5th Cir. 1986).

SEIZING DOCUMENTS

The crossing of an international border justified customs search. Photocopying of discovered documents was supported by reasonable suspicion of relation to customs violations. *U.S. v. Fortna*, 796 F.2d 724, 738-39 (5th Cir. 1986).

SPLIT IN CIRCUITS AS TO STANDARD ["REASONABLE SUSPICION" OR "CLEAR INDICATION" REQUIRED]

See Bush v. St. Tamany Parish, 754 F.2d 1132 (5th Cir. 1984) [agents lacked reasonable suspicion to stop vehicle for possible customs violations thus making the stop illegal no reasonable suspicion that the vehicle contained contraband]; *U.S. v. Vega-Barvo*, 729 F.2d 1341 (11th Cir. 1984) ["personal indignity suffered by the individual searched controls the level of suspicion required to make the search reasonable. ...X-rays do not require physical contact, they do not expose intimate body parts, and hospital generally will not perform an X-ray procedure without a person's consent. Additionally, an X-ray is one of the more dignified ways of searching the intestinal cavity. ...Without a ...showing that routine abdominal X-rays pose a significant health risk, it would be inappropriate to impose stringent Fourth Amendment constraints on their use in border searches. ...We hold that an X-ray while more intrusive than a frisk is no more intrusive than a strip search].

"The ...strip search requires a particularized 'reasonable suspicion'... We must now evaluate the [X-ray search] in light of the level of suspicion required by the reasonable suspicion test in the context of a strip search." *U.S. v. Vega-Bravo*, 729 F.2d at 1349.

SUSPECT WHO REFUSES X-RAY MAY BE DETAINED UNTIL HE EXCRETES CONTRABAND

U.S. v. Mosquera-Ramirez, 729 F.2d 1352, 1354, 1357 (11th Cir. 1984).

"A review of the facts reveals that the customs inspector's suspicion that defendant was carrying drugs internally was based on articulably suspicious behavior sufficient to make an X-ray search reasonable.... The detention of persons at the border long enough to reveal by natural processes that which would be disclosed by a more expeditious X-ray search cannot be held to be an unreasonable seizure. Nor can the search of the results of that natural process be held to be an unreasonable search." *U.S. v. Mosquera-Ramirez*, 729 F.2d at 1354, 1357. *See also U.S. v. Ogberaha*, 771 F.2d 655 (2d Cir. 1985) [vaginal searches of women at border only requires a reasonable suspicion]; *U.S. v. Oyekan*, 786 F.2d 832 (8th Cir. 1986) [an involuntary x-ray examination is justified by reasonable suspicion of drugs being carried in the alimentary canal. The key is the presence of (1) articulable facts, (2) particularized as to the person, and (3) as to the place].

However, the Ninth Circuit has held that a higher standard than "reasonable suspicion" described as "clear indication" or "plain suggestion" is required for X-Ray or lengthy detention to hear nature's call. *U.S. v. Hernandez*, 731 F.2d 1369, 1371-72 (9th Cir. 1984).

"X-ray and body cavity searches are more intrusive than a strip search. Such searches require a 'clear indication' or 'plain suggestion' that the person is carrying contraband within his body.... In this case, the officers had a strong suspicion that de Hernandez was carrying drugs in her body, but for more than 16 hours they did not apply for a court order. The officers decided, instead, to wait for nature to provide the stronger evidence that would support an order. This decision necessarily impacted both the comfort and the dignity of a human being. ...The degree of suspicion necessary to justify a detention for the purpose of having a suspect produce a bowel movement has not been established.... [w]hen in doubt the customs officers should present their information to a magistrate and permit the judicial officer to exercise judicial discretion in striking the delicate balance between human rights and the practical necessities of border security.

In the case at bar, there was a justifiably high level of official skepticism about the woman's good faith as a tourist; but at the same time the officers knew that thousands of unusual looking persons cross international borders daily on all sorts of errands, many of which are wholly innocent. At the time the

officers offered de Hernandez the alleged choice of taking the next plane back to Bogota (and remaining under observation during the wait), or submitting to a custodial x-ray examination, the officers knew... that the woman would suffer many hours of humiliating discomfort if she chose not to submit the x-ray examination. Under the circumstances of this Hobson's choice, one can hardly characterize as voluntary any decision on the part of de Hernandez to consent to wait under observation. Rather, the officers effectively decided that if she did not wish to submit to an x-ray examination, she could just wait until natural processes made that type of examination unnecessary, no matter how long that might be." *U.S. v. Hernandez*, 731 F.2d at 1371-72.

See U.S. v. Montoya De Hernandez, 473 U.S. 531, 105 S.Ct. 3304, 87 L.Ed.2d 371 (1985) [a 16 hour detention of smuggler with suspected contraband in anus prior to seeking warrant was held not unreasonable].

The Fifth Circuit announced a rule (bothered by a 60 hour detention) applied to all government agents and agencies which hereafter detain a suspected alimentary canal smuggler.

"Henceforth all agencies,...shall notify the local U.S. Attorney within 24 hours of detaining of such a suspected smuggler. The U.S. Attorney shall ...immediately notify a district or magistrate judge with jurisdiction and the detainee's attorney or local public defender's counsel appointed by the Court. In addition, the U.S. Attorney shall make a daily report until detention is terminated or the person is brought before the Court pursuant to charges." *Adekunle v. U.S.*, 980 F.2d 985 (5th Cir. 1992), *cert. denied*, 508 U.S. 924 (1993). See also *U.S. v. Adekunle*, 2 F.3d 559 (5th Cir. 1993), *vacated in part reinstated in part on reh'g*.

BORDER FRISK

The Second Circuit has held that a pat-down of the outer clothing of a person entering the United States at the border falls within the class of routine border searches and requires neither probable cause nor reasonable suspicion, even though it is more intrusive than intrusion into personal belongings such as a wallet or handbag. *U.S. v. Charleus*, 871 F.2d 265 (2d Cir. 1989).

LAPTOP COMPUTER SEARCHES

The Department of Homeland Security has recently announced a new policy with regard to laptop searches which raise constitutional concerns. In a July 16, 2008 policy memorandum, DHS announced that Border Patrol agents, "absent individualized suspicion" seize laptop computers and other electronic devices as well as documents at the border and have them sent off-site for further evaluation including translation or unencrypting the data found on the computer.

BORDER EXIT SEARCHES

Under the provisions of 31 U.S.C. ' 5317, customs officers have statutory authority to conduct warrantless exit searches on those departing the United States. *United States v. Berisha*, 925 F.2d 791 (5th Cir. 1991). The border search exception to the Fourth Amendment's warrant requirement usually applied to incoming cargo and baggage is equally enforceable to outgoing items. *See U.S. v. Odutayo*, 406 F.3d 386 (5th Cir 2005)

Since the standard for an extended border search requires a showing beyond a reasonable certainty that the border has been crossed, it is logical to assume the standard for an exit search would, at a minimum, be a showing of reasonable certainty that a border crossing is intended." *See U.S. v. Niver*, 689 F.2d 520, 526 (1982).

I. SCHOOL SEARCHES:

The Supreme Court has held that while Fourth Amendment protections and prohibitions are applicable to students in public school, school authorities can act on less than probable cause. The legality of a search of a student will depend upon the reasonableness, under all of the circumstances, of the particular search. *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985). In special settings, as in a school, children's Fourth Amendment protections are diminished by the school's duty to act *in loco parentis*. *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 122 S.Ct. 2559, 153 L.Ed.2d 735 (2002)[school children who participate in extra circular activities may be drug tested pursuant to school policy without a warrant and without an initial showing that the school is experiencing a drug problem]. *See also Horton v. Goose Creek Ind. School Dist.*, 690 F.2d 470 (5th Cir. 1982) [school officials, employed and said by state and supervising children (who are for the most part compelled to attend) are agents of government and constrained by Fourth Amendment].

However, the measures the school uses must be reasonably related to the objectives of the any search and cannot be excessively intrusive in light of the age and sex of the student and the the nature of the allegation. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). *Also see: Redding v. Stafford United School District #1*, 531 F.3d 1071 (9th Cir. 2008)(*en banc*) [finding a strip search of a 13 year old girl not reasonable in scope when the object of the search was tablets of ibuprofen].

J. ONE'S CASTLE IS PARTICULARLY PROTECTED:

One's home is accorded a heightened expectation of privacy. *See U.S. v. Ross*, 456 U.S. 798, 822, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982). "[T]he most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion." *U.S. v. Ross*, 456 U.S. at 822.

"A person's home holds a favored position in the list of those areas which are protected from unreasonable searches and seizures. Different considerations apply to movable property such as boats and motor vehicles. The high degree of judicial sanctity which the courts have accorded to dwellings is based upon the concept of privacy and the right to be left alone. The security of homes should not be left to the sole discretion of police officers. The decisions have repeatedly stressed and emphasized the concept that the underlying purpose of the Fourth Amendment is to protect and shield citizens from unwarranted intrusions into their private domain." *U.S. v. Davis*, 423 F.2d 974, 977 (5th Cir. 1970). *See also U.S. v. Williams*, 630 F.2d 1322 (9th Cir. 1980); *U.S. v. Cadena*, 588 F.2d 100, 101 (5th Cir. 1979); *U.S. v. Williams*, 589 F.2d 210, 214 (5th Cir. 1979); *U.S. v. Agapito*, 620 F.2d 324, 331 (2d Cir. 1980).

"To argue, as the Government does, that there is probable cause to search a residence simply because there is no better place in which to be secure and private offends the spirit as well as the letter of the law. The Fourth Amendment was intended to shield an individual's private residence from government intrusion not to constitute an excuse to invade the same. The approach urged by the Government would exploit that constitutional shield by suggesting that this heightened expectation of privacy accorded one home by the Constitution should provide an excuse to invade that privacy. The fact that we recognize a heightened expectation of privacy in the home cannot logically constitute the reason for invading that property." *U.S. v. Gant*, 759 F.2d 484 (5th Cir. 1985). *See also Miller v. U.S.*, 357 U.S. 301, 307, 78 S.Ct. 1190, 2 L.Ed.2d 1332, 1337 (1958). "The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter - all his forces dare not cross the threshold of the ruined tenement." *Miller v. U.S.*, 357 U.S. at 307.

Segura v. U.S., 468 U.S. 796, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984). "[T]he sanctity of the home is not to be disputed". *Steagald v. U.S.*, 451 U.S. 204, 213, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981); *Payton v. New York*, 445 U.S. 573, 601, n. 54, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); *U.S. v. Williams*, 630 F.2d 1322, 1326 (10th Cir. 1980) *U.S. v. Freire*, 710 F.2d 1515, 1519 (11th Cir. 1983) ["home is a haven of privacy"].

The Supreme Court reiterated "the strong expectation of privacy associated with a home," noting that "[E]xpectations of privacy are particularly strong in private residences." *Michigan v. Clifford*, 464 U.S. 287, 104 S.Ct. 641, 78 L.Ed.2d 477 (1984).

"We frequently have noted that privacy interests are especially strong in a private residence." *Michigan v. Clifford*, 464 U.S. at 296. *See also Thompson v. Louisiana*, 469 U.S. 17, 105 S.Ct. 409, 83 L.Ed.2d 246 (1984) [neither murder scene nor medical emergency reduces defendant's expectation of privacy. Must obtain warrant to search home].

THE "CURTILAGE" SURROUNDING A HOME IS INCLUDED WITHIN THE AREA OF HEIGHTENED PROTECTION

This increased protection afforded to houses by the Fourth Amendment "has never been restricted to the interior of the house", but includes the "area immediately surrounding the dwelling", known as the "curtilage", as well. *Wattenberg v. U.S.*, 388 F.2d 853, 857 (9th Cir. 1968).

See also Fullbright v. U.S., 392 F.2d 434-35 (10th Cir. 1968); *U.S. v. Davis*, 423 F.2d 974, 977 (5th Cir. 1970); *Fixel v. Wainwright*, 492 F.2d 480, 483 (5th Cir. 1974).

"The protection afforded by the Fourth Amendment, insofar as houses are concerned, has never been restricted to the interior of the house, but has extended to open areas immediately adjacent thereto. The differentiation between an immediately protected area and an unprotected open field has usually been analyzed as a problem of determining the extent of the 'curtilage'." *Wattenberg v. U.S.*, 388 F.2d at 857.

In *Fullbright v. U.S.*, 392 F.2d 432, 434-35 (10th Cir.), *cert. denied*, 393 U.S. 83 (1968) the court noted that:

"The word 'houses' in the Fourth Amendment has been extended by the court to include the curtilage.... If the investigators had physically breached the curtilage there would be little doubt that any observations made therein would have been proscribed. But observations from outside the curtilage of activities within are not generally interdicted by the Constitution." *Fullbright v. U.S.*, 392 F.2d at 434-35.

"The sacredness of a person's home and his right of personal privacy and individuality are paramount considerations in our country and are specifically protected by the Fourth Amendment. The Fourth Amendment's protection, however, extends further than just the walls of the physical structure of the home itself. The area immediately surrounding and closely related to the dwelling is also entitled to the Fourth Amendment's protection.... When officers have physically invaded this protected area either to seize evidence or to obtain a view of illegal activities, we have readily condemned such an invasion as violative of the Fourth Amendment." *Fixel v. Wainwright*, 492 F.2d at 483. *See also U.S. v. Certain Real Property located at 987 Fisher Road, Grosse Point, Mich.*, 719 F. Supp. 1396 (E.D.Mich., 1989) [the search of garbage placed for collector in backyard and within a home's curtilage is protected by the Fourth Amendment]; *U.S. v. Whaley*, 781 F.2d 417, 419-21 (5th Cir. 1986).

Plain view, without exigency, does not justify a warrantless entry onto the curtilage of a residence to investigate what "appeared to be marijuana", and the officer's ignorance of the warrant requirement does not raise "good faith". *But see U.S. v. Emmens*, 893 F.2d 1292 (11th Cir. 1990) [agents could lawfully enter private hangar on residential curtilage as same was, in this case, functional equivalent of border].

Recently, the Supreme Court affirmed this principle when it held a dog sniff at the door of a house where police suspected marijuana was being grown was a search. *See Florida v. Jardines*, 133 S. Ct. 1409 (2013).

Justice Scalia authored the 5-4 opinion of the Court, in which, Justices Thomas, Ginsburg, Sotomayor, and Kagan joined. Justice Kagan filed a concurring opinion, joined by Justices Ginsburg and Sotomayor. Justice Alito penned the dissent, joined by Justices Kennedy, Breyer and the Chief Justice.

As in *U.S. v. Jones*, 132 S. Ct. 945 (2012), the majority is divided as to the reasoning that should be employed to answer the question posed. Justice Scalia answers the question of "whether using a drug-sniffing dog on a homeowner's porch to investigate the contents of the home is a 'search' within the meaning of the Fourth Amendment," by noting that the Fourth Amendment establishes a simple baseline, that "[w]hen 'the Government obtains information by physically intruding' on persons, houses, papers, or effects, 'a search within the original meaning of the Fourth Amendment' has 'undoubtedly occurred.'" *Jardines*, 133 S. Ct. at 1414 (quoting *U.S. v. Jones*, 132 S. Ct. 945, 950 n. 3 (2012)).

Justice Kagan notes in her dissent that the Court decided the case under the property rubric, and, in her judgment, the Court, "could just as happily have decided it by looking to *Jardines*' privacy interests." *Id.* at 1418 (Kagan, J., concurring). Justice Kagan notes that police officers approached the door of *Jardines* with a "super-sensitive instrument" which they used to detect things inside that otherwise would have remained undetected. *Id.* (Kagan, J., concurring). "Was this activity a trespass? Yes, as the Court holds today. Was it also an invasion of privacy? Yes that as well." *Id.* (Kagan, J., concurring).

Justice Alito begins his dissent in *Jardines*, much like his dissent in *Jones*, by describing the reasoning employed by the Court's majority as deciding an important Fourth Amendment issue by using "a putative rule of trespass law." *Id.* at 1420 (Alito, J., dissenting). Justice Alito notes that the custom of allowing members of the public to approach a front door extends to friends, relatives, and delivery persons, as well as solicitors and peddlers who would likely be unwelcomed. *Id.* (Alito, J., dissenting). As to the issue of privacy noted by the concurrence, Justice Alito explains that "[a] reasonable person understands that odors emanating from a house may be detected from locations that are open to the public, and a reasonable person will not count on the strength of those odors remaining within the range that, while detectable by a dog, cannot be smelled by a human. *Id.* at 1421 (Alito, J., dissenting). Nonetheless, the holding remains, "[t]he government's use of trained police dogs to investigate the home and its immediate surroundings is a 'search' within the meaning of the Fourth Amendment." *Id.* at 1417-18.

EVEN GREATER EXPECTATION OF PRIVACY IN ONE'S PERSON THAN ONE'S HOME

Courts have indicated there may be an even greater expectation of privacy in one's person, than one's home [at least with respect to safety inspections]. *U.S. v. Roundtree*, 420 F.2d 845, 850 n.11 (5th Cir. 1969); *Camara v. Municipal Court*, 387 U.S. 523, 528, 537, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967).

"[T]he Supreme Court in *Camara* indicated that it considers a personal search to be a greater invasion of privacy (protection of which is the 'basic purpose' of the Fourth Amendment...) than other types of searches such as a housing inspection ('a relatively limited invasion of the urban citizen's privacy...')." *U.S. v. Roundtree*, 420 F.2d at 850 n.11.

REASONABLE EXPECTATION OF PRIVACY

U.S. v. Tabora, 635 F.2d 131 (2d Cir. 1980) [telescopic view into defendant's home]; *People v. Fly*, 110 Cal.Rptr. 159, 159 (Cal. App. 1973) [looking with aid of telescope through heavy foliage into defendant's backyard]; *U.S. v. Kim*, 415 F. Supp. 1252, 1256 (D.Ha. 1976) [use of high powered visual aids such as binoculars]; *People v. Arno*, 153 Cal.Rptr. 624 (Cal.App. 1979) [binoculars view of building]; *Philan v. Superior Court*, 88 Cal.App.2d 189 (Cal.App. 1979) [binocular search of garden]; *Kolb v. State*, 532 S.W.2d 87, 90 (Tex.Crim.App. 1976) [use of flashlights to see suitcases and garbage bags in darkened locker]; *Gonzales v. State*, 588 S.W.2d 355, 360 (Tex.Crim.App. 1979) [private property immediately adjacent to house is entitled to the same protection against unreasonable search and seizure as the home itself]; *State v. Rowe*, 422 S.2d 75, 76 (Fla. 1982) ["existence of a chain link fence" and fact "marijuana was planted in the midst of a vegetable garden "is sufficient"]; *Fixel v. Wainwright*, 492 F.2d 480 (5th Cir. 1974); *U.S. v. Thomas*, 757 F.2d 1359 (2d Cir. 1985) [that a defendant has a legitimate expectation of privacy that his closed apartment will remain private and a dog sniffing at his door from the outside is an invasion of that privacy]; *National Organization for the Reform of Marijuana Laws v. Mullen*, 608 F. Supp. 945 (D. Cal. 1985) (state and federal officials involved in California's "Campaign Against Marijuana Planting" enjoined from entering by foot, motor vehicle or helicopter any private property other than open fields without a warrant obtained on probable cause]. See also *People v. Sabo*, 185 Cal.App.3d 845 (1986); *Wheeler v. State*, 659 S.W.2d 381 (Tex.Cr.App. 1983) [occupants of farm exhibited a reasonable expectation of privacy in an opaque greenhouse on fenced and posted farm where the only openings were 2" louvers through which officers obtained a view with a high powered telephoto lens after having been unsuccessful for five weeks using helicopters, aerial photography, infrared night vision scopes, and high-powered telescopic lenses].

"This record contains ample evidence that appellants sought to preserve the greenhouse, and its contents, as private. They located their greenhouse on brushy, rural property in Lampasas County, one mile from the nearest public road, and at least 100 yards from the nearest vantage point on the neighboring property. The greenhouse itself was opaque, with ventilation provided for by a four-foot exhaust fan covered with slat-like louvers. There was a fence around the greenhouse and another fence around the entire tract of land. The outer fence was locked and posted with signs. These are numerous manifestations of an "actual (subjective) expectation of privacy." *Smith v. Maryland*, 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979).

As to the second prong of the *Smith* and *Katz* analysis, the State maintains that appellants lost their subjective expectation of privacy by exposing 'activities and things thereon to public view', ...

On the facts of this case, such reliance is misplaced. In fact, it was appellants' very well manifest expectation of privacy which raised suspicion to begin with. The only thing that was in 'plain sight' of the officer's initial observation, aided by a telescope, was an opaque greenhouse with "green growing plants". Later, an officer with a night vision telescope, and still later aerial surveillance, observed nothing in plain sight, or out of the ordinary. Despite this, the investigation continued specifically to observe the contents of the greenhouse until the affiant, armed with a 600 millimeter lens, caught a glimpse through the fan louvers of what he observed to be growing marijuana plants.

Here, the technology employed, its purpose, together with the concerted effort to view what had tenaciously been protected as private, constitutes a search. As we stated in *Long*:

A search means, of necessity, a quest for, a looking for, or a seeking out of that which offends the law. This implies a prying into hidden places for that which is concealed. It is simply not a search to observe that which is open to view. *Long v. State*, 532 S.W.2d 591, 593 (1975).

The crucial difference between the instant case and *Long*, *Turner*, and *Johnson* is the manifestation of privacy exhibited by appellants, and the efforts undertaken to overcome that privacy."

Wheeler v. State, 659 S.W.2d at 390.

"A person camping in Colorado on unimproved and apparently unused land that is not fenced or posted against trespassing, and in the absence of personal notice against trespassing, has a reasonable expectation of privacy in a tent used for habitation and personal effects therein." See *Colorado v. Schafer*, 946 P.2d 938 (Colo. 1997) see also *State v. Butterworth*, 737 P.2d 1297 (Wash.App. 1987) [greater expectation of privacy in unlisted telephone number, therefore warrant required to obtain same from phone company].

NO REASONABLE EXPECTATION

In *U.S. v. Dunn*, 480 U.S. 294, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987), the defendant sought to suppress evidence seized by government officers who, without a search warrant, entered onto defendant's land to view the insides of a barn that they suspected contained illegal chemicals. In suppressing the seized evidence, the Fifth Circuit noted that:

"Dunn took a number of steps to preserve privacy. Some result from the layout of his ranch and others from his affirmative acts. These steps, with different applications and different weights, all factor into the final conclusion. The barn was located in a clearing surrounded by woods on a 198 acre tract. The ranch was circled by a perimeter fence. The ranch house and buildings were at the end of a private drive approximately one-half mile from a public road. The entrance to the private driveway was secured by a locked chain. The barn was not visible from the public road or perimeter fence. The contents of the barn could not be seen from aerial observation, nor were the contents visible from the ground unless one approached the barn, penetrated its encircling fence, walked under its overhang and stood next to its fishnet front covering. Even then, entry could be made only by force or the hurdling of wooden gates which were locked.

Considering the location, type and placement of the structure, and the other steps Dunn took to limit access to the barn, we find that Dunn had a reasonable expectation of privacy in his barn and its contents. Accordingly, the fourth amendment abrogates the warrantless intrusion by agent Gospodarek and officer Fite on the night of November 5, 1980. That search required a search warrant." *U.S. v. Dunn*, 766 F.2d at 885-86.

Notwithstanding Dunn's numerous steps to preserve his privacy, the Supreme Court reversed the Fifth Circuit holding that:

"Curtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by... these factors are useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration - 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. Applying these factors to respondent's barn and to the area immediately surrounding it, we have little difficulty in concluding that this area lay outside the curtilage of the ranch house.

[T]he term 'open fields' may include any unoccupied or undeveloped area outside of the curtilage. An open field need be neither 'open' nor a 'field' as those terms are used in common speech. *Id.*, at 180, n. 11. It follows that no constitutional violation occurred here when the officers crossed over respondent's ranch-style perimeter fence, and over several similarly constructed interior fences, prior to stopping at the locked front gate of the barn. As previously mentioned, the officers never entered the barn, nor did they enter any other structure on respondent's premises. Once at their vantage point, they merely stood, outside the curtilage of the house and in the open fields upon which the barn was constructed, and peered into the barn's open front. And, standing as they were in the open fields, the Constitution did not forbid them to observe the phenyl acetone laboratory located in respondent's barn. This conclusion flows naturally from our previous decisions." *U.S. v. Dunn*, 480 U.S. 294, 301-04, 107 S.Ct. 1134, 94 L.Ed.2d 326, 334-6 (1987).

See also George v. State, 509 S.W.2d 347 (Tex.Crim.App. 1974) [looking through knotholes in backyard fence OK]; *California v. Ciraolo*, 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986) [traveling airway at 1000 feet and observing OK]; *Goehring v. State*, 627 S.W.2d 159 (Tex.Crim.App. 1982) [Fourth Amendment rights not violated by aerial surveillance of an open field]; *People v. Romo*, 243 Cal.Rptr. 801 (Cal.App. 1st Dist. 1988); *Texas v. Brown*, 460 U.S. 730, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983) ["[t]he use of a searchlight is comparable to the use of a marine glass or field glass. It is not prohibited by the Constitution"]; *U.S. v. Osunegbu*, 822 F.2d 472 (5th Cir. 1987) ["limited" expectation of privacy in private postal box]; *U.S. v. Colyer*, 878 F.2d 469 (D.C. Cir. 1989) [a passenger has no reasonable expectation of privacy from drug dog sniff in an overnight train berth on an Amtrak train].

Cases relating to inserting a key in an auto door to determine owner have gone both ways: *See U.S. v. DeBardelaben*, 740 F.2d 440 (6th Cir. 1984) [OK where based on "founded suspicion"]; *U.S. v. Portillo-Reyes*, 529 F.2d 844 (9th Cir. 1975)[requiring a warrant]. But, the owner of an automobile has no reasonable expectation of privacy in the vehicle identification number, due to a federal statutory requirement that it be visible from outside the vehicle. *New York v. Class*, 475 U.S. 106, 106 S.Ct. 960, 89 L.Ed.2d 81 (1986).

"NAKED EYE" STANDARD

U.S. v. Whaley, 779 F.2d 585 (11th Cir. 1986)[no reasonable expectation of privacy in basement of rural secluded home where internal activities were visible to the naked eye from adjoining property].

"ENHANCED" OBSERVATIONS

A citizen's expectation of privacy is diminished in direct proportion to advancements in the technology of surveillance equipment and devices. As a consequence, the citizenry is in need of greater, not lesser protection.

If the *Katz*-type inquiry regarding one's "reasonable expectation of privacy" is to continue to be the test, then a citizen's constitutional protection will be diminished in inverse proportion to increases in technology. One's Fourth Amendment protection should not be dependent upon the current state of the snooper's technology, it should be protected from same. Thus obtaining information about the interior of one's home through thermal imaging is a search requiring a warrant. *Kyllo v. U.S.*, 533 U.S. 27, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001). While most states have interpreted *Kyllo* as requiring a warrant based on probable cause, an Eighth Circuit panel has held that it only requires reasonable suspicion. *U.S. v. Kattaria*, 503 F.3d 703 (8th Cir. 2008)(rehearing *en banc* granted). However, it must be noted that the Eighth Circuit has vacated the panel's decision and granted a rehearing *en banc*, but it remains to be seen whether the entire court will allow this lower standard to stand. *U.S. v. Kattaria*, 519 F.3d 730 (8th Cir. 2007).

VIDEO CAMERA SEARCH

Law enforcement agents' use of a video camera to conduct a surveillance of a fenced-in backyard constitutes an unreasonable search. "This type of surveillance provokes an immediate negative visceral reaction: indiscriminate video surveillance raises the specter of the Orwellian state". *U.S. v. Cuevas-Sanchez*, 821 F.2d 248, 251 (5th Cir. 1987).

GARBAGE

One may expect no privacy in garbage placed in opaque containers curbside, since this is an area open to, and commonly available for inspection by animals, kids, scavengers, snoops, or the trash collector. Furthermore, evidence discovered there may comprise probable cause to search the abode from which the garbage came. *California v. Greenwood*, 486 U.S. 35, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988). *But see U.S. v. Certain Real Property Located at 987 Fisher Road, Grosse Point, Mich.*, 719 F.Supp 1396 (E.D. Mich., 1989) [search of garbage placed for collection in backyard and within a homes curtilage is protected by the Fourth Amendment].

K. SEARCHES OF RURAL AREAS AND OPEN FIELDS:

In determining whether a non-physical intrusion constitutes a "search" requiring a warrant, courts had moved away from the "open fields" doctrine of *Hester v. U.S.*, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed.2d 898 (1924) towards the *Katz* "reasonable expectation of privacy" "two distinct questions" analysis.

Smith v. Maryland, 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed. (1979) [installation of pen-registers, two-tiered test]. "The first is whether the individual, by his conduct, has 'exhibited an actual (subjective) expectation of privacy', ...whether ...the individual has shown that 'he seeks to preserve [something] as private.... The second question is whether the individual's subjective expectation of privacy is 'one that society is prepared to recognize as 'reasonable', ...whether ...the individual's expectation, viewed objectively, is 'justifiable' under the circumstances." *Smith v. Maryland*, 442 U.S. at 739.

However, the Supreme Court held *Hester's* "open fields" doctrine still viable under *Katz*-type analysis. "Open fields do not provide the setting for those intimate activities that the Fourth Amendment is intended to shelter from government interference or surveillance". *Oliver v. U.S.*, 466 U.S. 170, 179, 104 S.Ct. 1735, 80 L.Ed.2d 214, 224 (1984).

In *Oliver*, the Court defined the term "open fields" to include "any unoccupied or undeveloped area outside the curtilage". *Oliver v. U.S.*, 466 U.S. at 180.

L. COMMERCIAL PROPERTY:

While "the Fourth Amendment's prohibition on unreasonable searches and seizures is applicable to commercial premises, as well as to private homes...", it has been recognized that "[A]n expectation of privacy in commercial premises, however, is different from, and indeed less than, a similar expectation in an individual's home". *New York v. Burger*, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987).

Moreover, in contrast to the private home-owners Fourth Amendment rights, the owner of commercial property has no expectation of privacy beyond the interior of its covered buildings (there apparently is no "curtilage" recognized with respect to commercial property).

"The intimate activities associated with family privacy and the home and its curtilage simply do not reach the outdoor areas or spaces between structures and buildings of a manufacturing plant." *Dow Chemical Co. v. U.S.*, 476 U.S. at 236 [upholding EPA's aerial surveillance].

M. GOVERNMENT OFFICES:

A plurality of the United States Supreme Court held that a search of a governmental employee's office, not strictly limited to work related purposes, must meet Fourth Amendment requirements. *O'Conner v. Ortega*, 480 U.S. 709, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987).

N. PERVASIVELY REGULATED INDUSTRIES:

Another exception to the general rule that administrative searches must be limited to the underlying safety purpose for which they were intended is in the area of "pervasively regulated industries".

The Supreme Court has approved statutorily authorized administrative searches of historically regulated industry (auto "chop-shop"/junkyards) or diminished Fourth Amendment Safeguards, notwithstanding fact that underlying purpose of regulatory statute is enforcement of penal laws. The statute, however, must meet a three-pronged test. *New York v. Burger*, 482 U.S. 691, 107 S.Ct. 2636, 96 L.Ed.2d 601, 613-614 (1987).

O. FOURTH AMENDMENT PROTECTIONS UNDER "SAFETY STATUTES":

Administrative inspections, which allow privacy intrusions on less than ordinary Fourth Amendment standards, should be carefully limited in time, place and intrusiveness to the underlying safety purpose justifying the intrusion in the first place.

See Marshall v. Barlow's Inc., 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978) [OSHA warrants]; *U.S. v. Biswell*, 406 U.S. 311, 315, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972) [firearms . . . such searches must be "carefully limited in time, place and scope"]; *See v. City of Seattle*, 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967); *Michigan v. Tyler*, 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978); *Abel v. U.S.*, 362 U.S. 217, 80 S.Ct. 683, 4 L.Ed.2d 678 (1968).

"Deliberate use by the government of an administrative [safety statute] for the purpose of gathering evidence in a criminal case must be met with stern resistance by the Courts." *Abel v. U.S.*, 362 U.S. at 226. *See also Brock v. Gretna Mach. & Iron Works*, 769 F.2d 1110 (5th Cir. 1985) [administrative search warrant valid because adequately describes manner of defendant's selection for inspection]; *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 1325, 75 L.Ed.2d 229, 238 (1983).

"The scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." *Florida v. Royer*, 460 U.S. at 500.

Michigan v. Clifford, 464 U.S. 287, 294-7, 104 S.Ct. 641, 647, 78 L.Ed.2d 477, 484-6 (1984) ["If a warrant is necessary, the object of the search determines the type of warrant required."].

SOBRIETY CHECKPOINT APPROVED:

Without describing or defining what procedures or guidelines are required, the Supreme Court approved roadside "sobriety checkpoints," conducted pursuant to "guidelines," noting that same are "minimally intrusive"

and serve a "grave and legitimate interest" of the state, indistinguishable from the border stops approved in *U.S. v. Martinez-Fuerte*, 428 U.S. 543 (1976).

See *City of Indianapolis v. Edmond*, 121 S.Ct. 447(2000)[requiring individualized suspicion for narcotics-detection traffic roadblocks]; *Michigan Department of State Police v. Sitz*, 496 U.S. 444, 110 L.Ed.2d 412 (1990); *State v. Van Natta*, 811 S.W.2d 608 (Tex.Cr. App. 1991)[state must prove effectiveness of DWI roadblocks in preventing accidents caused by drunk drivers otherwise the roadblock will be violative of the Fourth Amendment]; *Meeks v. State*, 692 S.W.2d 504 (Tex.Cr.App. 1985) [a roadblock license check will be permitted *only* where the "sole purpose in stopping all traffic on the highway ...was ...to check driver's licenses"]; *State v. Barcia*, 562 A.2d 246 (N.J. 1989)[roadblock stopping every twentieth car to catch cocaine purchasers violated U.S. and New Jersey Constitutions -- only 59 vehicles were directed away from the main thoroughfare and only nine persons were arrested].

See also *Texas v. Brown*, 460 U.S. 730, 743, 103 S.Ct. 1535, 1543, 75 L.Ed.2d 502, 515 (1983), "The circumstances of the meeting between [the police officers and the defendant] gives no suggestion that the roadblock was a pretext whereby evidence of narcotic violation might be uncovered ...in the course a check for driver's licenses." *Texas v. Brown*, 460 U.S. at 743.

Commonwealth v. Tarbert, 502 A.2d 221 (Pa. 1985) [intrusiveness of systematic roadblock stops, made without reasonable suspicion, not outweighed by law enforcement interests]; *Fatemis v. State*, 558 S.W.2d 463, 466 (Tex.Crim.App. 1977) ["license checks" may not be used as a "pretext" for criminal investigations generally]; *People v. Bartley*, 466 N.E.2d 346 (Ill. App. 1984) [roadblocks stopping *all* drivers for intoxication violate state and federal constitution]; *In re Richard J.*, 185 Cal.App.3d 855, 229 Cal.Rptr. 884 (1986) [warrantless temporary stop at "sobriety checkpoints" violated California and United States Constitution]; *Meeks v. State*, 692 S.W.2d 504 (Tex.Crim.App. 1985) [license check roadblock could not be used to support a traffic stop, even though all vehicles were stopped unless the "sole purpose in stopping all traffic on the highway ..was not to check driver's licenses"]; *State v. Koppel*, 499 A.2d 977 (N.H. 1985) [drunk driving roadblocks violated the state's constitutional counterpoint to the Fourth Amendment]; *State v. Martin*, 496 A.2d 442 (Vt. 1985) [constitutional roadblock stop must involve explanation of purpose, minimal detention, compliance with objective guidelines for selection of vehicles to be stopped, visible display of legitimate authority and visibly non-random basis for stops].

Contra Little v. State, 479 A.2d 903 (Md.Cr.App. 1984) [OK where detailed regulations, only driver checked, other occupants and vehicle not searched, and large sign with provision for U-turn for those wishing to avoid the checkpoints]; *Ingersoll v. Palmer*, 221 Cal.Rptr. 659, 175 Cal.App.3rd 1028 (Cal.Ct.App. 1985) [DWI roadblocks' effect on personal liberty "minimal" in relation to public safety interest, but limited police discretion and advance publicity required]; *State v. Perpich*, 590 F. Supp. 1057 (D. Minn. 1984) [drunk driving survey]; *U.S. v. McFayden*, 865 F.2d 1306 (D.C. 1989) [where roadblock was designed to stem traffic congestion that resulted from street drug sales, all vehicles were stopped and same furthered legitimate government interest of safety, the court held it met constitutional standards].

Q. CANINE SEARCHES: GOING TO THE DOGS:

Dog sniff from outside a closed apartment to determine contents constituted a search.

U.S. v. Thomas, 757 F.2d 1359 (2d Cir. 1985) [a practice which may be non-intrusive in a public place such as an airport, *see U.S. v. Place*; becomes much more intrusive when used to "sense" what is inside a closed residence].

See *Strout v. State*, 688 S.W.2d 188, 191 (Tex.App.--Amarillo 1985) [no expectation of privacy in semi-public area *in front of* locked safety deposit box, such that sniffing was not a search]. See *State v. Hayes* 188

S.W.3d 505 (Tenn 2006) [The Fourth Amendment's prohibition on unreasonable seizures was violated by a police checkpoint program designed to improve the safety at a housing authority apartment complex by stopping pedestrians and motorists on the complex's privatized streets and asking them to provide their resident identification badges and other documentation. The court decided that the entry identification checkpoint program should be treated like the drug interdiction checkpoint program struck down in *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).]

Dog sniff of car exterior that had been lawfully stopped on a reasonable suspicion of carrying drugs did not become unconstitutional when the dog suddenly jumped into the car through the hatchback that had been opened by defendant. *U.S. v. Stone*, 866 F.2d 359 (10th Cir. 1989) [dog's "alert" response to a duffle bag inside car was sufficient to give probable cause for warrantless search].

But now a dog sniff occurring during a lawful traffic stop does not exceed any constitutional rights when it reveals possession of a substance that was not a legitimate interest in privacy. *See Illinois v. Caballes*, 543 U.S. 405, 125 S. Ct. 834 (2005)

SNIFFING SCHOOL DOGS

Public school officials, employed and paid by the State are "agents of the Government ...constrained by the Fourth Amendment". *Horton v. Goose Creek Ind. School Dist.*, 677 F.2d 471 (5th Cir. 1982). "Sniffing by dogs of the student's person, particularly where the dogs actually touch the person is a search within the purview of the Fourth Amendment." *Horton v. Goose Creek Ind. School Dist.*, 677 F.2d at 480.

THE UNTESTED CANINE NOSE

Many of the cases approving the use of drug alerting dogs reflect the training qualifications of the animal in question.

U.S. v. Place, 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983); *U.S. v. Lewis*, 708 F.2d 1078 (6th Cir. 1983); *U.S. v. Robinson*, 707 F.2d 811 (4th Cir. 1983); *U.S. v. Klein*, 626 F.2d 22, 27 (7th Cir. 1980) ["representation to the magistrate that the dog 'graduated from a training class in drug detection ...and 'has proven reliable in detecting drugs and narcotics on prior occasions'"]; *U.S. v. Johnson*, 660 F.2d 21, 22 (2d Cir. 1981) ["specially trained dog"]; *U.S. v. Venema*, 563 F.2d 1003, 1007 (10th Cir. 1977) ["Chane was a 'trained, certified marijuana sniffing dog'"]; *U.S. v. Goldstein*, 635 F.2d 356, 362 (5th Cir. 1981).

In *Florida v. Harris*, 133 S.Ct. 1050 (2013), the U.S. Supreme Court rejected the lower court's rigid requirement that police officers show evidence of a dog's reliability in the field to prove probable cause. A drug-detection dog's alert to the exterior of a vehicle for can provide an officer with probable cause to conduct a warrantless search of the interior of the vehicle.

In one airport case involving Agent Markoni the court noted that while the particular canine had no formal "drug-sniffing training," the particular dog "had 'graduated' first in his explosive's sniffing class". *U.S. v. McCraine*, 703 F.2d 1213, 1215 (10th Cir.1983).

MARKONI HAS GONE TO THE DOGS

Not to be outdone, Agent Markoni has pitted himself against his canine counterparts. *U.S. v. Sentovich*, 677 F.2d 834, 835-36 (11th Cir. 1982). "The ubiquitous DEA Agent Paul Markonni once again sticks his nose

into the drug trade. This time he is on the scent of appellant Mitchell Sentovich's drug courier activities. We now learn that among Markoni's many talents is an olfactory sense we in the past attributed only to canines. Sentovich argues that he should have been able to test, at a magistrate's hearing on issuance of a search warrant, whether Markoni really is the human bloodhound he claims to be. Sentovich's claims, however have more bark than bite. In fact, they 'have not a dog's chance of success.' Zeke, Rocky, Bodger and Nebuchadnezzar, and the drug dogs of the southeast, had best beware. Markoni's sensitive proboscis may soon put them in the dog pound." *U.S. v. Sentovich*, 677 F.2d at 835-36.

The Supreme Court has specifically approved the use of sniffing dogs to detect drugs in airline passenger's luggage.

"We conclude that the particular course of investigation that the agents intended to pursue here-- exposure of respondent's luggage which was located in a public-place, to a trained canine--did not constitute a 'search' within the meaning of the Fourth Amendment". *U.S. v. Place*, 462 U.S. at 707. *See U.S. v. Beale*, 736 F.2d 1289 (9th Cir. 1984) [*en banc*] [dog sniff of baggage is not a search within meaning of Fourth Amendment and requires neither reasonable suspicion nor probable cause].

R. SEARCHES IMPLICATING THE FIRST AMENDMENT:

The seizure of films or books on the basis of their content clearly implicates concerns not present in other seizures. The Supreme Court outlined the results of these concerns:

"...[W]e have required that certain special conditions be met before such seizures may be carried out. In *Roaden v. Kentucky*, 413 U.S. 496, 37 L.Ed.2d 757, 93 S.Ct. 2796 (1973), for example, we held that the police may not rely on the 'exigency' exception to the Fourth Amendment's warrant requirement in conducting a seizure of allegedly obscene materials, under circumstances where such a seizure would effectively constitute a 'prior restraint'. In *A Quantity of Books v. Kansas*, 378 U.S. 205, 12 L.Ed.2d 809, 84 S.Ct. 1723 (1964), and *Marcus v. Search Warrant*, 367 U.S. 717, 12 L.Ed.2d 809, 84 S.Ct. 1723 (1961), we had gone a step farther, ruling that the large-scale seizure of books or films constituting a 'prior restraint' must be preceded by an adversary hearing on the question of obscenity. In *Heller v. New York*, 413 U.S. 483, 37 L.Ed.2d 745, 93 S.Ct. 2789 (1973), we emphasized that, even where a seizure of allegedly obscene materials would not constitute a 'prior restraint,' but instead would merely preserve evidence for trial, the seizure must be made pursuant to a warrant and there must be an opportunity for a prompt post-seizure judicial determination of obscenity. And in *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636, 20 L.Ed.2d 1313, 88 S.Ct. 2103 (1968), we held that a warrant authorizing the seizure of materials presumptively protected by the First Amendment may not issue based solely on the conclusory allegations of a police officer that the sought-after materials are obscene, but instead must be supported by affidavits setting forth specific facts in order that the issuing magistrate may 'focus searchingly on the question of obscenity'. *Marcus*, at 732, 6 L.Ed.2d 1127, 81 S.Ct. 1708. *See also Stanford v. Texas*, 379 U.S. 476, 486, 13 L.Ed.2d 431, 85 S.Ct. 506 (1965)." *New York v. P.J. Video, Inc.*, 475 U.S. 868, 106 S.Ct. 1610, 89 L.Ed.2d 871, 879 (1986).

Nevertheless, the application for a warrant authorizing seizure of presumptively protected materials is to be evaluated by under the same standard of probable cause used to review warrant applications generally. *P.J. Video, Inc.*, 475 U.S. at 868.

VI. CONSENT:

In *Florida v. Bostick*, the Florida Supreme Court below had condemned the tactic explaining that such confrontations in close quarters amounts to a seizure requiring at least reasonable suspicion. *Florida v. Bostick*, 554 So.2d 1153 (Fla. 1989). The Supreme Court in *Florida v. Bostick*, 501 U.S. 429, 111 S. Ct. 2382, 115 L.Ed.2d 389 (1991), rejected the Florida court's *per se* rule and held that the close quarters was only a factor to be considered in determining whether a person is seized or whether his consent was coerced. Without deciding the consent or seizure issues the Court compared *Bostick* with *INS v. Delgado*, 466 U.S. 210 (1984), where factory workers were held not seized although immigration agents had secured the exits to their factory and questioned workers about their citizenship. The test said the Court is "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter."⁶ Continuing with the same reasoning, the Court held in *U.S. v. Drayton*, 122 S.Ct. 2105, 153 L.Ed.2 242 (2002) that persons need not be told by police that they have the right to refuse to consent, in order for consent to be voluntary. It is enough if the individuals knew they could refuse to consent. See also *Johnson v. State*, 68 S.W.3d 644 (Tex. Crim. App. 2002)[same].

Smarting from Justice Marshall's poignant dissent⁷ the majority protests:

"This Court, as the dissent correctly observes, is not empowered to suspend constitutional guarantees so that the Government may more effectively wage a 'war on drugs.' If that war is to be fought, those who fight it must respect the rights of individuals, whether or not those individuals are suspected of having committed a crime. By the same token, this Court is not empowered to forbid law enforcement practices simply because it considers them distasteful." *Florida v. Bostick*, 501 U.S. 429, 111 S. Ct. 2382, 115 L.Ed.2d 389 (1991) [citations omitted].

Where the Government claims that the search was based upon "consent" then the prosecution has the burden of establishing that such consent was knowing, intelligent, and voluntary. In addition, if a party has standing to complain of a search, she may also complain about the involuntary consent of another. The question is not actually whether one can complain of another's involuntary consent, but is whether the police have authority to conduct the search. Invalid or coerced consent does not provide authority to search. Even the lack of one's capacity to consent will render a search illegal with regard to another with standing to complain. See *U.S. v. Elrod*, 441 F.2d 252 (5th Cir. 1971)[Wright's mental incapacity to consent renders the search invalid as to Elrod].

However, the trial court's determination as to the voluntariness of that consent has been held to be reviewable under the "clearly erroneous" standard. *U.S. v. Davis*, 749 F.2d 292 (5th Cir. 1985). The Texas constitution similarly requires the state to show by clear and convincing evidence that consent is valid. *Guevara v. State*, 97 S.W.3d 579 (Tex. Crim. App. 2003).

Courts have held that no warning of a suspect's right to refuse consent is required, and such failure is only a circumstance to be considered in determining its voluntariness.

See also *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); *Haves v. Cody*, 500 F.2d 1212 (7th Cir.), cert. denied, 419 U.S. 1058; *U.S. v. Garcia*, 496 F.2d 670 (5th Cir.), cert. denied, 420 U.S. 960 (1975); *U.S. v. Drayton*, 536 U.S. 194 (2002) [after boarding a passenger bus requesting consent searches

⁶ The Court further held that "an individual may decline an officer's request without fearing prosecution. We have consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure." [citations omitted].

⁷ The majority attempts to gloss over the violence that today's decision does the Fourth Amendment with empty admonitions. 'If th[e] [war on drugs] is to be fought,' the majority intones, 'those who fight it must respect the rights of individuals, whether or not those individuals are suspected of having committed a crime.' The majority's actions, however, speak louder than its words." [citations omitted].

of passengers' luggage, police were not required to warn passengers of their right to deny consent]; *U.S. v. Hearn and Taylor*, 496 F.2d 236 (6th Cir.), *cert. denied*, 419 U.S. 1048 (1974); *U.S. v. Cage*, 494 F.2d 740 (10th Cir. 1974); *U.S. v. Campbell*, 516 F.2d 894 (1st Cir. 1975); *U.S. v. Sebetich*, 776 F.2d 412 (3d Cir. 1986)[specific findings required].

SCOPE

Permission to "look" in auto trunk does not extend consent to search packages and contents located therein. *U.S. v. Gay*, 774 F.2d 368, 1377 (10th Cir. 1985). However, a general consent to search one's auto when the announced purpose of the search is for drugs, allows the scope of that consent to extend to the search of closed containers in the vehicle. *Florida v. Jimeno*, 500 U.S. 248, 111 S.Ct. 1801, 114 L.Ed.2d 297 (1991).

"We think that it was objectively reasonable for the police to conclude that the general consent to search respondent's car included consent to search containers within that car which might bear drugs." *Florida v. Jimeno*, (noting the majority focused on the fact that the purpose for the search was announced before the consent was given)⁸.

Reminding the Court of what the Fourth Amendment provides, Justices Stevens and Marshall dissented:

"The majority also argues that the police should not be required to secure specific consent to search a closed container, because 'the community has a real interest in encouraging consent.' [citation omitted] I find this rationalization equally unsatisfactory. If anything, a rule that permits the police to construe a consent to search more broadly than it may have been intended would discourage individuals from consenting to searches of their cars. Apparently the majority's real concern is that if the police were required to ask for additional consent to search a closed container found during the consensual search of an automobile, an individual who did not mean to authorize such additional searching would have an opportunity to say no. In essence, then, the majority is claiming that 'the community has a real interest' not in encouraging citizens to *consent* to investigatory efforts of their law enforcement agents, but rather in encouraging individuals to be *duped* by them. This is not the community that the Fourth Amendment contemplates." *Florida v. Jimeno*, 500 U.S. 248, 111 S.Ct. at 1806.

Even though the defendant consents to a search of his person, same did not extend to a search of his crotch as the consent given could not be seen as completely voluntary and knowing. *U.S. v. Blake*, 718 F. Supp. 925 (S.D. Fla. 1988) [court found the search to be unreasonable and outrageous].

CONSENT OF CUSTODIAL ARRESTEE

At least one court, however, has held that a *Miranda* warning is required to obtain a free and voluntary consent from a custodial arrestee. *U.S. v. Verrusio*, 742 F.2d 1077 (7th Cir. 1984) [relying on *Florida v. Royer*].

It has further been held that where a defendant is in custody, the Government's burden of proving the voluntariness of consent is increased. *U.S. v. Ballard*, 573 F.2d 913, 916 (5th Cir. 1978); *Hayes v. Cady*, 500 F.2d

⁸ The dissent points out, "[a]ccording to the majority, it nonetheless is reasonable for a police officer to construe generalized consent to search an automobile for narcotics as extending to closed containers, because '[a] reasonable person may be expected to know that narcotics are generally carried in some form of a container.' This is an interesting contention. By the same logic a person who consents to a search of the car from the driver's seat could also be deemed to consent to a search of his person or indeed of his body cavities, since a reasonable person may be expected to know that drug couriers frequently store their contraband on their persons or in their body cavities. I suppose (and hope) that even the majority would reject this conclusion, for a person who consents to the search of his car for drugs certainly does not consent to a search of things other than his car for drugs. But this example illustrates that if there is a reason for not treating a closed container as something "other than" the car in which it sits, the reason cannot be based on intuitions about where people carry drugs." *Florida v. Jimeno*, 500 U.S. 248, 111 S.Ct. 1801, 114 L.Ed.2d 297 (1991).

1212 (7th Cir.), *cert. denied*, 419 U.S. 1058 (1974); *U.S. v. Rothman*, 492 F.2d 1260 (9th Cir. 1973); *U.S. v. Mayes*, 552 F.2d 732 (6th Cir. 1977).

See also U.S. v. Watson, 423 U.S. 411, 96 S.Ct. 820 (1976) [consent given while under valid arrest held voluntary on facts].

CONSENT FOLLOWING ILLEGAL ARREST

Some courts hold that illegal custody will vitiate any consent, unless the "taint" of the illegal arrest is attenuated. *See, e.g., Luepa v. State*, 561 S.W.2d 497, 498 (Tex.Crim.App. 1978).

"The detection, if unlawful may also have tainted appellant's apparent voluntary consent to search the trunk". *Luepa v. State*, 561 S.W.2d at 498.

U.S. v. Ballard, 573 F.2d 913, 916 (5th Cir. 1978); *McDougall v. State*, 547 S.W.2d 40 (Tex.Cr.App. 1977); *Armstrong v. State*, 550 S.W.2d 25, 32 (Tex.Cr.App. 1976); *Hinson v. State*, 547 S.W.2d 277, 278-281 (Tex.Cr.App. 1977) [illegal stop vitiates any consent thereafter given].

Courts have applied an "Attenuation Test" analogous to that approved by the Supreme Court in confession cases such as *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975); *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1975) [confession]; *Taylor v. Alabama*, 457 U.S. 687, 102 S.Ct. 2664, 73 L.Ed.2d 314 (1983).

See U.S. v. Robinson, 625 F.2d 1211 (5th Cir. 1980); *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983).

The Supreme Court in *Royer*, without detailing any "attenuation test" simply cited *Brown v. Illinois* and *Dunaway v. New York* noting that "the information available ...did not constitute probable cause to arrest; thus, if probable cause was required, the seizure was illegal and the resulting consent to search was invalid". *Florida v. Royer*, 460 U.S. at 514. The central inquiry regarding the dissipation of the taint of an illegal arrest is whether any consent was given voluntarily. *U.S. v. Cherry*, 794 F.2d 201, 205 (5th Cir. 1986).

DEMONSTRATION OF ATTENUATION

Prosecution has burden of demonstrating that any consent was not tainted by illegal arrest. *Brick v. State*, 738 S.W.2d 676 (Tex.Crim.App. 1987) ["Clear and convincing evidence"].

Court held that a "taint" is "inherent" anytime consent follows illegal arrest, and prosecution must demonstrate that following factors dissipated any such inherent taint:

1. Proximity of consent to the arrest,
2. whether seizure brought about police observation of particular object which they sought consent to search,
3. whether illegal seizure was "flagrant police misconduct,"
4. whether consent was volunteered,
5. whether arrestee was made aware of his right to decline consent, and
6. whether the polices' purpose was to obtain consent.

Even an otherwise voluntary consent may be invalidated where it is obtained during detention after an illegal arrest as "fruit of the poisonous tree," unless there is a showing that same is "sufficiently attenuated" so as not to constitute an exploitation of that initial illegality.

POISONED FRUIT DEEMED PALATABLE

The Supreme Court recently placed its stamp of perimure upon a custodial statement obtained from a suspect detained outside his home after he had been illegally arrested, without a warrant in violation of *Payton v. New York*. *New York v. Harris*, 495 U.S. 14, 109 L.Ed.2d 13, 110 S.Ct. 1640 (1990)[the officers had probable cause to arrest the defendant and the warrant required of *Payton* was "designed to protect the physical integrity of the home" and not to protect suspects from use of statements made outside those premises].

"It is ... evident, in light of *Payton*, that arresting Harris in his home without an arrest warrant violated the Fourth Amendment... we decline to apply the exclusionary rule in this context because the rule in *Payton* was designed to protect the physical integrity of the home; it was not intended to grant criminal suspects, like *Harris*, protection for statements made outside their premises where the police have probable cause to arrest the suspect for committing a crime."

U.S. v. Wilson, 569 F.2d 392 (5th Cir. 1978); *U.S. v. Cherry*, 794 F.2d 201, 206 (5th Cir. 1986); *U.S. v. Edmondson*, 791 F.2d 1512 (11th Cir. 1986).

Factors considered include:

1. Giving of *Miranda* warnings, although mere giving of warnings will not suffice to "attenuate" taint. *Brown v. Illinois*, 422 U.S. at 600; *Dunaway v. New York*, 442 U.S. at 397; *Taylor v. Alabama*, 457 U.S. at 319.
2. Temporal proximity of arrest and consent.
3. Intervening circumstances.
4. Purposefulness or flagrancy of officer's conduct.

Bumper v. North Carolina, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968) [consent given after authority to search is claimed under invalid warrant held to constitute a "situation ...consistent with coercion"]; *Wong Sun v. U.S.*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

CONSENT OBTAINED BY FRAUD OR TRICKERY

It has been held that the Government's use of fraud or trickery did not vitiate an accused's consent to search, but was simply one factor to be considered in the *Schneekloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) ["totality of the circumstances" test].

U.S. v. Andrews, 746 F.2d 247, 248 (5th Cir. 1984), *overruled on other grounds by U.S. v. Hurtado*, 905 F.2d 74 (1990)[there that the defendant's will had not been "overborne" by the Government's misrepresentation].

Cf. U.S. v. Davis, 749 F.2d 292, 295-96 (5th Cir. 1985) [where in upholding the consent search the court looked to fact that there was no *intent* by law enforcement agents to deceive the accused].

HANDCUFFS

See U.S. v. Mayes, 552 F.2d 732, 732 (6th Cir. 1977); *U.S. v. Calhoun*, 542 F.2d 1094 (9th Cir. 1976); *U.S. v. Taylor*, 716 F.2d 701, 709 (9th Cir. 1983) [*Terry* stop not converted to arrest by reasonable use of handcuffs].

DRAWN GUNS

See *U.S. v. Phillips*, 664 F.2d 971, 1023-24 (5th Cir. 1981) ["most unusual" that consent at gunpoint could be voluntary]; *U.S. v. Calhoun*, 542 F.2d 1094, 1011 (9th Cir. 1976); *U.S. v. Edmondson*, 791 F.2d 1512 (11th Cir. 1986); *U.S. v. Rouco*, 765 F.2d 983 (11th Cir. 1985) [the "[f]act that defendant was placed face down in a parking lot with an agent's gun to his head" did not render statement involuntary].

ATTACKING POLICE DOGS

U.S. v. Murphy, 763 F.2d 202 (6th Cir. 1985) ["incriminating statements made by defendant while he was being apprehended by attacking police dog should have excluded at trial, even though ... made in the complete absence of police misconduct or interrogation.."].

THIRD PARTY CONSENT

When a suspect declined consent to search of his property, police can wait until the suspect leaves in order to request consent from a co-tenant so long as the police do not actively participate in removing the suspect from the scene. *U.S. v. Groves*, 530 F.3d 506 (7th Cir. 2008)[police waited until a time they knew suspect would be away from home before seeking consent from co-tenant after being denied consent from suspect].

See *Ingram v. State*, 703 P.2d 415 (Alaska App. 1985) [consent of apartment dweller to search of premises extended to recent guest's personal property found on the premises; guest assumes the risk of host's consent]; *Boyle v. State*, 820 S.W.2d 122 (Tex.Crim.App. 1989), *cert. denied*, 503 U.S. 921 (1992). [owner of trucking company could validly consent to search of tractor trailer he owned since he retained "supervisory authority and control" over the defendant and the truck]; *Welch v. State*, 93 S.W.3d 50 (Tex.Crim.App. 2002)[passenger entrusted with vehicle after the arrest of the driver had sufficient authority to consent to the search of the same]; *Balentine v. State*, 71 S.W.3d 763 (Tex. Crim. App. 2002)[building owner who gave defendant permission to stay in apartment after he was thrown out of a house and who entered apartment at will had authority to consent to its search].

APPARENT AUTHORITY TO CONSENT

The Supreme Court held that one consenting to the search of a residence need not have actual authority, so long as the police officer's reliance upon same is objectively reasonable. *Illinois v. Rodriguez*, 497 U.S. 177, 111 L.Ed.2d 148, 110 S.Ct. 2793 (1990) [consent must "be judged against an objective standard: would the facts available to the officer at the moment ...'warrant a man of reasonable caution in the belief' that the consenting party had authority over the premises"].

In Texas a defendant might invalidate an otherwise valid search obtained with third party consent, if she can show that the police "intentionally bypassed" her to obtain the consent from another. *Maxwell v. State*, 73 S.W.3d 278 (Tex.Crim.App. 2002).

See also, *State v. Porting*, 130 P.3d 1173 (Kan. 2006). [A newly paroled inmate's ties to his intended residence were not strong enough to permit law enforcement officers to rely on his permission to conduct a warrantless search of the home. The occupants of the house to which the parolee planned to move had not "assumed the risk" that the parolee would permit others inside the residence]; *United States v. Knights*, 534 U.S. 112, (2001), [Warrantless search of probationer's apartment by sheriff's detective based on reasonable suspicion upheld where warrantless searches are a condition of probation].

TODDLER UNAUTHORIZED TO CONSENT TO SEARCH OF PARENT'S BEDROOM

Reynolds v. State, 781 S.W.2d 351, 46 Cr.L. 1152 (Tex.App.-Houston [1st Dist] 1989) [a "child of twelve is generally incapable of waiving his own rights. He is even less fit to surrender those of his mother"].

SPOUSAL CONSENT

Georgia v. Randolph, 547 U.S. 103 (2006). [Law enforcement officers' warrantless search of a shared home pursuant to the consent of one resident violates the Fourth Amendment rights of another resident who is present and expressly objects to the search. The Fourth Amendment's prohibition of unreasonable searches and seizures forbade law enforcement officers to conduct a warrantless search of a home pursuant to the consent of the wife when the husband was present on the scene and objected to the search. The court's ruling goes against the prevailing approach taken in the lower federal and state courts.]

U.S. v. Koehler, 790 F.2d 1256, 1259-60 (5th Cir. 1986) [a wife had the requisite "common authority" over family car by virtue of individual title, ultimate liability on purchase debt, and possession of keys at the time of the search. Husband's exclusion of wife from possession before his arrest could not bar her from giving consent after his arrest].

United States v. Johnson, 656 F.3d 375 (6th Cir. 2011) [Husband separated from wife but temporarily residing in home can object to search over long-time resident's consent, *Randolph's* holding does not require residential con-tenants to have equal possessory interests in order to prevent warrantless search]

CONSENT OF MINORS

Atkins v. State, 331 S.E.2d 597 (Ga. 1985) [a child under the age of 18 can validly consent to a search of his parent's home]. However, the court declined to establish a *per se* rule and concluded that the validity of the consent should be determined on a case-by-case basis.

CONSENT SOUGHT AFTER REQUEST FOR COUNSEL **[EDWARDS V. ARIZONA]**

Under the Supreme Court's analysis in *Edwards v. Arizona*, 451 U.S. 477, 484, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), a request for counsel should terminate further questions, including requests for consent to search.

"[w]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police- initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused ...having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police. *Edwards v. Arizona*, 451 U.S. at 484.

See *U.S. v. Cherry*, 733 F.2d 1124, 1132, n. 15 (5th Cir. 1984) [*Cherry I*]; See also *U.S. v. Yan*, 1989 WL 2705 (S.D.N.Y. 1989) [unpublished case] [post-arrest consent after equivocal request for counsel violates *Edwards v. Arizona*]. But see *U.S. v. Cherry*, 794 F.2d 206, 207 (5th Cir. 1986) [*Cherry III*] [based upon the

Supreme Court's decision in *Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed. 222 (1985), consent given after an unequivocal request for counsel is not *per se* invalid].

"This Court has previously ruled that the failure of the investigating agents, following Cherry's equivocal request for counsel, to cease all interrogation until they could clarify Cherry's request or provide him with counsel violated his rights under *Miranda* and *Edwards*....

The Court in *Cherry I* also held that Cherry's consent to the second search that led to the discovery of the murder weapon was also fatally tainted by this violation....

Since *Elstad* makes clear that failure to give or carry out the obligation of *Miranda* warnings in and of itself is not a constitutional infringement, the test by which to evaluate whether a defendant's underlying Fifth Amendment right against compelled testimony has been violated is still the 'due process voluntariness test'....

This due process voluntariness inquiry applies to the case before us since the issue is the use of derivative evidence obtained through the exploitation of statements obtained in violation of *Miranda*." *U.S. v. Cherry*, 794 F.2d at 207.

CONSENT TO SOBRIETY TEST VS. RIGHT TO COMMUNICATE WITH COUNSEL

See Sites v. State, 481 A.2d 192 (Md.App. 1984) [focusing the inquiry upon the Constitutional and statutory requirements that an arrestee be afforded a reasonable opportunity to consult with counsel].

"The Due Process Clause, as well as Article 24 of the Maryland Declaration of Rights, requires that a person under detention for drunk driving must, on request, be permitted a reasonable opportunity to communicate with counsel before submitting to a chemical sobriety test, as long as such attempted communications will not substantially interfere with the timely and efficacious administration of the testing process.

It is impossible to establish a bright line rule as to what constitutes a reasonable delay." *Sites v. State*, 481 A.2d 192 (Md.App. 1984).

VIDEOTAPED ANSWERS TO POLICE SOBRIETY QUESTIONS

The Supreme Court has held that while the "slurred nature" of a suspect's responses to police sobriety questions constitutes a physical trait, rather than being "testimonial or communicative", questions and answers that have import because of their "content", rather than the nature of their delivery, do invoke Fifth Amendment *Miranda* proscriptions. *Pennsylvania v. Muniz*, 496 U.S. 582, 110 L.Ed.2d 528, 110 S.Ct. 2638 (1990) [routine, focused and limited instructions as to how to take the test and whether the accused understood same did not constitute custodial interrogation]. *See also State v. Spencer*, 750 P.2d 147 (Or. 1988); *Department of Transportation v. Doherty*, 490 A.2d 481 (Pa. 1985) [that a citizen's request for counsel, prior to consenting to a sobriety test, was not a "refusal" to take the test for license suspension purposes].

"Here, Mr. Doherty's response does not evidence an attempt to debate, maneuver or negotiate the question of submission to the test. *Morris Motor Vehicle Operator License Case*, 218 Pa. Super. 347, 280 A.2d 658 (Pa. 1971). He did not condition his response on speaking with a lawyer but rather only inquired about the propriety of speaking to a lawyer before submitting to the breathalyzer test. The testing officer immediately recorded a refusal. We believe, however, that a refusal cannot be implied from a mere

question. We, therefore, conclude that Mr. Doherty's response did not amount to refusal." *Department of Transportation v. Doherty*, 490 A.2d 481 (Pa. 1985).

See also Commonwealth v. O'Conner, 555 A.2d 873 (Pa. 1989) [DWI arrestee who asks for counsel must be told that right does not apply in connection with a request for breath test so suspect can make an informed choice]. *But see McCambridge v. State*, 712 S.W.2d 499 (Tex.Cr.App. 1986); *Forte v. State*, 707 S.W.2d 89 (Tex.Cr.App. 1986).

VII. STANDING

(WHO CAN COMPLAIN?):

In *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978), the Supreme Court effectively removed any distinction which previously existed between an individual's standing to challenge a particular search and the substantive Fourth Amendment analysis of the search itself holding that the question crucial to both is that posed in *Katz v. U.S.*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576: "Whether the person who claims the protection of the [Fourth] Amendment has a legitimate expectation of privacy in the invaded place." *Rakas v. Illinois*, 439 U.S. at 134.

The focus of the standing inquiry has thus shifted from rigid considerations of one's proprietary interest in the place searched or items seized to whether the individual had a legitimate expectation of privacy in the invaded place.

"The court in *Katz* held that capacity to claim the of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the amendment has a legitimate expectation of privacy in the invaded place." *Rakas v. Illinois*, 439 U.S. at 143.

Ultimately, whether a person has standing is analyzed on a case-by-case basis looking to the claimant's reasonable expectation of privacy under the totality of circumstances.

A factual showing should be made at the evidentiary hearing to establish such factors as:

- 1) Defendant's proprietary or possessory interest in the place or item searched,
- 2) Defendant's right or authority to exclude others from the place or exclusive control over items searched,
- 3) Defendant's presence at the time of the search,
- 4) Security or other precautions taken by the Defendant which evince a reasonable expectation of privacy.

See U.S. v. Barry, 853 F.2d 1479 (8th Cir. 1988) [defendant checking bag in name of proposed buyer of stolen goods contained therein retained an expectation of privacy in same then having standing to complain of its warrantless search]; *U.S. v. Perez*, 689 F.2d 1336 (9th Cir. 1982) [those following truck with contraband to insure its delivery have standing since there was a formalized arrangement between the parties]; *U.S. v. Savides*, 665 F. Supp. 686 (D. Ill. 1987) [luggage placed in car then followed, still have expectation of privacy therefore standing]. *But see U.S. v. McBean*, 861 F.2d 1570 (11th Cir. 1988) [defendant had no standing to complain of search of luggage found in the trunk of his car as he disclaimed ownership of same].

Counsel should be aware that the question of standing does not end the inquiry regarding whether evidence obtained during a police encounter is admissible against the defendant. If, for example, the defendant without standing to complain of a vehicle stop, arrest of the driver and inventory search nevertheless may exclude evidence

of his un-Mirandized statements in response to an alleged "general on-the-scene" question. *Castelbarry v. State*, 2002 WL 31863228 (Tex. App. - San Antonio, December 24, 2002)[not designated for publication].

A. WHO IS PERSON AGGRIEVED?

While FED. R. CRIM. P. Rule 41(e) still speaks in terms of standing as "a person aggrieved by the unlawful search and seizure," the Supreme Court has made clear that the test is not whether the search was directed at a particular individual, or whether that individual was incriminated by its fruits, but whether that individual had a reasonable expectation of privacy in the place searched.

One method of demonstrating such expectation is to show a proprietary interest in the place searched. While such "interest" need not "have been a recognized property interest at common law" some relationship between the individuals and the place searched must be established in order to demonstrate that individual "had a legitimate expectation of privacy in the premises" at the time of the search. *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.387 (1978).

For an excellent treatment of standing, *see generally*, 18 AM. CR. L. REV. 387 (1981). *See also U.S. v. Broadhurst*, 805 F.2d 849 (9th Cir. 1986) [defendants still had a reasonable expectation of privacy and standing to contest a search of a residence that they did not reside at even though they were not present at the time of the search because they had exercised joint control and supervision of the property searched].

The burden is upon the accused. However, standing may be proved by hearsay. *See U.S. v. Gomez*, 495 F. Supp. 992, 1007 n.5 (S.D.N.Y. 1979) ["there is no automatic rule against receiving hearsay evidence in suppression hearings in instances in which the trial court can accord such evidence the weight that it deems desirable"]; *U.S. v. Ochs*, 461 F. Supp. 1, 6 (S.D.N.Y. 1968); *U.S. v. Matlock*, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974)[hearsay admissible at suppression hearings].

ALIEN

An alien has standing to contest whether a search of his house violated the Fourth Amendment. *U.S. v. Iribe*, 806 F.Supp 917 (D.Colo. 1992), *aff'd in part rev'd in part by U.S. v. Iribe*, 11 F.3d 1553 (10th Cir. 1993).

OWNER OF PREMISES

The owner of the premises searched, even if absent generally has standing to object to an illegal search. *U.S. v. Bright*, 630 F.2d 804, 811 (5th Cir. 1980) [one has reasonable expectation of privacy in one's own house but not that of another]; *U.S. ex rel Coffey v. Fay*, 344 F.2d 625 (2d Cir. 1965); *Henzel v. U.S.*, 296 F.2d 650 (5th Cir. 1961) [despite fact defendant lived elsewhere, in this case he paid part of rent, utilized address for driver's license and income tax purposes, had keys to residence and maintained property on the premises]; *Sallie v. North Carolina*, 587 F.2d 636 (4th Cir. 1978) [defendant lived in mobile home "much of the time", maintained personal belongings there and paid rent]; *Steagald v. U.S.*, 451 U.S. 204, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981).

OWNERSHIP OF ITEM ENTRUSTED TO ANOTHER

U.S. v. Freire, 710 F.2d 1515, 1519 (11th Cir. 1983):

"Mere ownership is not the talisman for Fourth Amendment jurisprudence. So teaches *Rakas*. It is, nevertheless, a bright star by which courts are guided when the place invaded enjoys universal acceptance as a haven of privacy, such as one's home. That Freire did not take the stand himself is not fatal to his

privacy claim. Pupo's testimony that the briefcase was Freire's and that Freire had entrusted it to Pupo for safekeeping was uncontroverted. Thus, Freire shouldered his burden of establishing his continuing privacy interest in the briefcase. Moreover, the Government did not show that Freire had abandoned it either purposely or through neglect or had otherwise abrogated his expectation of privacy. Hence, Freire's privacy interest remained intact. The district court correctly determined that Freire could challenge the search and seizure of his briefcase." *U.S. v. Freire*, 710 F.2d 1515, 1519 (11th Cir. 1983).

A third party had no authority to consent to search of locked container left by another on this property where he claims no interest nor enjoys no apparent access to same. *See May v. State*, 582 S.W.2d 848, 851-52 (Tex.Crim.App. 1979) [third party's consent to search his van did not authorize police search of another's lunch box found inside, when he claimed no interest in same]; *U.S. v. Pressler*, 610 F.2d 1206, 1213-14 (4th Cir. 1979) [friend could not consent to police search of locked briefcase left with him by defendant where friend had no combination to the locks and claimed no right of access]; *U.S. v. Block*, 590 F.2d 535, 541-42 (3d Cir. 1978) [mother could not consent to search of son's secured footlocker which was for his exclusive use]; *U.S. v. Diggs*, 569 F.2d 1264, 1265 (3d Cir. 1977) [uncle with whom defendant had left locked box for safekeeping could not consent to police search]; *U.S. v. Wilson*, 536 F.2d 883, 884-85 (9th Cir. 1976) [apartment holder could not consent to search of defendant's suitcases where she "disclaimed any ownership or possessory interest in them"]; *U.S. v. Sullivan*, 544 F. Supp. 701, 715 (D. Maine, 1982) ["Where a locked container is left with a bailee who has no key and claims no right of access, it seems clear that the bailor has assumed little risk of its inspection by anyone"]; *State v. Tanner*, 745 P.2d 757, 765 (Or. 1987) [items given as collateral for loan, owner still has standing to assert search was illegal].

Thus, defendants have standing to complain regarding the search of items entrusted to another if they took measures to ensure their privacy in the contents of those items. *See U.S. v. Lonagaugh*, 494 F.2d 1257, 1262 (5th Cir. 1973)[person boarding plane alone accompanied by bags checked for Defendant not on plane, Defendant has standing]; *U.S. v. Haydel aka "Ice Cream"*, 649 F.2d 1152 (5th Cir. 1981)[defendant in tax case had a legitimate expectation of privacy with respect to records he hid in his parents' home, under their bed, since "Ice Cream" exhibited a subjective expectation that it would be free from Government invitation and because he took precautions to maintain privacy]; *U.S. v. Barry*, 853 F.2d 1479, 1481-1482 (8th Cir. 1988)[defendant had standing regarding suitcase he checked-in in the name of another]; *U.S. v. Daniel*, 982 F.2d 146, 150-161 (5th Cir. 1993)[package sent on airplane, recipient had standing]; *U.S. v. Lovell*, 849 F.2d 910, 916 (5th Cir. 1988)[checked baggage]; *U.S. v. Villareal*, 963 F.2d 770, 774 (5th Cir. 1992)[barrels not addressed to intended recipients shipped by private carrier, recipients had standing]; *U.S. v. Medernos Gomez*, 312 F.3d 920 (8th Cir. 2002)[package addressed to place not associated with Defendant recipient, defendant had standing]; *U.S. v. Buchner*, 7 F.3d 1149, 1154 (5th Cir. 1993)[owner of a suit case contained in another's car has a legitimate expectation of privacy in the contents of the suitcase], *cert. denied sub nom, Buchner v. U.S.*, 510 U.S. 1207, 114 S.Ct. 1331, 127 L.Ed.2d 678 (1994); *U.S. v. Freire*, 710 F.2d 1515, 1519 (11th Cir. 1983)[defendant had standing to complain of the search of his briefcase in the possession of another who had been instructed to protect his privacy]; *U.S. v. Haqq*, 213 F. Supp. 2d 383 (S.D. N.Y. 2002)[defendant charged with a firearms offense had standing to complain about the search of records contained in a borrowed suitcase hidden under his acquaintance's bed]. It is not the ownership of the item which determines standing, but the defendant's recipient status and the expectations, agreement and measures which he took to assure privacy which control.

NO PROPRIETARY INTEREST IN DWELLING

An accused may demonstrate a legitimate expectation of privacy even in a dwelling in which he has no proprietary interest by establishing such things as:

- 1) his clothes were maintained or located in the room;
- 2) he was present at the time of the search;
- 3) he had other items of personal belongings in the room where he and the items seized were found; or

4) present with owner's permission.

In *Minnesota v. Olson*, 495 U.S. 91, 109 L.Ed.2d 85, 110 S.Ct. 1684 (1990) defendant was not a tenant, had no possessions at duplex except for a change of clothes, slept on the floor, had permission to stay there for some indefinite period and had right to allow or refuse visitors.

"The State argues that [the defendant's] relationship to the premises does not satisfy the 12 factors which in its view determine whether a dwelling is a 'home'. Aside from the fact that it is based on the mistaken premise that a place must be one's 'home' in order for one to have a legitimate expectation of privacy there, the state's proposed test is needlessly complex. We need go no further than to conclude, as we do, that [the defendant's] status as an overnight guest is alone enough to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable. ...To hold that an overnight guest has a legitimate expectation of privacy in his host's home merely recognizes the everyday expectations of privacy that we all share. Staying overnight in another's home is a longstanding social custom that serves functions recognized as valuable to society. ...We will all be hosts and we will all be guests many times in our lives. From either perspective, we think that society recognizes that a houseguest has a legitimate expectation or privacy in his host's home." [distinguishing *Rakas*].

Contra Residing in "drop house" by illegal alien held insufficient to confer standing. *U.S. v. Briones-Garza*, 680 F.2d 417, 421 (5th Cir. 1982) [while term "residence" may often be an important consideration, it is not talismanic].

"Squatters" on government property lack a reasonable expectation of privacy in their 'homes'." *U.S. v. Ruckman*, 806 F.2d 1471 (10th Cir. 1986); *Amezquita v. Hernandez-Colon*, 518 F.2d 8 (1st Cir. 1975).

LESSEE

Lessee of premises has generally been held to have standing to contest a search of same. *U.S. v. Callazo*, 732 F.2d 1200, 1204 (4th Cir. 1984) [expanding to even one "given control" by a lessee]; *U.S. v. Little*, 735 F.2d 1049, 1053-54 (8th Cir. 1984). *But see U.S. v. Gomez*, 770 F.2d 251 (1st Cir. 1985) [no legitimate expectation of privacy for standing purposes where defendant was technical lessee of apartment but had not lived there for four months prior to search, no evidence of possession or control, or that he was able to exclude others or that he personally used or had access to premises and failed to provide evidence of a subjective expectation of privacy in area searched].

FAILURE TO ASSERT INTEREST

Defendant, who failed to assert any interest in a house lacked standing to contest search of premises, even though Court recognized Defendants were "custodian of the drug warehouse", were seen entering house and one had front door key when arrested. *U.S. v. Molina-Garcia*, 634 F.2d 217 (5th Cir. 1981).

FAILURE TO PAY RENT

Absent lessee had no standing to contest search of apartment where his lease had expired five (5) days prior by virtue of his failure to pay rent. *U.S. v. Buchanan*, 633 F.2d 423 (5th Cir. 1980); *Webb v. State*, 752 S.W. 2d 208, 212 (Tex. App. Hou. [1st Dist] (1988); *Voelkel v. State*, 717 S.W.2d 314 (Tex.Crim.App. 1986).

MOTEL ROOMS

Lawful occupant of a hotel or motel room has reasonable expectation of privacy therein, albeit qualitatively different from that which he may enjoy in his home. *U.S. v. Agapito*, 620 F.2d 324, 331 (2d Cir. 1980).

"The occupants of a hotel room are entitled to the protection of the Fourth Amendment ...but the reasonable privacy expectations in a hotel room differ from those in a residence... In view of the transient nature of hotel guests ...one cannot be sure who his neighbors are in a hotel room. A person in a residence generally knows who his neighbors are. A person in a hotel room therefore takes a greater risk than one in a residence that, instead of neighbors, an adjoining room may contain strangers or, as in this case, even persons with interests adverse to his own." *U.S. v. Agapito*, 620 F.2d at 331. *See also U.S. v. Tolliver*, 780 F.2d 1177, 1185 (5th Cir. 1986).

This same Court held that illegally obtained evidence may be considered in determining probable cause to arrest a defendant where he or she had no standing to complain of the prior search or arrest. In *Tolliver*, defendants arrested at a motel were held to lack standing to challenge the arrest of co-defendants after those co-defendants had left the motel. Consequently, the fruits of those co-defendants' arrests could be used to establish probable cause for the arrest of defendants still at the motel. *See also U.S. v. Ramirez*, 810 F.2d 1338 (5th Cir. 1987) [search of motel room upheld despite fact that agents deliberately waited for rental period to expire].

MOTEL GUEST'S EXPECTATIONS AFTER CHECKOUT TIME

Where defendant leaves personal effects in hotel room after the expiration of his rental term [past posted checkout time] it has been held he loses any reasonable expectation of privacy. *See U.S. v. Jackson*, 585 F.2d 653 (5th Cir. 1978). *But see U.S. v. Owens*, 782 F.2d 146 (10th Cir. 1986) [a motel guest's right to privacy was violated, even though motel claimed he had remained beyond checkout].

Similarly, overnight guests maintain an expectation of privacy in the place they are invited to stay so long as they are welcome. *Granados v. State*, 85 S.W.3d 217 (Tex.Crim. App. 2002)[guest asked to move out twelve hours before, no longer had standing to complain of search of apartment].

MOTEL ROOMS AND EAVESDROPPING NEIGHBORS

U.S. v. Mankani, 738 F.2d 538 (2d Cir. 1984).

A government agent who overheard conversations through an adjoining wall in a hotel room without a warrant did not violate the suspect's reasonable expectation of privacy. The Court utilized the same analysis as set out in *U.S. v. Agapito*, 620 F.2d 324 (2d Cir. 1980), which included the following factors: where the eavesdropping took place, whether the agents had a right to be in the adjoining room; and whether the agents were aided by any artificial, mechanical or electronic devices." *U.S. v. Mankani*, 738 F.2d 538 (2d Cir. 1984).

See also Marullo v. U.S., 328 F.2d 361, 363 (5th Cir. 1964) [noting a private home is completely different from a motel room]; *U.S. v. Jackson*, 585 F.2d 653 (5th Cir. 1978); *U.S. v. Clement*, 854 F.2d 1116 (8th Cir. 1988) [that despite a lack of evidence that arrested drug sellers had planned to return to hotel room, exigent circumstances permitted the agents to forcibly enter and search the hotel room where the arrestee's associates were based on the possibility that those associates might grow nervous, and might destroy drugs].

In Texas, an officer may approach a citizen in a public place or knock on a door to ask questions or seek consent to search. The officer need not have reasonable suspicion to do so as long as the officer does not indicate that compliance is required. In *Carranza*, record showed that the deputies knocked on the defendant's door, he opened the door, the deputies asked for consent to search the room, and he gave consent by saying "yes," and then stepping away from the door stating he had nothing to hide. The record did not indicate that the defendant was led to believe he had no right to refuse consent. The deputies did not need a reasonable suspicion to legally knock on the defendant's hotel room door.] *Carranza v. State*, 162 S.W.3d 407(Tex. App-Beaumont 2005)

OVERNIGHT TRAIN BERTHS

U.S. v. Colyer, 878 F.2d 469 (D.C. Cir. 1989) [a passenger has no reasonable expectation of privacy from drug dog sniff in an overnight train berth on an Amtrak train].

CORPORATE OFFICES

Standing to contest search of corporate offices is not conferred merely because one is a corporate officer. See *U.S. v. Vicknair*, 610 F.2d 372, 379 (5th Cir. 1980); *U.S. v. Lefkowitz*, 618 F.2d 1313, 1316 (9th Cir. 1980); *U.S. v. Britt*, 508 F.2d 1052, 1055-56 (5th Cir. 1975); *U.S. v. Bush*, 582 F.2d 1016 (5th Cir. 1978); *U.S. v. Evans*, 572 F.2d 455 (5th Cir. 1978).

But, a legitimate expectation of privacy may be established by showing "a sufficient proprietary interest in the suite [of officer] which was the target of the search and where corporate records were seized, to impart standing." *U.S. v. Lefkowitz*, 618 F.2d 1313, 1316 n.2 (9th Cir. 1980).

Otherwise, indicia of standing in the corporate office context would include:

- 1) " each defendant's position in the firm;
- 2) [whether] he had any ownership interest;
- 3) his responsibilities;
- 4) his power to exclude others from the area;
- 5) did he work in the area;
- 6) was he present at the time of the search...
- 7) additional security measures: (e.g. locked doors and cabinets)" at *U.S. v. Brien*, 617 F.2d 299, 306 (1st Cir. 1980).

But see U.S. v. Horowitz, 806 F.2d 1222, 1226 (4th Cir. 1986) [a defendant had no legitimate expectation of privacy in the computer memory system of a company electronically linked to a terminal in his home office and into which he had transmitted information]; *U.S. v. Webbe*, 652 F. Supp. 20, 27 (E.D. Mo. 1986) [no standing to contest search in reception area].

OWNER OF VEHICLE

The owner of a searched vehicle generally has standing to object to an illegal search, *Rosencranz v. U.S.*, 356 F.2d 310, 312-13 (1st Cir. 1966); *U.S. v. Eldridge*, 302 F.2d 463 (4th Cir. 1962) [an automobile gratuitously bailed to a friend]; *U.S. ex rel Coffey v. Fay*, 344 F.2d 625 (2d Cir. 1965); *Henzel v. U.S.*, 296 F.2d 650 (5th Cir. 1961); *U.S. v. Mulligan*, 488 F.2d 732, 736 (9th Cir. 1973) [an automobile loaned to another and registered under fictitious name]; *U.S. v. Mendoza*, 473 F.2d 692, 695 (5th Cir. 1972) [property interest in automobile]; *U.S. v. Foster*, 506 F.2d 444 (5th Cir. 1975) [property interest in automobile]. *Matthews v. State*, 164 S.W.3d 104 (Tex. App-Fort Worth 2005) [Standing is coequal with the concept of expectation of privacy. A defendant has standing to challenge a search if his expectation of privacy was violated. "The owner of a vehicle has standing to contest the search because the owner has an expectation of privacy. A defendant also has standing to challenge the search of a car he does not own if he shows that he gained possession of the car from the owner with the owner's consent

or from someone authorized to give permission to drive it. In this case, the trial court found that defendant was driving his mother's car, that they lived at the same address, and that the car was usually driven by defendant and his wife. Defendant testified without contradiction that the vehicle was never driven by his mother. This evidence is uncontroverted, and there is no evidence that the truck was stolen.]

Also see Kothe v. State, 152 S.W.3d 54 (Tex.Crim.App.2004). [During the search of driver's passenger, because DWI suspect had a reasonable expectation of privacy in not being subjected to an unduly prolonged detention, he has standing to challenge the seizure of evidence obtained by exploiting that detention.]

POSSESSOR OF VEHICLE

Simpson v. U.S., 346 F.2d 291 (10th Cir. 1965) [possessory interest in automobile owned by another]; *U.S. v. Ochs*, 595 F.2d 1247 (2d Cir. 1979) [defendant had permission to use car, had keys as well as complete dominion and control over vehicle].

Even one *not* in possession but who had been "given control" of the vehicles by a lessee has standing. *See U.S. v. Little*, 735 F.2d 1049, 1053-54 (8th Cir. 1984) [where lessee gave defendants control over an airplane, the defendants had a reasonable expectation of privacy]; *U.S. v. Posey*, 663 F.2d 37, 41 (7th Cir. 1981) [defendant had a reasonable expectation of privacy in a vehicle that was owned by his wife when he was operating that vehicle]; *U.S. v. Griffin*, 729 F.2d 475, 483 (5th Cir. 1984) [conferring standing on both driver and passenger, where both given permission to use vehicle].

"Despite the fact that neither [Defendant] owned or had a property interest in the 1982 Corvette in which 805 grams of phencyclidine were found, both defendants had a legitimate expectation of privacy in the vehicle. According to the district court's findings of fact [one of the Defendants] close relative, his brother, ...owned the Corvette and with [his] permission, both ...were exercising exclusive control over the vehicle on the evening of December 2, 1982. Thus, [both] had standing to claim that the inventory search of the 1982 Corvette violated their privacy rights under the Fourth Amendment." *U.S. v. Griffin*, 729 F.2d at 483.

PASSENGER IN VEHICLE

The Supreme Court has held that a passenger in a stopped vehicle is seized and therefore entitled to challenge the stop. If the stop is held to be unconstitutional, the defendant is then entitled to suppression of any evidence obtained as a result of the illegal search. *Brendlin v. California*, 551 U.S. 249, 127 S.Ct. 2400 (2007).

RESURRECTING STANDING FROM ITS SUPINE POSITION BROWER v. INYO & PENNSYLVANIA v. BRUDER.

("A WORD MEANS WHAT WE WANT IT TO MEAN")

Although viewed from different contexts, the Supreme Court this term distinguished what constitutes a "seizure" for Fourth Amendment, as opposed to Fifth Amendment purposes. In *Brower v. Inyo*, 489 U.S. 593, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989), a civil case, the Court held that for Fourth Amendment purposes:

""[W]henver an officer restrains the freedom of a person to walk away, he has seized that person."" *Brower v. Inyo*, 103 L.Ed.2d at 634.

"The complaint here sufficiently alleges that respondents ...sought to stop Brower by means of a roadblock and succeeded in doing so. That is enough to constitute a 'seizure' within the meaning of the Fourth Amendment." *Brower v. Inyo*, 103 L.Ed.2d at 637.

The same term the Court, in *Pennsylvania v. Bruder*, 488 U.S. 9, 109 S.Ct. 205, 102 L.Ed.2d 172, (1988), held that the "in custody requirement" for Fifth Amendment *Miranda* purposes is not triggered even though "the stop was unquestionably a seizure within the meaning of the Fourth Amendment". *Pennsylvania v. Bruder*, 488 U.S. 9, 109 S.Ct. 205, 102 L.Ed.2d at 176.

"[T]he 'noncoercive aspect of ordinary traffic stops prompts us to hold that persons temporarily detained pursuant to such stops are not 'in custody' for the purposes of *Miranda*. The Court reasoned that although the stop was unquestionably a seizure within the meaning of the Fourth Amendment, such traffic stops typically are brief, unlike a prolonged station house interrogation. Second, the Court emphasized that traffic stops commonly occur in the 'public view', in an atmosphere far 'less 'police dominated' than that surrounding the kinds of interrogation at issue in *Miranda* itself.' The detained motorist's 'freedom of action [was not] curtailed to 'a degree associated with formal arrest.'" Accordingly, he was not entitled to a recitation of his constitutional rights prior to arrest, and his roadside responses to questioning were admissible." *Pennsylvania v. Bruder*, 488 U.S. 9, 109 S.Ct. 205, 102 L.Ed.2d at 176 (citations omitted).

Consider utilizing the court's willingness to find a seizure more readily in Fourth Amendment analysis as a basis for asserting a passenger's standing by refocusing the courts inquiry from whether a passenger has a reasonable expectation of privacy in the vehicle in which he or she was traveling, to whether the search of the vehicle was incident to the arrest or "seizure" of its occupants. At least one Court has held that a passenger in a vehicle has standing to complain of his own seizure or arrest and any search of himself or the vehicle (under *N.Y. v. Belton's*, "bright line rule") incident to that arrest. *U.S. v. Flores*, No. 87-CR-193 (W.D. Tex. 1988).

"This case is not about standing in the traditional sense... The Court need not determine whether either defendant had a legitimate expectation of privacy in the passenger compartment of the van...

This Court is of the opinion that both Defendants have standing to object to their arrests and the search incident to that arrest, despite traditional notions that privacy interests in a rented vehicle might be limited...

[n]one of the defendants in either *Rakas* or *Williams* were arrested before the challenged searched.

Here on the other hand, the Defendants were arrested before the search and they do challenge the legality of the arrests and claim that their rights under the Fourth Amendment are violated." *United States v. Mendoza-Burciaga*, 981 F.2d 192 (5th Cir. 1992).

Some care should be utilized in setting out this theory with specificity prior to pinning down police witnesses on whether their search was incident to the arrest, rather than on some other, more fruitful theory.

RENTAL VEHICLE

The Tenth Circuit holds only persons named or authorized by the rental contract have standing to complain about the search of the rental vehicle.

See U.S. v. Obregon, 748 F.2d 1371 (10th Cir. 1984) [a defendant who was driving a rented car but whose name did not appear on rental contract or any other documents either as renter or authorized driver did not have standing to challenge search of vehicle].

The Eleventh Circuit held that a person still had proper standing even though their rental vehicle was overdue by four days. *See U.S. v. Cooper*, 133 F.3d 1394, 1400 (11th Cir. 1998) [defendant had a reasonable expectation of privacy in a rental vehicle that was four days past due].

The Ninth Circuit has held that a motorist whose name does not appear as an authorized driver on a rental car agreement nevertheless has an expectation of privacy in the car that is protected by the Fourth Amendment so long as the motorist received permission to possess the car from someone listed on the agreement. *United States v. Thomas*, 447 F.3d 1191 (9th Cir. 2006) State and federal courts are divided as to how to apply the Fourth Amendment to unauthorized drivers of rental cars, and the issue was one of first impression in the Ninth Circuit.

"JOINT VENTURE" OR "CO-CONSPIRATOR" STANDING

Absent owners of boat, involved in a "joint venture" to smuggle marijuana, had standing to complain of search of vessel's concealed hold. *U.S. v. Quinn*, 751 F.2d 980, 981 (9th Cir. 1984) [relying upon the accused's "ownership of both the place searched and the items seized"]. "Where a joint venture is being pursued, the mere fact of a joint venturer's absence from the place searched is insufficient to establish abandonment or relinquishment of the property seized." *U.S. v. Quinn*, 751 F.2d at 981.

Owner of trucks as well as corporation which had possessory interest in them at time of seizure have standing to object to stop of trucks and seizure of weigh bills carried by truck driver. *But see U.S. v. \$47,875.00 in U.S. Currency*, 746 F.2d 291 (5th Cir. 1984) [strict construction to State joint venture and partnership statutes to find a co-conspirator's interest was not sufficient to give him a reasonable expectation of privacy - "under Texas law, a joint venture must be based on either an express or implicit agreement containing these essential elements: (1) a community of interest in the venture, (2) an agreement to share profits, (3) an agreement to share losses, and (4) a mutual right of control or management of the enterprise... Where any one of these elements is absent, no joint venture exists"]. *U.S. v. Schaefer*, 637 F.2d 200 (3^d Cir. 1980).

NON-OWNER OF VEHICLE, NOT PRESENT AT SEARCH

Those not present in truck rented by another (formal agreement and riding in escort/surveillance truck nearby) still have a reasonable expectation of privacy. *U.S. v. Perez*, 689 F.2d 1336, 1381 (9th Cir. 1982).

POSSESSORY INTEREST IN DRUGS WILL CONFER STANDING

The Supreme Court rejected the co-conspirator analysis of the 9th Circuit in reversing *U.S. v. Padilla*, 508 U.S. 77, 113 S.Ct. 1936, 123 L.Ed.2d 635 (1993). "Participation in a criminal conspiracy may have expectations such as interest [of privacy], but the conspiracy itself neither adds nor detracts from them." *U.S. v. Padilla*, 508 U.S. 77, 113 S.Ct. at 1939.

Consequently, a fact specific analysis of each person's expectations is required. *See U.S. v. Villarreal*, 963 F.2d 770, 76-77 (5th Cir. 1992) [two co-conspirator's who received a drum under a single fictitious name and returned possession of a single receipt for the drum had a legitimate expectation of privacy.]

Contra U.S. v. Dall, 608 F.2d 910, 914 (1st Cir. 1979) [which held owner ship alone is not enough to determine reasonable expectation of privacy]; *U.S. v. One 1967 Cessna Aircraft*, 454 F. Supp. 1352, 1357 (C.D.

Cal. 1978) [standing conferred on one who had paid part of purchase price although had neither possession of more keys to the searched aircraft].

LIEN INTEREST IN PROPERTY

A lien interest has been held sufficient to establish standing for similar probable cause hearings in the forfeiture context. *See U.S. v. All That Tract and Parcel of Land, 2306 North Eiffel Court*, 602 F. Supp. 307, 311 (N.D. Ga. 1985) [credit corporation as lien-holder with security interest in the defendant property had "standing" to contest its seizure]; *U.S. v. One (1) 1980 Stapleton Pleasure Vessel Named Threesome, Registration No. FL 4180EA*, 575 F. Supp. 473, 477 (D.C. Fla. 1983) [ownership for purposes of establishing standing to contest forfeiture action may be established by demonstrating a "financial stake" in the property seized]; *U.S. v. One 1945 Douglas C-54, Etc.*, 647 F.2d 864, 866 (8th Cir. 1981) [standing may be evidenced in a number of ways including demonstrating a "financial stake"]; *U.S. v. One Porsche Coupe*, 364 F. Supp. 745, 748 (E.D. Pa. 1973) [court looks to who would actually suffer from the loss of the property]; *U.S. v. One 1961 Cadillac Hardtop Automobile, Etc.*, 207 F. Supp. 693, 697-98 (E.D. Tenn. 1962) [lienholder has a right to intervene to test the legality of a seizure].

ADDRESSEE & ADDRESSOR BOTH HAVE STANDING TO CONTEST SEARCH OF PACKAGE IN POSSESSION OF COMMON CARRIER

The Fifth Circuit has held that both the addressee and the addressor of a package entrusted to a common carrier have standing to contest the search of that package, even where both used false names, so long as the defendant was the real intended recipient of the package. *U.S. v. Villarreal*, 963 F.2d 770 (5th Cir. 1992).

DRIVER OF VEHICLE

The driver of a vehicle has a reasonable expectation of privacy in same in that he has dominion and control over everyone except the true owner. *See U.S. v. Portillo*, 633 F.2d 1313, 1317 (9th Cir. 1980); *U.S. v. Arce*, 633 F.2d 689 (5th Cir. 1980); *U.S. v. Lopez*, 474 F. Supp. 943 (C.D. Cal. 1979). *Contra U.S. v. Odum*, 625 F.2d 626, 628 (5th Cir. 1980) [defendant lacked standing even though he "was the driver and sole occupant of the loadstar truck when it was stopped", where "He denied knowing who owned the truck or that the truck was loaded with the contraband"]; *U.S. v. Obregon*, 748 F.2d 1371 (10th Cir. 1984) [a defendant who was driving a rented car but did not appear on rental contract or any other documents either as renter or authorized driver did not have standing to challenge search of vehicle].

PASSENGER OF VEHICLE

Ordinarily a passenger in a vehicle would have no reasonable expectation of privacy. *See Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978); *U.S. v. Portillo*, 633 F.2d 1313, 1317 (9th Cir. 1980); *U.S. v. Whitfield*, 629 F.2d 136 n.4 (D.C. Cir. 1980).

TAXI CABS

Taxicab passengers have been held to have standing to complain of the search and seizure of items found under the driver's front seat.

Chapa v. State, 729 S.W.2d 723, 725-29 (Tex.Crim.App. 1987).

"At issue in this cause is whether a 'passenger qua passenger' in a *taxicab* has 'standing' to challenge a search of the interior of the cab under the Fourth Amendment to the United States Constitution, in light of the Supreme Court's opinion in *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978).

That the driver of the cab, though a perfect stranger, may have shared a degree of privacy in the area beneath the front seat (as opposed to receptacles kept there, belonging exclusively to him) does not defeat appellant's reasonable claim to freedom from government intrusion there.

We hold that appellant qua fare in a taxicab had a legitimate expectation of privacy in, and hence standing to challenge the search of, the area under the front seat of the taxicab." *Chapa v. State*, 729 S.W.2d 723, 725-29 (Tex. Crim. App. 1987).

See also Bates v. State, 494 A.2d 976, 980 (Md. App. 1985) [distinguishing an individual who has hired a taxicab "unlike the defendants in *Rakas v. Illinois*, 439 U.S. 128 (1978), who, as 'mere agents' are not entitled to challenge a search of the car in which they were riding, one who hires a taxi has an objectively reasonable expectation of privacy for the period of his use"].

LEGITIMATELY ON PREMISES

Being legitimately on the premises is also insufficient. In *Rakas v. Illinois*, the Supreme Court overruled the one prong of *Jones v. U.S.*, 362 U.S. 257, 261-64, 80 S.Ct. 725, 4 L.Ed.2d 697, granting standing to any person "legitimately present on the premises". The court holding that a defendant's "legitimate presence on the premises" while not "irrelevant", "it cannot be deemed controlling", noting that the defendant there "asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized". *See also U.S. v. Payner*, 447 U.S. 727, 100 S.Ct. 2439, 65 L.Ed.2d 468 (1980) [defendant has no standing to complain of evidence obtained by police authorized burglary of third person].

PUBLIC PLACES

Telephone booth:

Katz v. U.S., 389 U.S. 347, 88 S.Ct. 507, 607, 19 L.Ed.2d 576 (1967).

Peep show booths:

Liebman v. State, 652 S.W.2d 942 (Tex.Crim.App. 1983).

Contra Green v. State, 566 S.W.2d 578 (Tex. Crim. App. 1978) [where the booth's curtains did not fully cover the entrance, no reasonable expectation of privacy]; *Commonwealth v. Oretto*, 482 N.E.2d 329 (Mass.App. 1985) [searching inside of passing car at night with spotlight held not to be an illegal search].

POSSESSORY INTEREST IN ITEMS SEIZED

Possessory interest in the property seized standing alone may be insufficient to establish standing. *Rawlings v. Kentucky*, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980) [holding, however, there "the record contains a frank admission by petitioner that he had no subjective expectation that Cox's purse would remain free from Governmental intrusion"].

CHECKED BAGGAGE

Courts have held that an airline passenger has a reasonable expectation of privacy in his checked baggage, even though he had another person remove the suitcases from the luggage carousel. *U.S. v. Fernandez*, 772 F.2d 495 (9th Cir. 1985). See also *Bond v. U.S.*, 529 U.S. 334, 338-39, 120 S.Ct. 1462 (2000) [the defendant sought to preserve his privacy by placing the brick of cocaine in an opaque bag and placing it directly above his seat and that a traveler's personal luggage is an "effect" protected by the Fourth Amendment right to be secure against unreasonable searches and seizures]; *U.S. v. Barry*, 853 F.2d 1479, 1481-82 (8th Cir. 1988) [even though bag of stolen goods was checked in proposed buyer's name].

CHARGED WITH "POSSESSORY CRIME"

It appeared that any "automatic standing" arising from the so-called "vice of prosecutorial self contradiction" where the defendant is charged with a possessory offense, established in *Jones v. U.S.*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d (1960), was overruled in *U.S. v. Salvucci*, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980). As to the "vice against prosecutorial self-contradiction" the Court stated:

"We simply decline to use possession of a seized good as a substitute for a factual finding that the owner of the good had a legitimate expectation of privacy in the area searched." *U.S. v. Salvucci*, 448 U.S. at 92.

"AUTOMATIC STANDING" NOT DEAD, JUST RESTING

A least one court, however, exhumed the vice against prosecutorial self-contradiction to preclude the Government from raising standing on appeal even where the accused admittedly "fail[ed] to prove that he had a legitimate expectation of privacy" in the place searched. *U.S. v. Morales*, 737 F.2d 761, 763-64 (8th Cir. 1984).

"Despite appellant's failure to prove that he had a legitimate expectation of privacy in room 141, we nonetheless find that because of the inconsistent positions the government has taken at trial and on appeal concerning appellant's alleged disclaimer of knowledge of the key, the government has lost its right to challenge appellant's standing. At the suppression hearing, the government argued that because appellant disclaimed knowledge of the key which he possessed, he must have been in wrongful possession of the key and therefore had burglarized room 141. At trial, the government successfully argued that because appellant had possession of the key, he had dominion and control over room 141 and therefore had constructive possession of the cocaine seized from the room. Now on appeal, the government argues that because appellant disclaimed knowledge of the key, he abandoned the key and could not therefore have a legitimate expectation of privacy in room 141." *U.S. v. Morales*, 737 F.2d at 763-64.

See also *U.S. v. Issacs*, 708 F.2d 1365, 1368 (9th Cir. 1983). "[The defendant's] denial of ownership should not defeat his legitimate expectation of privacy in the space invaded and thus his right to contest the lawfulness of the search when the government at trial calls upon the jury to reject that denial." *U.S. v. Issacs*, 708 F.2d at 1368.

TESTIMONY BY THE ACCUSED

The defendant may testify at the pretrial motion to suppress hearing (e.g., to establish his standing to suppress evidence) without rendering such testimony admissible against him in the prosecution's case in chief at the trial on the merits. The theory being that an accused should not be required to forfeit one Constitutional right

[here his Fifth Amendment privilege] in order to effectively exercise another [that being his Fourth Amendment right to be free from the unreasonable searches]. *See Simmons v. U.S.*, 390 U.S. 377, 394, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968); *U.S. v. Mantos*, 421 F.2d 214, 200 n.2 (5th Cir. 1970).

FED. R. EVID. Rule 104(d) provides that:

"The accused does not, by testifying upon a preliminary matter subject himself to cross-examination as to other issues in the case." FED. R. EVID. Rule 104(d).

Accordingly, it would appear that at least under the Federal Rules of Evidence defense counsel would be able to limit cross-examination to the issue presented on direct.

See Rawlings v. Kentucky, 448 U.S. 98, 100 S.Ct. 2556, 2561 n.3, 65 L.Ed.2d 633 (1980), for demonstration of how not to make a *Simmons* proffer.

But see U.S. v. Boruff, 870 F.2d 316 (5th Cir. 1989) [testimony of a third-party witness, called by the defendant at the suppression hearing in an effort to establish standing may be used by the Government at trial].

FAILURE TO TAKE ADVANTAGE OF SIMMONS MAY BE CONSIDERED

Some courts have even considered the accused's failure to testify at pretrial suppression hearing against them.

"The defendants could have rebutted that showing by their own testimony at the suppression hearing, and they could have done so without material prejudice to their rights, as their testimony at the suppression hearing could not have been used against them (other than for impeachment) at trial. In general, the failure to produce a favorable witness or other evidence when it is peculiarly within a party's power to do so creates an inference that the witness' testimony will be unfavorable. Some application of this rule is appropriate ...[s]ince the defendants could have testified without material prejudice to their rights at trial, their failure to present evidence contradicting that presented by the government warrants at least some inference that the March 3 statements were, as they purported to be, properly obtained." *U.S. v. Charles*, 738 F.2d 686 (5th Cir. 1984), *abrogated on other grounds by United States v. Bengivenga*, 738 F.2d 686 (5th Cir. 1984).

STIPULATION AS TO STANDING

A "stipulation" by the Defendant that the luggage is his has been held sufficient to confer standing. *U.S. v. Mazzelli*, 595 F.2d 1157 (9th Cir. 1979), *vacated by U.S. v. Conway*, 448 U.S. 902, (1980).

However, if the defendant thereafter takes the stand at the trial on the merits in his own defense, there is the possibility that his testimony, given at the pretrial hearing, could be used by the prosecution for impeachment purposes or cross-examination. *See Harris v. New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971) [allowing use for impeachment of a confession obtained in violation of *Miranda*]; *U.S. v. Havens*, 446 U.S. 620, 628, 100 S.Ct. 1912, 64 L.Ed.2d 559 (1980) [allowing evidence illegally obtained in violation of Defendant's Fourth Amendment rights, to be used for impeachment of response to cross-examination reasonably suggested by his direct examination].

STANDING MAY NOT BE RAISED FOR THE FIRST TIME ON APPEAL

The law is clear that the government may not raise a defendant's lack of standing to contest a search for the first time on appeal.

See Steagald v. U.S., 451 U.S. 204, 209-211 (1981); *Combs v. U.S.*, 408 U.S. 224, 226-7 (1972); *U.S. v. Ford*, 525 F.2d 1308, 1310 (10th Cir. 1975); *U.S. v. Morales*, 737 F.2d 761, 764 (8th Cir. 1984); *U.S. v. Sanchez*, 689 F.2d 508, 509, n. 1 (5th Cir. 1982); *U.S. v. Mendoza*, 722 F.2d 96, 97, n. 1 (5th Cir. 1983); *U.S. v. Amuny*, 767 F.2d 1113, 1121 (5th Cir. 1985):

"Before we discuss the merits of the appellant's search and seizure claim, we must address an issue that has arisen with disturbing regularity in this circuit - the government's failure to raise in the district court its claim on appeal that the appellants lack standing to challenge the allegedly illegal search and seizure...

Consistent with the ordinary rule of appellate procedure, we usually will not entertain a claim raised for the first time on appeal.... And we have rejected repeatedly the government's standing challenges where the government failed to raise the issue before the district court." *Amuny*, 767 F.2d at 1121.

Contra Sullivan v. State, 564 S.W.2d 698 (Tex.Crim.App. 1978) (op. on reh'g), *overruled in part on other grounds*, *Comer v. State*, 754 S.W.2d 698, 704 (Tex.Crim.App. 1988) [the state may raise the issue of a defendant's standing for the first time on appeal in those situations where the evidence shows that the defendant had no standing to litigate the search]; *Sutton v. State*, 711 S.W.2d 136 (Tex.App.-Houston [14th Dist.] 1986).

DETERMINATION OF LEGALITY OF STOP OR SEARCH IN PRIOR PROCEEDING MAY "COLLATERAL ESTOP" RECONSIDERATION OF THAT ISSUE IN SUBSEQUENT PROSECUTION:

See Ferenc v. Dugger, 867 F.2d 1301, 1304 (11th Cir. 1989) [citing *U.S. v. McKim*, 509 F.2d 769, 775 (5th Cir. 1975)].

The question was "whether the doctrine of collateral estoppel precludes the state's use of evidence, previously suppressed on Fourth Amendment grounds in a prior state court proceeding, in a subsequent, unrelated criminal action against the same defendant". *Ferenc v. Dugger*, 867 F.2d 1301. (11th Cir. 1989).

The court, recognizing a two prong inquiry and that the question of the lawfulness of a search and seizure is a mixed question of law and fact, found that the state was not estopped from raising the Fourth Amendment issue again. To effectively estop the prosecution:

"First, the issue sought to be foreclosed from consideration must have been resolved in the defendant's favor at the prior trial.... Second, the fact which the defendant seeks to exclude must have been essential to conviction in the first trial." *Id.* at 1303-04.

VICE OF PROSECUTORIAL SELF-CONTRADICTION

Where the State has charged an individual with an offense which will require proof of that individual's possession of contraband beyond a reasonable doubt, the State cannot claim, at the same time, that individual had insufficient interest in the property to complain about its search.

In *U.S. v. Morales*, 737 F.2d 761, 763 (8th Cir. 1984), the defendant disclaimed ownership of a key to a motel room containing contraband, the government argued first that defendant has "...constructive possession of the cocaine because he had dominion and control over room 141", *U.S. v. Morales*, 737 F.2d at 763, and then

argued later that defendant did not have standing to challenge the search of the room. *U.S. v. Morales*, 737 F.2d at 763. In reversing the conviction and remanding, the Eighth Circuit held that the Government could not challenge the defendant's standing to complain about the search:

"Despite appellant's failure to prove that he had a legitimate expectation of privacy in room 141, we nonetheless find that because of the inconsistent positions the government has taken at trial and on appeal concerning appellant's alleged disclaimer of knowledge of the key, the government has lost its right to challenge appellant's standing.

...We believe that the government should not be permitted to use at the suppression hearing appellant's alleged disclaimer to support a warrantless entry, then argue at trial that appellant's possession of the key supported constructive possession of the cocaine, and now on appeal argue that the disclaimer constituted abandonment to defeat an expectation of privacy." *U.S. v. Morales*, 737 F.2d at 763-64.

In *U.S. v. Isaacs*, 708 F.2d 1365 (9th Cir. 1983), *cert. denied*, 464 U.S. 852 (1983). The government argued at the suppression hearing that the defendant had no standing to contest the search of a safe located in his apartment because he denied ownership of it. Then at trial, the government argued that the defendant had sufficient possessory interest in the safe's contents to prove his guilt at trial. In granting the defendant standing to contest the search the court noted:

"Here, however, the government wants it both ways: It seeks to rely on Isaacs disavowal of ownership to defeat his right to contest the lawfulness of the search at the same time it introduces the journal as evidence of his guilty. Yet the government cannot and does not dispute that Isaacs had a legitimate expectation of privacy in the safe itself, and there can be no question of abandonment of items found in the putative abandoner's personal safe. Isaac's denial of ownership should not defeat his legitimate expectation of privacy in the space invaded and thus his right to contest the lawfulness of the search when the government at trial calls upon the jury to reject that denial.... The government's concession that Isaacs had 'legitimate expectation of privacy in the invaded place; *Rakas v. Illinois*, 439 U.S. at 143, 99 S.Ct. at 430, precludes its contention that he had none in the items found there." *U.S. v. Isaacs*, 708 F.2d at 1368.

B. ABANDONMENT:

One has no standing to complain of search of "abandoned" property. *U.S. v. Canady*, 615 F.2d 694 (5th Cir. 1980) [disclaimed ownership of suitcase at airport security checkpoint]; *U.S. v. Lara*, 638 F.2d 892 (5th Cir. 1981); *U.S. v. Williams*, 569 F.2d 823, 826 (5th Cir. 1978); *U.S. v. Santa-Manriquez*, 603 F.2d 575, 578 (5th Cir. 1979); *U.S. v. Barker*, 557 F.2d 628, 632-33 (8th Cir. 1977); *People v. Howard*, 430 N.Y.S.2d 578, 585-86 (N.Y.App. 1980); *U.S. v. Colbert*, 474 F.2d 174, 176 (5th Cir. 1973).

"One has no standing to complain of a search or seizure of property he has voluntarily abandoned... The issue is not abandonment in the strict property-right sense, but whether the person prejudiced by the search had voluntarily discarded ...or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search." *U.S. v. Colbert*, 474 F.2d at 176.

However, where abandonment of property is "caused" by an illegal stop or arrest, same is "tainted" by same and should be excluded. *U.S. v. Beck*, 602 F.2d 726, 730 (5th Cir. 1979).

"In this case, it seems clear that the contraband was abandoned because of the illegal stop of the Chevrolet ...it would be sheer fiction to presume they were caused by anything other than the illegal stop.... Here because there was 'a nexus between ...lawless [police] conduct and the discovery of the challenged

evidence which has not become so attenuated as to dissipate the taint, ...the evidence should be suppressed." *U.S. v. Beck*, 602 F.2d at 730.

FRUIT OF THE POISONOUS TREE (AS AN EXCEPTION TO THE LEGITIMATE EXPECTATION OF PRIVACY REQUIREMENT)

Likewise, if the search of allegedly abandoned property is prompted by the results of police illegality, then same must be excluded, not because it wasn't abandoned but because it came about by exploitation of unlawful police conduct. *See U.S. v. Jones*, 619 F.2d 494 (5th Cir. 1980) [a product of defendant's illegal arrest and search where several bullets which "naturally caused [the officers] to believe a gun may have been discarded during [the defendant's] flight". Accordingly, they "searched the surrounding area for five to ten minutes and found [a] pistol at the edge of the wooded area just off the path along which Jones had fled". The Court held "[t]he discovery of the pistol was the product of the illegal search"].

While the government contended "that Jones lacked standing to challenge the admissibility of the pistol since he abandoned it during his flight," the Court held such argument "misplaces the proper focus of our analysis. Our concern is not whether Jones abandoned the pistol. It is, instead, whether the discovery of the pistol was brought about by unlawful police conduct."

"In this case, it seems clear that the contraband was abandoned because of the illegal stop of the Chevrolet ...it would be sheer fiction to presume they were caused by anything other than the illegal stop... Here because there was 'a nexus between ...lawless [police] conduct and the discovery of the challenged evidence which has not become so attenuated as to dissipate the taint, ...the evidence should be suppressed." *U.S. v. Beck*, 602 F.2d at 730.

See also U.S. v. Santia-Manriquez, 603 F.2d 575, 578 (5th Cir. 1979); *U.S. v. Barker*, 557 F.2d 628, 632-33 (8th Cir. 1977); *Lawrence v. Henderson*, 478 F.2d 705, 708 (5th Cir. 1973).

"If it is assumed that Lawrence possessed the narcotics paraphernalia at one time, the facts make clear that the illegal arrest prompted him to conceal it in the vehicle. Under the circumstances it cannot be said that Lawrence voluntarily abandoned the 'outfit". *Lawrence v. Henderson*, 478 F.2d at 708.

U.S. v. Richards, 638 F.2d 765 (5th Cir. 1981) [a defendant who denied ownership of package, still had standing when asserting that he was acting on behalf of another].

EXPLICIT LABEL ON CONTAINER DOES NOT CONSTITUTE ABANDONMENT OF PRIVACY EXPECTATION

Explicit labeling of containers ["repositories of personal effects"] may be a factor, but it does not necessarily diminish one's reasonable expectation that sealed cartons will not be opened [especially where exposure of such label is the result of non- governmental, third party's action].

Walter v. U.S., 447 U.S. 649, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980) [sealed crates "on one side of which were suggestive drawings, and on the other were explicit descriptions of the contents"].

"...[O]ne may not deem petitioners to have consented to the screening merely because the labels on the unexposed boxes were explicit." *Walter v. U.S.*, 447 U.S. at 658.

SINGLE PURPOSE CONTAINERS

Some containers, although opaque, "by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance." *Arkansas v. Sanders*, 442 U.S. 753, 764-65 n.13 (1979), *abrogated by California v. Acevedo*, 500 U.S. 565 (1982). Plain view and "immediately apparent" item in "plain view" is evidence of crime.

NO NEED TO MAKE CLAIM OF OWNERSHIP

An individual's failure to make an immediate claim of ownership or possessory interest in the searched containers cannot "be fairly regarded as an abandonment of their interest in preserving the privacy of the shipment" since "such a request could reasonably be expected to precipitate criminal proceedings". *Walter v. U.S.*, 447 U.S. 649, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980).

"We cannot equate an unwillingness to invite a criminal prosecution with a voluntary abandonment of any interest in the contents of the cartons." *Walter v. U.S.*, 447 U.S. at 658.

At the suppression hearing, however, it is incumbent upon the accused to assert underlying facts establishing reasonable expectation of privacy in the place or thing searched. *U.S. v. Hilton*, 619 F.2d 127, 133 (1st Cir. 1980).

"[D]efendants [on board of vessel] have no standing to contest the search of the briefcase, the camera, and the film canisters seized aboard the Southern Belle since none of the defendants, either at the time of the seizure or *at the suppression hearing*, asserted any proprietary or possessory interest in the items seized." *U.S. v. Hilton*, 619 F.2d at 133.

VIII. TAINTED EVIDENCE:

FRUIT OF THE POISONOUS TREE

If it is established that the search or seizure was illegal, then not only is any evidence obtained thereby inadmissible, but any evidence discovered as the result or exploitation of that primary illegality is as well inadmissible as "fruit of the poisonous tree". *Wong Sun v. U.S.*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

"[W]hether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of the illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun v. U.S.*, 371 U.S. at 487-488.

This is true regardless of what type of evidence has been obtained from the illegal search. Witness testimony that is the product of such a search is subject to the exclusionary rule's suppression penalty. The prosecution bears the burden of showing that the testimony falls within an exception to the exclusionary rule. *See U.S. v. Houlton*, 566 F.2d 1027 (5th Cir. 1978). *U.S. v. Ramirez-Sandoval*, 872 F.2d 1392 (9th Cir. 1989) [verbal evidence of alien smuggling obtained by police after illegal search of a van is tainted "fruit"].

Thus, not only is evidence obtained by the "primary illegality" inadmissible, but also any derivative evidence obtained "by exploitation of that illegality" will be proscribed:

"If one such product of illegal detention is proscribed, by the same token all should be proscribed." *Davis v. Mississippi*, 394 U.S. 721, 724, 189 S.Ct. 1394; 22 L.Ed.2d 676, 679 (1969). *See also Hayes v. Florida*, 470 U.S. 811, 105 S.Ct. 1643, 84 L.Ed.2d 705 (1985) [removal and transportation of a suspect to the

police station for fingerprinting requires probable cause and a warrant, no matter how brief the station house interrogation]; *Silverthorne Lumber Company v. U.S.*, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed.2d 319 (1920); *Fletcher v. Wainwright*, 399 F.2d 62 (5th Cir. 1968); *U.S. v. Ruffin*, 389 F.2d 76, 79 (7th Cir. 1968).

"[A]n otherwise legal search or arrest cannot stand if probable cause for it was established only by a prior illegal search. *U.S. v. McKim*, 509 F.2d 769, 775 (5th Cir. 1975). *But see U.S. v. Lynch*, 716 F. Supp. 96 (S.D. N.Y. 1989) [illegally obtained evidence may be utilized to prove "other crimes" evidence].

TANGIBLE EVIDENCE

See Davis v. Mississippi, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969) [fingerprints]; *U.S. v. Harris*, 453 F.2d 1317 (8th Cir. 1972) [handwriting exemplars]; *U.S. v. Kennan*, 496 F.2d 181 (1st Cir. 1974) [hands examined under ultraviolet light]; *U.S. v. Bridges*, 499 F.2d 179, *cert. denied*, 419 U.S. 1010 (1974) [hands swabbed with chemicals designed to reveal traces of explosives].

INEVITABLE DISCOVERY DOCTRINE

The Supreme Court adopted the so-called "inevitable or ultimate discovery" doctrine, holding that a victim's body, located as the result of interrogation conducted in violation of an accused Sixth Amendment right to Counsel, would have been inevitably discovered by the search already in progress. *See Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984); *U.S. v. Martinez-Gallegos*, 807 F.2d 868, 870 (9th Cir. 1987) [INS agents would have consulted defendant's immigration file absent un-warned incriminating statements]; *U.S. v. Kroesser*, 731 F.2d 1509 (11th Cir. 1984) [a reasonable probability of inevitable discovery removes taint of fruit of unconstitutional interrogation].

The prosecution must meet a two part test in the Fifth Circuit before evidence discovered by police misconduct will be admissible. First, there must be a reasonable probability that the evidence would have been discovered by lawful means in the absence of police misconduct and second the prosecution must have been actively pursuing a substantial alternate line of investigations at the time of the constitutional violation." *U.S. v. Cherry*, 759 F.2d 1196 (5th Cir. 1985).

The prosecution has the burden of demonstrating same by a "preponderance of evidence", but need not negate "bad faith". *Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984).

The "inevitable discovery" exception (ultimate discovery doctrine) to the "exclusionary rule" has been applied to permit introduction into evidence of a victim's body, even though the accused's post arrest statement leading police to that scene was obtained in violation of defendant's Sixth Amendment right to counsel. *Wicker v. State*, 667 S.W.2d 137 (Tex.Crim.App. 1984) (en banc); ...and has permitted evidence from a search conducted pursuant to invalid consent since probable cause to search the home existed and an officer had already gone to prepare an affidavit for a search warrant. *U.S. v. Lamas*, 930 F.2d 1099 (5th Cir., 1991).

INDEPENDENT SOURCE DOCTRINE

Justice Scalia writing the majority (4-3) opinion in *Murray v. U.S.*, 487 U.S. 533 (1988), found that the independent source doctrine was closely akin to the inevitable source doctrine, both exceptions to the exclusionary

rule. Employing the fiction that although a valid discovery never really takes place, it is accepted as inevitable Scalia dismisses the possibility the doctrine would encourage police to make an invalid search to see if it is worth their while to procure a warrant. Scalia explains, in a footnote, that the prosecutor does not need to prove that a warrant would have even been sought regardless of the illegal entry. *Murray v. U.S.*, *supra*.

Segura v. U.S., 468 U.S. 796, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984)[independent source applicable where search warrant obtained after 19 hours elapsed from the warrantless entry of apartment, arrest of defendant, and seizure of drug paraphernalia in plain view]. However, the lawful process by which the evidence would have been inevitably discovered must have already been initiated at the time the evidence was illegally obtained. *U.S. v. Satterfield*, 743 F.2d 827, 846-47 (11th Cir. 1984) [officers "obtained a valid warrant for the search of (the accused's) residence several hours *after* the illegal search was made" could not qualify under the "inevitable discovery" doctrine, noting that "the illegality can be cured only if the police possessed and were pursuing a lawful means of discovery at the time the illegality occurred"].

"To qualify for admissibility, there must be a reasonable probability that the evidence in question would have been discovered by lawful means, and the prosecution must demonstrate that the lawful means which made discovery inevitable were possessed by the police and were being actively pursued prior to the occurrence of the illegal conduct.... Here the Government had not yet initiated the lawful means that would have led to the discovery of the evidence.... [a]t the time the government violated Satterfield's fourth amendment right, it did not possess the legal means that would have led to the discovery of the shotgun. That means did not exist until several hours later when the warrant was obtained." *U.S. v. Satterfield*, 743 F.2d at 846-47.

U.S. v. Cherry, 759 F.2d 1196, 1205, n. 10 (5th Cir. 1985) [in order to rely upon the inevitable discovery exception to the warrant requirement "the alternate means of obtaining the evidence must at least be in existence and, at least to some degree, imminent, if yet unrealized"]; *U.S. v. Amuny*, 767 F.2d 1113, 1129 n.10 (5th Cir. 1985) [prosecution has burden].

"The prosecution must demonstrate both a reasonable probability that the evidence would have been discovered in the absence of police misconduct and that the government was actively pursuing a substantial alternative line of investigation at the time of the constitutional violation. ... The government has offered no theory suggesting how the agents would have discovered the contraband absent the agents' misconduct. They have failed to sustain their burden of proof that the doctrine applied." *U.S. v. Amuny*, 767 F.2d at 1129 n.10.

U.S. v. Brookins, 614 F.2d 1037 (5th Cir. 1980); *U.S. v. Andrade*, 784 F.2d 1431 (9th Cir. 1986)[one hour after defendant is arrested, police searched his garment bag and discovered cocaine. Court upholds search under inevitable discovery doctrine since the cocaine would have been lawfully discovered during the inventory search when defendant was booked]; *U.S. v. Silvestri*, 787 F.2d 736 (1st Cir. 1986) [requirement that warrant application process have already begun at the time of the illegal search ...search warrant for garage would have inevitably been sought and issued even if illegal search had never taken place]; *U.S. v. Whitehorn*, 813 F.2d 646 (4th Cir. 1987) [evidence first seen during illegal search and later seized during second search pursuant to warrant held admissible under "inevitable discovery" doctrine]; *But see United States v. Watkins*, ___ F.4th ___, 2021WL3700295 at *2 (11th Cir. 2021) (Government must prove by a preponderance of the evidence that the evidence would have been discovered by some lawful means.) (citing *Nix v. Williams*, 104 S. Ct. 2501 (1984)).

It is not required that there be two distinct searches in order for the independent source doctrine to apply. *U.S. v. Forbes*, 528 F.3d 1273 (10th Cir. 2008).

GOVERNMENT HAS BURDEN OF PROOF TO SHOW "INDEPENDENT SOURCE" OF DISCOVERY OF OTHERWISE TAINTED EVIDENCE

Once the illegality of the initial search or arrest has been established, and a showing made that other evidence has been arrived at as the result or exploitation of that primary illegality, then the burden shifts to the Government to prove that such evidence had an independent source which is sufficiently distinguishable to purge such evidence of the primary taint. *Harrison v. U.S.*, 392 U.S. 219, 255 n.12, 88 S.Ct. 2008, 20 L.Ed.2d 1047 (1968).

DISSIPATION OF "TAINT"

Evidence which is discovered as the result of an illegal search or arrest is regarded as fruit of that illegal activity unless knowledge of it "is gained from an independent source" such as to "dissipate that primary taint" *Silverthorne Lumber Co. v. U.S.*, 251 U.S. 385, 392, 40 S.Ct. 182, 64 L.Ed.2d 319 (1920).

Nardone v. U.S., 308 U.S. 338, 341, 60 S.Ct. 266, 84 L.Ed.2d 307 (1939); *Costello v. U.S.*, 365 U.S. 265, 290, 81 S.Ct. 534, 5 L.Ed.2d 551 (1961).

NO "INEVITABLE DISCOVERY" OR "INDEPENDENT SOURCE" EXCEPTION UNDER TEXAS STATUTE

The express provisions of TEX. R. CRIM. P. Art. 38.23, Texas' statutory exclusionary rule, cannot support application of either the "inevitable discovery" or "independent source" exceptions to the federal exclusionary rule.

"The article contains no exceptions to the rule. If there should be exception to the rule, similar to the exceptions which have been recently made to the exclusionary rule, such a change should come by way of amendment to art. 38.23, not by our ruling that the evidence is admissible in direct contradiction to the plain wording of the statute." *Oliver v. State*, 711 S.W.2d 442, 445 (Tex.App.-Ft. Worth 1986).

IDENTIFICATION

The mere fact that an accused's presence at his prosecution is the result of an illegal arrest does not require the suppression of that in-court identification as fruit of the illegal arrest, at least not where the accused's identity had been known to police as well as a suspicion of his relation to the criminal activity prior to his arrest. *U.S. v. Crews*, 445 U.S. 463, 100 S.Ct. 1244, 63 L.Ed.2d 537 (1980).

ILLEGAL FRUITS AS PROBABLE CAUSE

Where probable cause for a search or arrest is established by a prior illegal search or arrest, then same will be tainted thereby and the fruits thereof suppressed. 3 WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 677; *Hayes v. Florida*, 470 U.S. 811, 105 S.Ct. 1643, 84 L.Ed.2d 705 (1985); *Hair v. U.S.*, 289 F.2d 894 (D.C. Cir. 1961); *U.S. v. Paroutian*, 299 F.2d 486 (2d Cir. 1962); *U.S. v. Ramirez-Sandoval*, 872 F.2d 1392 (9th Cir. 1989) [suppressing verbal evidence obtained by police during an illegal search]; *U.S. v. Gonzalez*, 728 F. Supp. 185 (S.D.N.Y. 1989) [suppressing illegal search based on drug profile as post-arrest statements as fruit of the poisonous tree].

Nor can probable cause for a search be established by a statute obtained in violation of *Miranda*. *U.S. v. Morales*, 788 F.2d 883, 886 (2d Cir. 1986). Neither can a search be justified by what it produces. *Byars v. U.S.*, 273 U.S. 28, 29, 47 S.Ct. 248, 71 L.Ed.2d 520 (1927).

The existence of a warrant for a person's arrest does not validate the unreasonable seizure when a police officer stops and obtains identification from a suspect without reasonable suspicion for the stop. *United States v. Gross*, 662 F.3d 393 (6th Cir. 2011)

IX.CONFESSIONS

A. CONFESSION OBTAINED BY EXPLOITATION OF FOURTH AMENDMENT VIOLATION:

Incriminating statements obtained during detention after an illegal arrest may be suppressed on Fourth Amendment grounds as "fruits of the poisonous tree", unless there is a showing that same are "sufficiently attenuated" so as not to constitute an exploitation of that initial illegality. *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975); *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979) [analogizing interrogation of suspect in illegal custody to the taking of his fingerprints in *Davis v. Mississippi*, 394 U.S. 721 (1969)].

"Detention for custodial interrogation -- regardless of its label -- intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest". *Dunaway v. New York*, 442 U.S. 200, 216 (1979).

Lanier v. South Carolina, 474 U.S. 25, 106 S.Ct. 297, 88 L.Ed.2d 23 (1985)[though a confession may be voluntary for Fifth Amendment purposes because *Miranda* warnings were proper, the confession being the product of a illegal arrest was tainted]; *De La Rosa v. Texas*, 743 F.2d 299, 303 (5th Cir. 1984) [even if two hour delay in bringing petitioner before magistrate was unreasonable, there was no constitutional error, and confession made during this time not suppressible]; *J.D.B. v. North Carolina*, 131 S.Ct. 2394 (2011)[Boys age was factor to consider in custody analysis when obtaining confession in principles office].

BURDEN OF PROOF

The giving of *Miranda* warnings will not in itself attenuate the effects of an illegal arrest or render a confession given thereafter admissible, "and the burden of showing admissibility rests, of course, on the prosecution". *Brown v. Illinois*, 422 U.S. 590, 600, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975).

See also Dunnaway v. New York, 422 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1969).

Factors:

- a) "causal connection between the illegality and the confession;
- b) "temporal proximity of the arrest and the confession";
- c) "presence of intervening circumstances";
- d) "the purpose and flagrancy of the official misconduct" (*e.g.*, whether one of the purposes of stopping the individual was interrogation).

WITNESS' STATEMENTS AND TESTIMONY

Several courts have held that where the identity of a witness and his relationship to the criminal enterprise is discovered solely as the result of an illegal search or arrest that such witness' statements and testimony are rendered inadmissible at trial as constituting "fruits" of that "primary illegality."

See *Williams v. U.S.*, 382 F.2d 48 (5th Cir. 1967); *Staples v. U.S.*, 320 F.2d 817 (5th Cir. 1963); *U.S. v. Guana-Sanchez*, 484 F.2d 590 (7th Cir. 1973); *U.S. v. Tane*, 329 F.2d 848 (2d Cir. 1964); *Smith v. U.S.*, 344 F.2d 545 (D.C. Cir. 1965); *Goodman v. U.S.*, 285 F. Supp. 245 (S.D. Cal. 1968); *U.S. v. Marder*, 474 F.2d 1192, 1195 (5th Cir. 1973).

"This circuit has followed the general rule that if the identity of a Government witness and his relationship to the defendant are revealed because of an illegal search and seizure, the testimony of such witness must be excluded." *U.S. v. Marder*, 474 F.2d at 1195.

In determining the Federal Exclusionary Rule was not *per se* applicable to the result of an illegal search where "both the identity of [the witness] and her relationship" with the offense "was well known to those investigating the case," the Supreme Court held that Courts should exercise "greater reluctance where the claim is based on a causal relationship between a constitutional violation and the discovery of a live witness than when a similar claim is advanced to support suppression of an inanimate object" holding that Court's should apply the following factors in determining whether to apply the "exclusionary rule" to testimonial fruits:

- 1) Whether the testimony was given as an "act of ...free will",
- 2) The time, place and manner of initial questioning as well as any other factors indicating whether the statements were the product of detached reflection, or whether it was "coerced or induced by official authority",
- 3) Whether the evidence was induced as a result of other illegally obtained evidence,
- 4) The relationship of the purpose of the illegal search to the subject of the testimony, and
- 5) Whether "substantial periods of time elapsed between the time of the illegal search and the initial with the witnesses, on the one hand, and between the latter and the testimony at trial on the other" [looking toward the potential deterrent effect on the law enforcement officials]. *U.S. v. Cecollini*, 435 U.S. 268, 98 S.Ct. 81, 55 L.Ed.2d 268 (1978).

B. "CUSTODIAL" INTERROGATION:

The test for determining whether an accused's statements were obtained as the result of "interrogation" or its functional equivalent is whether the words or actions of the police are such that they should have known the same were reasonably likely to elicit an incriminating response from the suspect. *Rhode Island v. Innis*, 446 U.S. 291, 299-301 (1980).

"The concern of the Court in *Miranda* was that the 'interrogation environment' created by the interplay of interrogation and custody would 'subjugate the individual to the will of his examiner' and thereby undermine the privilege against compulsory self-incrimination.... We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police." *Rhode Island v. Innis*, 446 U.S. at 299-301.

See also *U.S. v. Robertson*, 833 F.2d 777 (9th Cir. 1987) [brief detention at gun point was arrest not *Terry* stop]; *Zimmerman v. Commonwealth*, 363 S.E.2d 708 (Va. 1988) [evidence, here the defendant's name, obtained during an illegal investigative stop is suppressible]; *U.S. v. American Investors of Pittsburgh, Inc.*, 672 F. Supp. 850 (W.D. Pa. 1987) [where 37 agents took control of business; held custodial].

With regard to when an interrogation is "custodial" the court will look to the totality of the circumstances to determine when a suspect is free to leave. Merely telling a suspect he is "free to leave" is not always sufficient.

In *U.S. v. Craighead*, 539 F.3d 1073 (9th Cir. 2008), the court find that this statement was particularly hollow when a suspect was in his ultimate sanctuary – his home. The court noted that the usual inquiry did not address the the same fact that if a suspect is already at home, where would be be free to go since “[h]e is already in the most constitutionally protected place on earth. To be ‘free’ to leave is a hollow right if the one place the suspect cannot go is his own home.” *Id.* at 1083.

According to the United States Supreme Court, a bait and switch technique does not undermine *Miranda*. Whether a citizen is aware of all the crimes about which he may be questioned is not determinative in establishing a valid waiver of his or her Fifth Amendment privilege against self-incrimination. The Agents' advice when giving *Miranda* warnings that they were investigating interstate transportation of stolen weapons did not preclude use of answers to questions relating to murder. *Colorado v. Spring*, 479 U.S. 564, 107 S.Ct. 851, 93 L.Ed.2d 954 (1987).

Nonetheless, the court maintains that invocation of the Right to Counsel pursuant to one’s Fifth Amendment right to counsel bars further police initiated questioning without counsel for both the crime under investigation at the time the request is made and also any other unrelated offense that the defendant might be suspected of. *Arizona v. Roberson*, 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d 704(1988)⁹ See also *Minnick v. Mississippi*, 498 U.S. 146, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990) ; *Holloway v. State*, 780 S.W.2d 787 (Tex.Crim App. 1989).

BADGE BEARING CELLMATE

The Supreme Court held that an undercover police officer need not *Mirandize* an incarcerated suspect who has been led to believe he is speaking to a fellow prisoner, at least not when he or she has yet to be formally charged. *Illinois v. Perkins*, 496 U.S. 292, 110 L.Ed.2d 243 (1990).

The Court's rationale was that "the essential ingredients of a 'police-dominated atmosphere' and compulsion are not present when an incarcerated person speaks freely to someone that he believes to be a fellow inmate. Coercion is determined from the perspective of the suspect.... When a suspect considers himself in the company of cell mates and not officers, the coercive atmosphere is lacking." "It is the premise of *Miranda* that the danger of coercion results from the interaction of custody and official interrogation.... '[W]hen the agent carries neither badge nor gun and wears not 'police blue', but the same 'prison gray' as the suspect, there is no 'interplay between police interrogation and police custody'."

But where coercion enters the picture, the Supreme Court has suppressed the statement. *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) [badge bearing cellmate promised to protect the defendant from prison violence, thus adding coercion to the encounter]. The Court also distinguishes the situation where "[t]he suspect ... was aware that the agent was a government official" and therefore had some reason to assume he or she "might feel coerced," see *Illinois v. Perkins*, 496 U.S. 292, 110 S.Ct. at 2398 (1990);

⁹ *Butler v. McKellar*, 494 U.S. 407, 108 L.Ed.2d 347 (1990) [the Supreme Court decided that *Roberson* announced a "new rule" and, therefore, the Defendant was not entitled to its retroactive application on collateral review]. The Court provided a new definition for the second exception to the *Teague* "new rule" restriction of which the dissent complains:

"Today, under the guise of fine-tuning the definition of 'new rule,' the Court strips state prisoners of virtually any meaningful federal review of the constitutionality of their incarceration. A legal ruling sought by a federal habeas petitioner is now deemed "new" as long as the correctness of the rule, based on precedent existing at the time the defendant's conviction became final, is 'susceptible to debate among reasonable minds.' Put another way, a state prisoner can secure habeas relief only by showing that the state court's rejection of the constitutional challenge was so clearly invalid under then-prevailing legal standards that the decision could not be defended by any reasonable jurist. With this requirement, the Court has finally succeeded in its thinly veiled crusade to eviscerate Congress' habeas corpus regime.

..[T]oday's decision, essentially foreclosing habeas review as an alternative 'avenue of vindication,' overrides Congress' will and leaves federal judicial protection of fundamental constitutional rights during the state criminal process solely to this Court upon direct review. I share Congress' lack of confidence in such a regime. After today, despite constitutional defects in the state processes leading to their conviction or sentencing, state prisoners will languish in jail and others like Butler will die because state courts were reasonable, even though wrong."

The majority apparently finds such injustice acceptable based upon an asserted 'interest in leaving concluded litigation in a state of repose.'...This will not do." *Butler v. McKellar*, 494 U.S. 407, 108 L.Ed.2d 347 (1990).

Mathis v. U.S., 391 U.S. 1 (1968); or, where the suspect "has been [formally] charged with the¹⁰ crime" and "the Sixth Amendment prevents the government from interfering with the accused's right to counsel"; *Massiah v. U.S.*, 377 U.S. 201 (1964); *U.S. v. Henry*, 447 U.S. 264 (1980); *Maine v. Moulton*, 474 U.S. 159, 176 (1985).

One's Sixth Amendment right to counsel is different than one's Fifth Amendment right to counsel. The Sixth Amendment right is offense specific. Thus, even when the defendant is formally charged, the Sixth Amendment will not shield a defendant from questioning related to other charges. Noting that the Sixth Amendment is "offense-specific," the Supreme Court held "[i]t cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced...." *McNeil v. Wisconsin*, 501 U.S. 171, 115 L.Ed.2d 158, 111 S.Ct. 2204 (1991). This is true even for uncharged offenses that are inextricably intertwined with the charged offense. *Texas v. Cobb*, 532 U.S. 162, 121 S.Ct. 1335, 149 L.Ed.2d 321 (2001). Although any incriminating statements pertaining to other crimes would only be admissible "at the trial of those offenses." *McNeil v. Wisconsin*, 501 U.S. 171, 111 S.Ct. 2204, 115 L.Ed.2d 158, (1991).\

OVERHEARD CONVERSATIONS

While the Supreme Court in *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980) made clear that "interrogation includes a 'practice that the police should know is reasonably likely to evoke an incriminating response from a suspect,'" conversation between an accused and his spouse in the presence of a police officer and, in plain view of an operating tape recorder, does not constitute "interrogation" within the meaning of *Miranda* or *Rhode Island v. Innis*. See *Arizona v. Mauro*, 481 U.S. 520, 107 S.Ct. 1931, 95 L.Ed.2d 458 (1987).

The four dissenting justices strongly criticized the majority's narrow view of "interrogation:"

"In *Rhode Island v. Innis*, the Court emphasized that the police 'cannot be held accountable for the unforeseeable results of their words or actions. *Rhode Island v. Innis*, 446 U.S. at 301-02. But there is a grand canyon between innocent unforeseeability and the mere lack of explicit police subterfuge that the Court now finds adequate to preclude a finding that an interrogation has taken place....

It is undisputed that a police decision to place two suspects in the same room and then to listen to or record their conversation may constitute a form of interrogation even if no questions are asked by any police officers. That is exactly what happened here. The police placed respondent and his wife, who was also in police custody, in the same small area. Mr. and Mrs. Mauro were both suspects in the murder of their son. Each of them had been interrogated separately before the officers decided to allow them to converse, an act that surely did not require a tape recorder or the presence of a police officer within hearing range. Under the circumstances, the police knew or should have known that Mrs. Mauro's encounter with respondent was reasonably likely to produce an incriminating response." *Mauro*, 481 U.S. at 534-35.

The citizen has the initial burden of demonstrating that he or she was in custody at the time the statements were obtained. See, *Xu v. State*, 191 S.W.3d 210 (Tex. App.—San Antonio, 2002)[un-Mirandized questioning at police station when person voluntarily accompanied police to the station is not custodial interrogation]; *U.S. v. DeLaFuente*, 548 F.2d 528, 533-34 (5th Cir. 1977); *U.S. v. Conley*, 779 F.2d 970 (4th Cir. 1985)["custodial" interrogation of prison inmate does not occur in the absence of restraint exceeding that normally imposed in prison]; *U.S. v. Beraun-Panez*, 812 F.2d 578 (9th Cir. 1987) [defendant was separated from co-worker in remote rural area, accused of lying, confronted with witnesses who made false statements to him, and where officers took

¹⁰ The Supreme Court held that police are prohibited from initiating interrogation of a custodial suspect as to second unrelated offense, where the accused has previously cut-off interrogation by requesting counsel. *Arizona v. Roberson*, 486 U.S. 675, 685 [noting that "the inherent pressures of custodial interrogation ... arise from the fact of such interrogation and exist regardless of the number of crimes under investigation"].

advantage of defendant's insecurities about his alien status, same constituted custodial interrogation and *Miranda* warnings were required].

SILENCE IS GOLDEN

Wainwright v. Greenfield, 474 U.S. 284, 106 S.Ct. 634, 88 L.Ed.2d 623 (1986) [Miranda implicitly mandates that silence carry no penalty]; *Doyle v. Ohio*, 426 U.S. 610, 618, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976) [the prosecution cannot use the defendant's silence, after receiving his *Miranda* warnings, even as evidence of sanity].

But see Greer v. Miller, 483 U.S. 1056, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987) [no *Doyle* violation where prosecutor's question "why didn't you tell this story to anybody when you got arrested" was immediately objected to and the jury instructed to disregard it]; *Gladden v. Roach*, 864 F.2d 1196 (5th Cir.1989) [no absolute right to silence questions regarding identity and residence are not interrogation for Fifth Amendment purposes]; *U.S. v. Carmona*, 873 F.2d 569 (2d Cir. 1989) [requested information was simply identification for booking and arraignment].

See also U.S. v. Burns, 276 F.3d 439 (8th Cir. 2002) [allowing the admission of evidence of a defendant's refusal to speak with officers after initially waiving his *Miranda* rights.]; and *U.S. v. Andújar-Basco*, 488 F.3d 549 (1st Cir. 2007)[holding express invocation of *Miranda* rights, as opposed to mere refusal to talk, after initially waiving them, is inadmissible].

DIFFERENT RULE APPLIED TO SILENCE UNDER TEXAS CONSTITUTION

Prosecution cannot use Defendant's silence against him regardless whether he had been warned or *not*, relying upon independent State Constitutional grounds. TEX. CONST. Art. I, § 10.

See Sanchez v. State, 707 S.W.2d 575, 580 (Tex.Cr.App. 1986) ["we hold that pursuant to Art. I, ' 10 of the Texas Constitution, when the defendant is arrested he has the right to remain silent, and the right not to have that silence used against him, even if for impeachment purposes regardless of when he is later advised of his rights."].

PROTECTED PLEA NEGOTIATIONS

Incriminating statements by an accused in the course of plea discussions are inadmissible against him or her in any civil or criminal proceeding. FED. R. CRIM. P. 11(e)(6); FED. R. EVID. 410. Rule 11 was amended in 1979 to expressly require that to render plea discussions inadmissible under FED. R. CRIM. P. Rule 11(e)(6)(D) they must be with an "attorney for the Government". *U.S. v. Keith*, 764 F.2d 263 (5th Cir. 1985). However when, as the result of the Government's conduct, "the accused 'exhibited an actual subjective expectation to negotiate a plea at the time of the discussion' and the expectation [is] reasonable, given the circumstances" such statements fall within Rule 11(e)(6)(D)'s proscription. *U.S. v. Keith*, 764 F.2d 263 (5th Cir. 1985).

U.S. v. Robertson, 582 F.2d 1356, 1366 (5th Cir. 1978) [en banc]; *U.S. v. Posey*, 611 F.2d 1389, 1390 (5th Cir. 1980).

"Obviously then, the accused's assertions concerning his state of mind are critical in determining whether a discussion should be characterized a plea negotiation. ...The trial court must apply a two-tiered analysis and determine, first, whether the accused exhibited a plea at the time of the discussion, and, second, whether the accused's expectation was reasonable given the totality of the objective circumstances." *U.S. v. Posey*, 611 F.2d at 1390.

U.S. v. Robertson, 582 F.2d 1356, 1366 (5th Cir. 1978) [en banc]. *U.S. v. Boltz*, 663 F. Supp. 956 (D. Alaska 1987).

THE FORMER EXCULPATORY "NO" DOCTRINE

Before *U.S. v. Rodriguez-Rios*, 14 F.3d 1040 (5th Cir. 1994) a defendant's negative response to accusatory questioning could not constitute a violation of 18 U.S.C. § 1001, prohibiting the making of false statements to a federal official. However, the Court dispensed with the principle finding "exculpatory no" exception does not apply to statute governing crime of making false, fictitious, or fraudulent statement in any matter within jurisdiction of department or agency of United States. *Brogan v. U.S.*, 522 U.S. 398, 118 S. Ct. 805 (1998) [exculpatory "no" doctrine is not a defense under the plain language of 18 U.S.C. § 1001].

In *Brogan*, federal investigators visited the defendant at his home where he was asked if he had received any labor-oriented "gifts" from the corporation whose employees were represented by the union. The defendant replied "no" and, as a result, the Government charged the defendant with making false statements within the jurisdiction of a federal agency. *Brogan v. U.S.*, 522 U.S. 398, 118 S. Ct. 805 (1998).

MIRANDA APPLICABLE TO BORDER PATROL ARRESTS

Where a border patrol agent has probable cause to arrest a suspect, he must give the arrestee *Miranda* warnings. *U.S. v. Bengivenga*, 811 F.2d 853 (5th Cir. 1987).

COERCED CONFESSIONS TO PRIVATE CITIZENS

Some courts have held that, because of its inherent unreliability, an "involuntary" confession is inadmissible regardless of the role played by police officials, *People v. Switzer*, 355 N.W.2d. 670 (Mich. 1984) [Michigan Court of Appeals held that a confession coerced by a private citizen is "involuntary" and therefore inadmissible]. But the United States Supreme Court held that neither a confession nor a waiver of *Miranda* rights will be subject to suppression as involuntary unless same is the product of "official coercion". See *Colorado v. Connelly*, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986). Official coercion apparently includes that a youthful suspect's voluntary trip to the police station late at night did not keep the encounter from qualifying as an arrest under the Fourth Amendment. *Kaupp v. Texas*, 538 U.S. 626, 629, 123 S. Ct. 1843 (2003).

OFFICERS DO NOT HAVE TO SPECIFICALLY MENTION THE RIGHT TO HAVE A LAWYER PRESENT

Criminal suspects have a right to have their lawyer present during police questioning, and the police are required to inform suspects of that right as part of their "*Miranda* warning." In this case, police officers told a suspect that he had "the right to talk to a lawyer before answering [any] questions" and "[y]ou have the right to use any of these rights at any time you want during this interview." The Court held that even though this warning did not specifically mention the right to have a lawyer present during questioning (as opposed to the right to talk to the lawyer before questioning), the warning nonetheless was constitutional because it conveyed to the suspect that he had the right to have an attorney present. *Florida v. Powell* 559 U.S. 50 (2010)

CONGRESS CANNOT CHANGE CONSTITUTIONAL REQUIREMENT FOR MIRANDA WARNINGS

The Supreme Court has held that *Miranda* warnings have a constitutional base. Thus the requirement the warning be given cannot be defeated by Congressional enactment. *See Dickerson v. U.S.*, 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000). The Supreme Court in *Fellers v. U.S.*, 540 U.S. 519, 124 S. Ct. 1019, 157 L.Ed.2d 1016 No. 02-6320, (2003), granted certiorari to decide whether the Eighth Circuit properly admitted Fellers' statements after officers interviewed him, knowing they were going to arrest him, before administering his *Miranda* rights. Fellers had been indicted before the officers approached him for an interview. However the officers did not tell him that they were there to arrest him until after they interviewed him. Commentators view this as another attempt to circumvent the requirement for *Miranda* warnings.

In *U.S. v. Patane*, 542 U.S. 630, 124 S.Ct. 2620, 159 L.Ed.2d 667, (2004), the Supreme Court has granted certiorari to decide whether physical evidence obtained by police as the result of "un-Mirandized" statements by criminal defendants must be excluded at trial. The lower court, the Tenth Circuit, decided the *Dickerson*, *supra*, reopened the question.

MIRANDA VIOLATION TAINTS PROBABLE CAUSE

An un-warned incriminating statement may not be used to establish probable cause unless there is no indication of trickery or coercion on the officer's part. *U.S. v. Morales*, 788 F.2d 883, 886 (2d Cir. 1986). *See also, U.S. v. Dart*, 747 F.2d 263 (4th Cir. 1984), which held even though an officer's decision to enter into warehouse that had been burglarized was lawful, his subsequent decision to snoop further by looking under a blanket was not justified by exigent circumstances.

PRISON INMATES ARE NOT IN CUSTODY FOR MIRANDA PURPOSES

When the police arrest a suspect, they must tell him his "*Miranda* rights," which include the right to a lawyer and the right to remain silent. Once the suspect requests a lawyer, the police may not question him again until he is given one, even if he later waives that right. In this case, the Court ruled that, if the suspect has been released from custody for at least fourteen days since he last requested a lawyer, the police may resume questioning him if he waives his right to a lawyer at that time. In the prison context, the police may resume questioning an inmate after he has been released into the general prison population for fourteen days. *Maryland v. Shatzer* 130 S. Ct. 1213 (2010)

SUSPECT MUST UNABIGUOUSLY INVOKE MIRANDA

The police are required to stop questioning a suspect once he invokes his *Miranda* right to remain silent. In this case, the Court held that a suspect did not invoke his right to remain silent by simply not answering questions. Instead, a suspect must unambiguously invoke his right to remain silent before the police are required to end their questioning. *Berghuis v. Thompkins* 560 U.S. 370 (2010).

In *Salinas v. Texas*, 133 S. Ct. 2174 (2013), the Court upheld the prosecution's use of an accused's silence as evidence of guilt. *See Salinas v. Texas*, 133 S. Ct. 2174 (2013). The suspect in *Salinas*, without being arrested or receiving *Miranda* warnings answered questions asked by a police officer investigating a murder. *Id.* at 2177. However, Salinas fell silent when asked whether a ballistics test would prove that shotgun shell casings from the crime scene would match his gun. *Id.* In a plurality opinion, joined by Chief Justice Roberts and Justice Kennedy, Justice Alito wrote that, "[p]etitioner's Fifth Amendment claim fails because he did not expressly invoke the privilege against self-incrimination in response to the officer's question." *Id.* at 2178. Because Salinas was voluntarily interviewed by the police, and free to end the interview and leave at any time, he was "outside the scope of *Miranda* and other cases in which [the Court has] held that various forms of governmental coercion prevented defendants from voluntarily invoking the privilege." *Id.* at 2180. Justice Alito went on to add that the Court's history of "cases establish that a defendant normally does not invoke the privilege by remaining silent."

Id. at 2181. Therefore, “[b]efore petitioner could rely on the privilege against self-incrimination, he was required to invoke it.” *Id.* at 2184. So, in order to maintain the constitutional privilege of silence, one must speak.

Justice Thomas, joined by Justice Scalia, concurred in the judgement, but wrote separately to more directly answer the question, “whether the Fifth Amendment privilege against compulsory self-incrimination prohibits a prosecutor from using a defendant’s silence as evidence of his guilt.” *Salinas*, 133 S. Ct. at 2184 (Thomas, J., concurring). The Justices looked to the 18th century and found that “at the time of the founding, English and American courts strongly encouraged defendants to give unsworn statements and drew adverse inferences when they failed to do so,” and agreed “with the plurality that *Salinas*’ Fifth Amendment claim fails.” *Id.* at 2184–85 (Thomas, J., concurring).

In his dissent, Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, begins by noting that the “Fifth Amendment prohibits prosecutors from commenting on an individual’s silence where that silence amounts to an effort to avoid becoming ‘a witness against himself.’” *Salinas*, 133 S. Ct. at 2185 (Breyer, J., dissenting). Noting that the plurality would require a suspect to expressly invoke his Fifth Amendment privilege, Justice Breyer asks, “does it really mean that the suspect must use the exact words ‘Fifth Amendment’? How can an individual who is not a lawyer know that these particular words are legally magic?” *Id.* at 2190 (Breyer, J., dissenting). The dissent opposed a rule based approach to solving the issue, recognizing the difficulties and adding “that other cases may arise where facts and circumstances surrounding an individual’s silence present a closer question. The critical question—whether those circumstances give rise to a fair inference that the silence rests on the Fifth Amendment—will not always prove easy to administer. But that consideration does not support the plurality’s rule-based approach here, for the administrative problems accompanying the plurality’s approach are even worse.” *Id.*

C. INCRIMINATING STATEMENTS OBTAINED BY EXPLOITATION OF VIOLATION OF RIGHT TO COUNSEL:

The Supreme Court has often condemned the official practice of deliberately eliciting statements from the accused after the Sixth Amendment right to counsel has attached. *Massiah v. U.S.*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964) [codefendant acting for police after indictment and retention of counsel]; *McLeod v. Ohio*, 381 U.S. 356, 85 S.Ct. 1556, 14 L.Ed.2d 682 (1965) [after indictment, before arraignment and appointment of counsel]; *Milton v. Wainwright*, 407 U.S. 371, 92 S.Ct. 2174, 33 L.Ed.2d 1 (1972) [officer posing as cellmate]; *Brewer v. Williams*, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977) [post-arrest, post-arraignment]; *U.S. v. Henry*, 447 U.S. 264, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1980) [cellmate-informant paid to listen, but not initiate conversation]; *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981) [psychiatrist’s testimony as to “dangerousness” of defendant based on post-indictment competency examinations]. See also *U.S. v. Geittman*, 733 F.2d 1419, 1427 (10th Cir. 1984). “*Massiah* and *Henry* condemn deliberate efforts by the Government to create situations in which indicted defendants are likely to make incriminating statements ...in the absence of counsel.” *U.S. v. Geittman*, 733 F.2d at 1427.

In *Maine v. Moulton*, 474 U.S. 159, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985), the Court reiterated this sentiment, emphasizing the Government’s affirmative obligation “with respect to a formally charged individual’s right to counsel. *Maine v. Moulton*, 474 U.S. 159, 88 L.Ed.2d at 493.

“Once the right to counsel has attached and been asserted, the State must of course honor it. This means more than simply that the State cannot prevent the accused from obtaining the assistance of counsel. The Sixth Amendment also imposes on the State an affirmative obligation to respect and preserve the accused’s choice to seek this assistance. We have on several occasions been called upon to clarify the scope of the State’s obligation in this regard, and have made clear that, at the very least, the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel.

The Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a ‘medium’ between him and the State. As noted above this guarantee includes the State’s

affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking this right. The determination whether particular action by state agents violates the accused's right to the assistance of counsel must be made in light of this obligation. Thus, the Sixth Amendment is not violated whenever - by luck or happenstance - the state obtains a statement from the accused after the right of counsel has attached. ...However, knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity. Accordingly, the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent." [emphasis added]. *Maine v. Moulton*, 474 U.S. 159, 88 L.Ed.2d at 492-93, 496.

While "knowing exploitation" is rarely subject to direct proof, the mere fact that the Government's agents should have known that it was likely to obtain incriminating statements" from the accused in the absence of counsel suffices". *Maine v. Moulton*, 474 U.S. 159, 88 L.Ed.2d at 496 n. 12.

"Direct proof of the State's knowledge will seldom be available to the accused. However, as *Henry* makes clear, proof that the State 'must have known' that its agent was likely to obtain incriminating statements from the accused in the absence of counsel suffices to establish a Sixth Amendment violation." *Maine v. Moulton*, 474 U.S. 159, 88 L.Ed.2d at 496 n.12; *Henry*, 447 U.S. 264, 281, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980).

POLICE MUST NOTIFY ATTORNEY ONCE SIXTH AMENDMENT RIGHT TO COUNSEL HAS ATTACHED

The Texas Court of Criminal Appeals has held that *regardless* of any waiver by an indicted accused who is represented by counsel, the police must first notify his attorney, *before* initiating any interrogation. *Holloway v. State*, 780 S.W.2d 787 (Tex.Crim. App. 1989). "Only through notice to defense counsel may authorities initiate the interrogation of an indicted and represented defendant." *Holloway, Id.*

STATEMENTS OBTAINED BY VIOLATION OF A DISCIPLINARY RULE

"DR7-104. Communicating with One of the Adverse Interest."

"(A) During the course of his representation of a client a lawyer shall not:

(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so."

Although previously prosecutors argued that the Supremacy Clause exempted them from the rules of ethics, the McDade/Murtha Act settled the matter. The rules of ethics apply to prosecutors as well as private counsel. 28 U.S.C. § 530B.

28 U.S.C.A. § 530B.

“§ 530B. Ethical standards for attorneys for the Government

(a) An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.”

Thus, once a criminal defendant is represented by an attorney the Government may not communicate with that defendant unless his/her attorney is notified. *See U.S. v. Thomas*, 474 F.2d 110, 112 (10th Cir.), *cert. denied*, 412 U.S. 932, 93 S.Ct. 2758, 37 L.Ed.2d 160 (1973). The Fifth Circuit has recognized that conduct which violates this canon of ethics is reprehensible and suppression is the appropriate sanction. *U.S. v. Killian*, 639 F.2d 206, 210 (5th Cir.), *cert. denied sub nom; Brunk v. U.S.*, 451 U.S. 1021, 101 S.Ct. 3010, 69 L.Ed.2d 394 (1981) [defendant relied solely on the violation of an "ethical principle of the legal profession"].

"We agree that the conduct which occurred in this case was highly improper and unethical. ...suppression of the statements would probably have been the appropriate sanction in this case, were it not for the refusal of the government to use those statements. ...The action that was taken in this case is truly reprehensible and taints the dignity of the offices of the U.S. Attorney, the D.E.A. and the F.B.I." *U.S. v. Killian*, 693 F.2d at 210.

Whether DR7-104(A)(1) is violated pre or post indictment, suppression may be warranted. *U.S. v. Hammad*, 858 F.2d 834 (2d Cir. 1988).

"Moreover, we resist binding the Code's applicability to the moment of indictment. The timing of an indictment's return has substantially within the control of the prosecutor. Therefore, were we to construe the rule as dependent upon indictment a government attorney could manipulate grand jury to avoid its encumbrances." *U.S. v. Hammad*, 858 F.2d at 839.

One court has held that such conducted when based upon institutional policy [a June 8, 1989 DOJ Memorandum, advising Justice Department "litigators" that they need not abide by such Codes of Professional Responsibility, even where they are adopted as the local rules of the court] warrants outright dismissal. *U.S. v. Lopez*, 765 F. Supp. 1433, (N.D. Cal. 1991), *order vacated by U.S. v. Lopez*, 4 F.3d 1455 (9th Cir. 1993).

STATEMENTS INDUCED BY POLICE PROMISES

A confession may be rendered involuntary where it is induced by police promises. A promise by an informant cellmate to protect the defendant from rough treatment by other inmates in exchange for a confession amounts to coercing the confession. *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) [but subject to harmless error analysis].

Gallegos v. State, 715 S.W.2d 139 (Tex.App.-San Antonio 1986).

"The law universally condemns the use of confessions obtained by means of promises or inducements. *Bram v. United States*, 168 U.S. 542, 542-43, 18 S.Ct. 183, 42 L.Ed. 568 (1897); *Washington v. State*, 582 S.W.2d. 122, 124 (Tex.Crim.App. 1979). Texas courts apply a four part test to determine whether a promise has rendered an accused's confession inadmissible. This test requires that the promise must: (1) be of some benefit to the defendant; (2) be positive; (3) be made or sanctioned by a person in authority; and (4) be of such character as would be likely to influence the defendant to speak untruthfully. *Washington*, 582 S.W.2d at 124; *Fisher v. State*, 379 S.W.2d 900, 902 (Tex.Crim.App. 1964)." *See Gallegos v. State*, 715 S.W.2d at 141.

See also U.S. v. Pinto, 671 F. Supp. 41 (D. Maine 1987) [confession involuntary where interrogator promised that he was "on defendant's side" and "in a position to help" defendant and "the one thing between defendant and jail"]; *People v. Shaw*, 536 N.E.2d 849 (Ill. App. 1st Dist. 1989)[police officer's promise to a defendant of probation and psychiatric help undermined the voluntariness of his confession necessitating suppression]; *Commonwealth v. Gibbs*, 553 A.2d 409 (Pa.S.Ct. 1989) [in-custody suspect, after receiving

Miranda warnings and raising issue of obtaining counsel, asked interrogating officer what good it would do to talk with police. Officer responded that any cooperation would be brought to the attention of the district attorney. Such a response was an improper suggestion that "poisoned" the interrogation by interfering with the defendant's ability to evaluate his need for a lawyer].

But see U.S. ex rel Cole v. Lane, 654 F. Supp. 74 (N.D. Ill. 1987) [where police tell a Mirandized, "educated" defendant that he might receive easier treatment if he confesses. Court admits confession].

FOREIGN CONFESSIONS

The Ninth Circuit has admitted a confession made to Mexican authorities over the defendant's protests that the admission into evidence of the confession violated the due process and self-incrimination clauses of the Fifth Amendment because it was a product of police coercion. *U.S. v. Wolf*, 813 F.2d 970, 975 (9th Cir. 1987). The Court found that the fact that the defendant received no *Miranda* warnings, without more, does not lead to the conclusion that the confession was coerced. *U.S. v. Wolf*, 813 F.2d 970, 975 (9th Cir. 1987).

MIRANDA CANNOT GIVETH AND TAKETH AWAY

A confession is rendered "involuntary as a matter of law" and "inadmissible per se" where it is given in response to the ambiguous *Miranda* warning that anything the citizen say "might be used 'for or against him' or "for and against him", as same "renders the confession inadmissible as a matter of law because to warn the accused that his confession might be used for him holds out an inducement for making the confession". *Dunn v. State*, 721 S.W.2d 325, 341 (Tex.Crim.App. 1986) (en banc), *abrogated by Creager v. State*, 952 S.W.2d 852 (Tex.Crim.App. 1997) (en banc). Likewise, a warning that the accused's "statement will not be used against" him renders any subsequent admission involuntary. *Streetman v. Lynaugh*, 812 F.2d 950 (5th Cir. 1987).

REQUESTS FOR COUNSEL

A request for counsel constitutes an exercise of the suspect's Fifth Amendment *Miranda* rights, and should terminate further questioning by police. *Edwards v. Arizona*, 451 U.S. 477, 485, 101 S.Ct. 1880, 68 L.Ed.2d 378, 386 (1981).

"[W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona*, 451 U.S. at 485.

Questioning by police may not be re-initiated after a request for Counsel unless the citizen "initiates" further discussions with police, *and* intelligently waives the rights he had previously invoked. *Smith v. Illinois*, 469 U.S. 91, 95, 105 S.Ct. 490, 83 L.Ed.2d 488, 493-4 (1984).

"First, courts must determine whether the accused actually invoked his right to counsel... Second, if the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked." *Smith v. Illinois*, 469 U.S. at 95.

But see Oregon v. Bradshaw, 462 U.S. 1039, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983) [accused's question "Well, what's going to happen to me now?" constituted initiation by accused, after which accused knowingly and voluntarily waived the rights previously invoked].

This is a two pronged test:

"We recently restated the requirement in *Wyrick v. Fields*, 459 U.S. 42, 74 L Ed 2d 214, 103 S Ct 394 (1982) [per curiam], to be that before a suspect in custody can be subjected to further interrogation after he requests an attorney there must be a showing that the 'suspect himself initiates dialogue with the authorities'.

But even if a conversation taking place after the accused has 'expressed his desire to deal with the police only through counsel', is initiated by the accused, where reinterrogation follows, the burden remains upon the prosecution to show that subsequent events indicated a waiver of Fifth Amendment right to have counsel present during the interrogation." *Bradshaw*, 462 U.S. at 1044.

Fleming v. Kemp, 837 F.2d 940, 947 (11th Cir. 1988) [a broad interpretation must be given to a request for counsel so that accused's indication he would get his own attorney was an invocation of the right].

However, exercise caution since the Supreme Court has held that a defendant's invocation of his Sixth Amendment right to counsel at a hearing does not give rise to his Fifth Amendment right to counsel regarding a different offense than the one addressed in the previous hearing. *McNeil v. Wisconsin*, 501 U.S. 171, 112 L.Ed.2d 158 (1991). As stated previously, the Sixth Amendment right to counsel is offense specific thus the Supreme Court held "[i]t cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced...." *McNeil v. Wisconsin*, 501 U.S. 171, 179, 112 L.Ed.2d at 166. Although any incriminating statements pertaining to other crimes would only be admissible "at the trial of those offenses." *McNeil v. Wisconsin*, 501 U.S. 171, 180.112 L.Ed.2d. at 167 [quoting *Maine v. Moulton*, 474 U.S. 159 n.16 (1985)].

The dissent reminded the Court that "Although judges and lawyers may understand and appreciate the subtle distinctions between the Fifth and Sixth Amendment rights to counsel, the average person does not." *McNeil v. Wisconsin*, 501 U.S. 171, 184-187 [quoting *Michigan v. Jackson*, 475 U.S. 625 (1986)]. Showing sensitivity to the current attack on the criminal defense bar, the dissent concluded:

"Whenever the Court ignores the importance of fair procedure in this context and describes the societal interest in obtaining 'uncoerced confessions' from pretrial detainees as an 'unmitigated good,' the Court is revealing a preference for an inquisitorial system of justice.

"...'This case turns on a proper appraisal of the role of the lawyer in our society. If a lawyer is seen as a nettlesome obstacle to the pursuit of wrongdoers-as in an inquisitorial society-then the Court's decision today makes a good deal of sense. If a lawyer is seen as an aid to the understanding and protection of all constitutional rights-as in an accusatorial society-then today's decision makes not sense at all.'

"The Court's refusal to acknowledge any 'danger of "subtle compulsion"' in a case of this kind evidences an inability to recognize the difference between an inquisitorial and an adversarial system of justice." *McNeil v. Wisconsin*, 501 U.S. 171, 189 (1986).

ONCE INVOKED, FIFTH AMENDMENT RIGHT TO COUNSEL CANNOT BE WAIVED WITHOUT COUNSEL'S PRESENCE

With respect to an accused's Fifth Amendment right to counsel, once a suspect has invoked his or her *Edward's* Fifth Amendment right to counsel the lawyer must actually be present before the right to counsel may

be waived. It is not enough for the authorities to provide a suspect with an opportunity to *consult* with Counsel, counsel must actually be physically present. *Minnick v. Mississippi*, 498 U.S. 146, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990).

"In our view, a fair reading of *Edwards* and subsequent cases demonstrates that we have interpreted the rule to bar police initiated interrogation unless the accused has counsel with him at the time of questioning. *Whatever the ambiguities or our earlier cases on this point, we now hold that when counsel is requested, interrogation must cease, and officials may not reiterate interrogation without counsel present, whether or not the accused has consulted with his attorney.*

"We consider our ruling to be an appropriate and necessary application of the *Edwards* rule." (emphasis added). *Minnick v. Mississippi*, 498 U.S. at 158.

However, a death sentenced defendant's refusal to talk with police without his attorney present, did not preclude the prosecution's use of a tape recording made by a police officer who sat in on a meeting between the accused and his wife. The Supreme Court reasoned that since the police officer asked no questions, using a tape recorder in plain sight to record their conversation, did not constitute interrogation for *Miranda* or *Edwards* purposes. *Arizona v. Mauro*, 481 U.S. 520, 107 S.Ct. 1931, 95 L.Ed.2d 458 (1987).

See also, U.S. v. Webb, 755 F.2d 382 (5th Cir. 1985) [jailer's questions to an accused concerning the nature of the charges against him constituted police-initiated interrogation in violation of *Edwards*, where the accused had previously invoked his right to counsel when initially questioned by the F.B.I]; *Hamilton v. Nix*, 781 F.2d 619 (8th Cir. 1985) [calculated exploitation of fruit of the poisonous tree, resulting in defendant's request that further incriminating evidence be disclosed, does not attenuate the taint]; *Martin v. Wainwright*, 770 F.2d 918 (11th Cir. 1985), *abrogation recognized by Coleman v. Singletary*, 30 F.3d 1420 (11th Cir. 1994) [defendant's request "can't we wait until tomorrow" made during a custodial interrogation was a sufficient invocation of right to cut-off questioning and to require officer to determine whether defendant intended to invoke right to counsel]; *U.S. v. Porter*, 776 F.2d 370 (1st Cir. 1985)[if accused's words and actions are ambiguous as to whether he wishes a lawyer, questioning officers must find out more specifically whether he wants lawyer before they can proceed with other questioning]; *U.S. v. Kroesser*, 731 F.2d 1509 (5th Cir. 1984) [a defendant initiated discussion, after invoking right to counsel, by expressing regret of involvement in another criminal activity]; *Bradburn v. McCotter*, 786 F.2d 627 (5th Cir. 1986) [accused arrested in Nevada for a crime committed in Texas who states to police that he would wait until he got back to Dallas to get a court appointed attorney on some future date does not invoke *Edwards*]; *U.S. v. Gotchis*, 803 F.2d 74 (2d Cir. 1986) [*Edwards* not violated by seeking basic identifying data even though later used to incriminate]; *U.S. v. Taylor*, 799 F.2d 126 (4th Cir. 1986) [seeking accused's identity may constitute *Edwards* violation if identity reasonably expected to be incriminating]; *U.S. v. Johnson*, 812 F.2d 1329 (11th Cir. 1986) [statement made "in same breath" as invocation of right to counsel admissible, statement made just after invocation not admissible]; *Ramirez v. State*, 721 S.W.2d 490 (Tex.App.-Houston [1st Dist.] 1986) [videotaping a Mirandized detainee attempting to call his attorney held not to deny him his right to counsel]; *State v. Spencer*, 750 P.2d 147 (Or. 1988) [a DWI arrestee is entitled to a reasonable opportunity to contact an attorney regarding breath test or results are suppressible].

PRESENCE OF COUNSEL SERVES TO INSURE TRUSTWORTHINESS

The Supreme Court has long recognized that the presence of counsel serves to protect both the accused and his accuser.

"The presence ...may serve several significant ...functions. ...If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness. With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless

exercised the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial". *Miranda v. Arizona*, 384 U.S. 436, 470, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

See U.S. v. Wade, 388 U.S. 218, 230, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) [equating similar functions served by Sixth Amendment right to counsel].

REQUEST BY THIRD PARTY

Failure of police to inform arrestee that a lawyer hired by his sister unbeknownst to him had called and requested they *not* speak to him before lawyer saw him does not invoke *Edwards* nor render citizen's otherwise voluntary confession inadmissible. *Moran v. Burbine*, 475 U.S. 412, 106 S.Ct. 1135 (1986). *Contra, State v. Hickman*, 338 S.E.2d 188 (W.Va. 1985).

AMBIGUOUS REQUEST FOR COUNSEL

An ambiguous request for counsel terminates further custodial interrogation beyond clarifying whether the accused desires to consult with an attorney. *U.S. v. Cherry*, 733 F.2d 1124, 1130 (5th Cir. 1984), *abrogation recognized by Soffar v. Cockrell*, 300 F.3d 588 (5th Cir. 2002).

"If a suspect is indecisive in his request for counsel, law enforcement officials must cease the interrogation unless they ask the suspect further questions to clarify whether the suspect wants to consult with an attorney before continuing with the interrogation. However, such questioning is to be limited to this clarification and cannot be used as a means of eliciting any incriminating statements from the suspect relating to the subject matter of the 'interrogation.'" *Bradshaw*, 462 U.S. at 1044.

However, a suspect's refusal to give a written statement without the presence of counsel under *Edwards v. Arizona*, where he expressed his willingness to provide an oral statement waived his rights. *Connecticut v. Barrett*, 479 U.S. 523, 107 S.Ct. 828, 93 L.Ed.2d 920 (1987).

Silva v. Estelle, 672 F.2d 457, 459 (5th Cir. 1982) [where request is "equivocal" the officers should "make further inquiry to clarify the suspects wishes"]; *U.S. v. Olsen*, 609 F. Supp. 1154 (D.C. Me. 1985) [lack of knowledge of prior request for counsel by questioning officers is immaterial]; *U.S. v. Webb*, 755 F.2d 382 (5th Cir. 1985); *U.S. v. Porter*, 776 F.2d 370 (1st Cir. 1986); *U.S. v. Fouche*, 776 F.2d 1298 (9th Cir. 1985).

But see Oregon v. Bradshaw, 462 U.S. 1039, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983) [an accused's inquiry: "what is going to happen to me now" constituted initiation of further communication by the accused warranting interrogation].

"Before a suspect in custody can be subjected to further interrogation after he requests an attorney, there must be a showing that the 'suspect himself initiated dialogue with the authorities'...

But even if a conversation taking place after the accused has 'expressed his desire to deal with the police only through counsel', is initiated by the accused, where reinterrogation follows, the burden remains upon the prosecution to show that subsequent events indicated a waiver of the Fifth Amendment right to have counsel present during the interrogation." *Bradshaw*, 462 at 1044.

See Commonwealth v. Waggoner, 540 A.2d 280 (Pa. 1988) [defendant stating that he could not afford a lawyer raised a duty in the officers to clarify whether or not he was asserting his Sixth Amendment right to

counsel]; *Bradburn v. McCotter*, 786 F.2d 627 (5th Cir. 1986) [statement by an accused arrested in Nevada that he would wait until he got to Texas to obtain a court appointed counsel at some future date did not invoke *Edwards*]. See also *U.S. v. Gravatt*, 868 F.2d 585 (3d Cir. 1989) [where defendant, charged with tax evasion, claimed to be unemployed but refused to complete financial affidavit claiming it would violate his privilege against self-incrimination; court should make effort to answer defendant's concern by in camera review, seal information, or grant use immunity for indigency hearing].

SIXTH AMENDMENT "RIGHT TO COUNSEL" MORE EASILY INVOKED THAN FIFTH AMENDMENT RIGHT

Although the United States Supreme Court had recognized the significance of formal charges being brought against an accused when it held that even a generalized request for counsel precludes subsequent questioning of the accused without counsel present, *Michigan v. Jackson*, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986) *overruled by Montejo v. Louisiana*, 556 U.S. 778 (2009); the Court held that the formal attachment of the Sixth Amendment right to counsel alone has no effect on the rules governing overt police questioning. Thereby, an indicted accused who has not asked for an attorney may be further questioned by police and prosecutors without counsel present. *Patterson v. Illinois*, 487 U.S. 285, 291, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988).

In a 5-4 decision, the Court held that "the prosecution may use a statement taken in violation of the *Jackson* prophylactic rule to impeach a defendant's false or inconsistent testimony." *Michigan v. Harvey*, 494 U.S. 344, 108 L.Ed.2d 293, 110 S.Ct. 1176 (1990). Although the agent taking the statement had told the defendant that he did not need to speak to his attorney the Court concluded that there were not sufficient record facts to demonstrate whether defendant had waived his Sixth Amendment rights.

"We have never prevented use by the prosecution of relevant voluntary statements by a defendant, particularly when the violations alleged by a defendant relate only to procedural safeguards that are 'not themselves rights protected by the constitution,' but are instead measures designed to ensure that constitutional rights are protected. In such cases, we have decided that the 'search for truth in a criminal case' outweighs the 'speculative possibility' that exclusion outweighs the 'speculative possibility' that exclusion of evidence might deter future violations of rules not compelled directly by the Constitution in the first place." [citations omitted].

The Court concluded that there should be no further extension of the exclusionary rule for *Jackson* violations than there is for violations of *Edwards* or *Miranda* Stating that "nothing in the Sixth Amendment prevents a suspect charged with a crime and represented by counsel from voluntarily choosing, on his own, to speak with police in the absence of an attorney" the Court did not address Justice Stevens' concern voiced in the dissent:

"The Sixth Amendment right to counsel is much more pervasive because it affects the ability of the accused to assert any other rights he might have."

"...Just as the Sixth Amendment's right to 'the assistance' of counsel necessarily encompasses a right to the effective assistance of counsel,... so too the accused's right to have counsel 'for his defense' in a 'criminal prosecutio[n]' includes the right to rely on counsel after the government's role has shifted from investigation to accusation and the 'defendant finds himself faced with the prosecutorial forces of organized society.'

"...Any lesser guarantee would provide insufficient protection against any attempt by the State to supplant 'the public trial guaranteed by the Bill of Rights' with a secret trial in the police precincts.' [footnotes and citations omitted]."

PER SE EXCLUSION OF EDWARDS V. ARIZONA APPLIES WHEN RIGHT TO COUNSEL HAS BEEN EXPRESSLY INVOKED

"Thus, the Sixth Amendment right to counsel at a post-arraignment interrogation requires at least as much protection as the Fifth Amendment right to counsel at any custodial interrogation.

Indeed, after a formal accusation has been made - and a person who had previously been just a "suspect" has become an "accused" within the meaning of the Sixth Amendment - the constitutional right to the assistance of counsel is of such importance that the police may no longer employ techniques for eliciting information from an uncounselled defendant that might have been entirely proper at an earlier stage of their investigation. ...In *Edwards*, ...we rejected the notion that, after a suspect's request for counsel, advice of rights and acquiescence in police-initiated questioning could establish a valid waiver. 451 U.S., at 484, 68 L Ed 2d 378, 101 S Ct 1830. We find no warrant for a different view under a Sixth Amendment analysis. ...

Edwards is grounded in the understanding that "the assertion of the right to counsel [is] a significant event", 451 U.S. at 485, 68 L Ed 2d 378, 101 S Ct 1880, and that "additional safeguards are necessary when the accused asks for counsel." *Edwards*, 451 U.S. at 484, 68 L Ed 2d 378, 101 S.Ct 1880. We conclude that the assertion is no less significant, and the need for additional safeguards no less clear, when the request for counsel is made at an arraignment and when the basis for the claim is the Sixth Amendment. We thus hold that, if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid." *Michigan v. Jackson*, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631, 639-642 (1986).

Although *Michigan v. Jackson* was overruled by *Montejo v. Louisiana*, 556 U.S. 778 (2009), courts have applied the *Edwards v. Arizona*, *per se* standard to review statements obtained from a formally charged citizen, as though the accused had expressly invoked his right to counsel. *U.S. v. Eagle Elk*, 711 F.2d 80, 82 (8th Cir. 1983).

"Our examination of the relevant case[s] leads us to conclude that the appropriate standard for reviewing the validity of a waiver of the Sixth Amendment right to have counsel present at an interrogation is essentially the same standard applied to waivers of the Fifth Amendment right to counsel where the right to counsel has been previously invoked." *U.S. v. Eagle Elk*, 711 F.2d at 82.

Thus, "a valid waiver of that right cannot be established by showing that he responded ..even if he has been advised of his rights". *Edwards v. Arizona*, 451 U.S. at 483.

But see U.S. v. Taylor, 799 F.2d 126, 128 (4th Cir. 1986) (after defendant invoked his *Miranda* right to counsel, police questioned him concerning his identity and elicited incriminating statements; however, the court held that where the "officers had no reasonable expectation that their questions would be likely to elicit incriminating information", no *Miranda* violation occurred during their "ministerial" questioning].

RETROACTIVITY OF EDWARDS

The *Edwards* prohibition against further interrogation after a request for counsel is not to be retroactively applied on collateral ("Habeas") review of a final conviction. *Solem v. Stumes*, 465 U.S. 638, 104 S.Ct. 1338, 79 L.Ed.2d 579 (1984). The Supreme Court has also held that *Edwards* should be given retroactive application to cases pending on "direct appeal" at the time *Edwards* was decided. *Shea v. Louisiana*, 470 U.S. 51, 105 S.Ct. 1065, 84 L.Ed.2d 38 (1985).

PER SE RULE BECOMES PRESUMPTIVE

The Supreme Court has abandoned any *per se* rule that requesting an attorney automatically terminates further interrogation by holding that the failure to carry out the obligation of *Miranda* only presumptively violates the Fifth Amendment. *Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d (1985). As a result, derivative evidence obtained by exploitation of a *Miranda* violation is not *per se* tainted. *U.S. v. Cherry*, 794 F.2d 201, 207 (5th Cir. 1985) [the standard for determining whether "derivative evidence" is rendered inadmissible is the "due process voluntariness" standard. However, the burden of showing a waiver of the Fifth Amendment right to Counsel during interrogation remains on the prosecution].

EVEN VOLUNTEERED STATEMENTS HAVE BEEN EXCLUDED

Even where a formally charged defendant "initiated conversation with the officers in an attempt to make what he called a 'deal'", the Courts have held "that the *Massiah* rule ...applies to exclude post- indictment incriminating statements of an accused to Government agents in the absence of counsel even when not deliberately elicited by interrogation or induced by misapprehension engendered by trickery or deception" and even where "it is clear [the] statements ...were volunteered." *Hancock v. White*, 378 F.2d 479, 482 (1st Cir. 1967).

CANNOT OBTAIN WAIVER FROM ACCUSED "UNDER THE INFLUENCE"

At least one court has held that a valid waiver cannot be obtained from an accused who is "under the influence" of narcotics, and consequently, any statement obtained thereafter would be tainted. *U.S. v. Woolbright*, 641 F. Supp. 1570 (E.D. Mo. 1986).

WAIVER BY MENTALLY RETARDED ACCUSED MUST BE MADE KNOWINGLY AND INTELLIGENTLY

A waiver of *Miranda* rights by an accused who is mentally retarded must be made knowingly and intelligently just like a waiver by any other citizen. *Smith v. Zant*, 855 F.2d 712 (11th Cir. 1988)[defendant had poor reading and verbal comprehension, had been hiding in the woods for twenty-four hours prior to the questioning, and was questioned by a police officer who had known him all his life]. See also *Miller v. Dugger*, 838 F.2d 1530 (11th Cir.), cert. denied, 486 U.S. 1061 (1988) [mental illness is a factor that must be considered when deciding whether a waiver was intelligent; this is separate from the *Connelly* question of official coercion].

SNITCHING CELLMATE

When police ask paid informant to relate statements made by a formally charged defendant incarcerated in the same cell, same violates that defendant's constitutionally guaranteed right to counsel, just as if the inmate "agent" were a police officer himself. *U.S. v. Henry*, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1972) [paid informant]; *Milton v. Wainwright*, 407 U.S. 371, 92 S.Ct. 2174, 33 L.Ed.2d 1 (1970) [officer posing as cellmate]; *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981) [same result on both 5th and 6th amendment

grounds with respect to psychiatrist's examination for competency, where he is called at later stage to testify as to the defendant's "dangerousness" in death penalty case]; *Holyfield v. State*, 711 P.2d 834 (Nev. 1985) [questioning by officially-planted cellmate was functional equivalent of official questioning]; *U.S. v. Sampol*, 636 F.2d 621 (D.C. Cir. 1980) [cell-mate/informant whose sentence depended solely upon giving information to the prosecutor was described as "information at large" and his testimony was excluded].

But see Illinois v. Perkins, 496 U.S. 292 (1990) ("Where the suspect does not know that he is speaking to a government agent, there is no reason to assume the possibility of coercion." Thus the *Miranda* requirements are not triggered) (citing *Massiah v. United States*, 377 U.S. 201 (1964)). *Thomas v. Cox*, 708 F.2d 132 (4th Cir. 1983) [*Henry* rationale not applicable where the informant acted not as "agent of state" but was either "motivated by conscience" or "curiosity" without prior arrangement with the police or prosecution]; *U.S. v. Taylor*, 800 F.2d 1012 (10th Cir. 1986) [where government made neither promises to, nor entered into agreements with, informer and consequently any statements made to informer were admissible]; *Dufour v. State*, 495 So.2d 154 (Fla. 1986) [where informer volunteered the incriminating statements, no agency relationship existed with the government and his statements were held admissible]; *U.S. v. Hicks*, 798 F.2d 446 (11th Cir. 1986) [where informer was not "employed" to obtain incriminating statements from the accused, his statements were admissible].

RESURRECTION AND SUBSEQUENT CHANGES TO McNABB/MALLORY RULE

FED. R. CRIM. P. Rule 5(a) required that a federal officer "making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate" and "a complaint shall be filed forthwith which shall comply with the requirements of Rule 4(a) ...with respect to the showing of probable cause" thereby incorporating the arrest warrant requirements of FED. R. CRIM. P. 4(a) and most states have analogous statutory provisions, e.g., TEX. CODE CRIM. P. Art. 14.06. Thus, the Supreme Court has exercised its "supervisory power," to exclude confessions and other evidence obtained from an accused during a period of "unnecessary delay" in bringing him before a magistrate. *McNabb v. U.S.*, 318 U.S. 332, 43 S.Ct. 608, 87 L.Ed. 819 (1943), *superseded by statute as stated in Corley v. U.S.*, 556 U.S. 303 (2009); *Mallory v. U.S.*, 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479 (1957), *superseded by statute as stated in Corley v. U.S.*, 556 U.S. 303 (2009).

Then in 2009, the Court held that 18 U.S.C. § 3501 "modified *McNabb–Mallory* without supplanting it. Under the rule as revised by § 3501(c), a district court with a suppression claim must find whether the defendant confessed within six hours of arrest (unless a longer delay was "reasonable considering the means of transportation and the distance to be traveled to the nearest available [magistrate judge]"). If the confession came within that period, it is admissible, subject to the other Rules of Evidence, so long as it was "made voluntarily and ... the weight to be given [it] is left to the jury." *Ibid.* If the confession occurred before presentment and beyond six hours, however, the court must decide whether delaying that long was unreasonable or unnecessary under the *McNabb–Mallory* cases, and if it was, the confession is to be suppressed." *Corley v. U.S.*, 556 U.S. 303, 322 (2009).

D. REMEDY FOR FIFTH AMENDMENT VIOLATION OF ILLEGALLY OBTAINED CONFESSION IS MOTION TO SUPPRESS AND HEARING:

A Motion to Suppress is also the proper remedy where evidence has been obtained in violation of the Fifth Amendment (e.g., a confession which was illegally obtained or other evidence obtained as a result of that illegally obtained confession). *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880 (1981); *Oregon v. Bradshaw*, 462 U.S. 1039, 103 S.Ct. 2830 (1983); *Smith v. Katzenbach*, 351 F.2d 810 (D.C. Cir. 1965); *Grant v. U.S.*, 282 F.2d 165 (2d Cir. 1960).

However, an accused corporation and/or the individual who is custodian of the corporate records cannot assert a Fifth Amendment privilege and thereby escape authenticating the records by the act of production or personal incrimination. *Braswell v. U.S.*, 487 U.S. 99, 101 L.Ed.2d 98, 108 S.Ct. 2284 (1988).

"We note further that recognizing a Fifth Amendment privilege on behalf of the records custodians of collective entities would have a detrimental impact on the Government's efforts to prosecute "white-collar crime", one of the most serious problems confronting law enforcement authorities. 'The greater portion of evidence of wrongdoing by an organization or its representatives is usually found in the official records and documents of that organization. Were the cloak of the privilege to be thrown around these impersonal records and documents, effective enforcement of many federal and state laws would be impossible.' If custodians could assert a privilege, authorities would be stymied not only in their enforcement efforts against those individuals but also in their prosecutions of organizations. ...[T]he Court observed: 'In view of the inescapable fact that an artificial entity can only act to produce its records through its individual officers or agents, recognition of the individual's claim of privilege with respect to the financial records of the organization would substantially undermine the unchallenged rule that the organization itself is not entitled to claim any Fifth Amendment privilege, and largely frustrate legitimate governmental regulation of such organizations.'" *Braswell*, 487 U.S. 99, 101 L.Ed.2d 98, 108 S.Ct. 2284 (1988) [citations and footnotes omitted].

E. "IMPEACHMENT" USE OF ILLEGALLY OBTAINED EVIDENCE

Although the Federal "Exclusionary Rule" prevents the admission of illegally obtained evidence in the case in chief, it does not preclude the use of such "tainted" evidence for impeachment purposes where the accused testifies in his own behalf. *Harris v. New York*, 401 U.S. 222 (1971) [confession obtained in violation of *Miranda*, admissible on cross-examination to impeach accused]; *Mincey v. Arizona*, 437 U.S. 385 (1978) [involuntary statements cannot be used even for impeachment purposes]; *U.S. v. Havens*, 446 U.S. 620 (1980) [evidence obtained as result of illegal search may be used to impeach statement elicited on cross-examination of accused who testified in his own behalf]. However, the Supreme Court has held that evidence illegally obtained from the accused may not be used to impeach *other* defense witnesses. *James v. Illinois*, 493 US 307, 107 L.Ed.2d 676, 110 S.Ct. 648 (1990).

"The [Illinois Supreme] Court reasoned that, in order to deter the defendant from engaging in perjury 'by proxy', the impeachment exception to the exclusionary rule ought to be expanded to allow the State to introduce illegally obtained evidence to impeach the testimony of defense witnesses other than the defendant himself...

'There is no gainsaying that arriving at the truth is a fundamental goal of our legal system.' But various constitutional rules limit the means by which government may conduct this search for truth in order to promote other values embraced by the Framers and cherished throughout our Nation's history. 'Ever since its inception, the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principal made of discouraging lawless police conduct...[W]ithout it the constitutional guarantee against unreasonable searches and seizure would be a mere 'form of words.'" The occasional suppression of illegally obtained yet probative evidence has long been considered a necessary cost of preserving overriding constitutional values: '[T]here is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all.

"Expanding the class of impeachable witnesses from the defendant alone to all defense witnesses would create different incentives affecting the behavior of both defendants and law enforcement officers... More significantly, expanding the impeachment exception to encompass the testimony of all defense witnesses likely would chill some defendants from presenting their best defense -- and sometimes any

defense at all... inadmissibility of illegally obtained evidence must remain the rule, not the exception." *James v. Illinois*, 493 U.S. 307, 107 L.Ed.2d 676, 110 S.Ct. 648 (1990)[citations omitted].

X. ELECTRONIC SURVEILLANCE:

The Motion to Suppress is also appropriate for pre-trial suppression of evidence obtained as a result of illegally intercepted electronic or oral communications. 18 U.S.C. § 2515, 2518(10)(a) [setting out procedure for suppression of illegal electronic or oral communication]; *Gelbard v. U.S.*, 408 U.S. 41, 92 S.Ct. 2357, 33 L.Ed.2d 179 (1972) [§ 2515 applicable to Grand Jury witnesses]; *U.S. v. Simpson*, 813 F.2d 1462 (9th Cir. 1987) [necessity for wiretap must be shown by proof that traditional investigatory procedures will not work and have not worked]; *In re Grand Jury 11-84*, 799 F.2d 1321 (9th Cir. 1986) [DEA Agent failed to adequately explain execution of wiretap by foreign authorities without involvement or suggestion of United States agents]; *U.S. v. Massino*, 652 F. Supp. 244 (S.D. N.Y. 1986) [court orders suppression hearing to determine whether federal officer who failed to mention previous applications was aware of surveillance by local authorities].

Texas' wire tap statute is codified as TEX. R. CRIM. P. Art. 18.20, which resembles the Federal Statute, 18 U.S.C. § 2510. The Texas statute applies only to "...evidence of the commission of a felony" under the State's drug laws [TEX. R. CRIM. P. Art. 18.20(4)], may be authorized only by a single, appointed district judge in each judicial district, and can be sought and administered only by D.P.S. (TEX. R. CRIM. P. Art. 18.20(5)). Compare Title III of the Omnibus Crime Control Act, which under § 2616, the U.S. Attorney General or a designated Assistant U.S. Attorney General may petition any federal judge for an order permitting a federal agency to intercept wire or oral communications.

FORM OVER SUBSTANCE

While the citizen's expectation of privacy may not have fared so well over all, in *U.S. v. Ojeda Rios*, 495 U.S. 257, 109 L.Ed.2d 224, 110 S.Ct. 1845 (1990), the Court held that a failure to comply with the sealing requirements of 18 U.S.C. § 2518 will warrant suppression of taped communications if the explanation for the failure to timely seal the tapes does not satisfactorily address why the delay occurred and why it excusable.

Compare *U.S. v. Karo*, 468 U.S. 705, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984), and *U.S. v. Butts*, 729 F.2d 1514 (5th Cir. 1983) [installation and monitoring of transponder from within a zone of privacy].

The Second Circuit has held that when the government wants to use unsuppressed material obtained from electronic surveillance in a publicly filed memo or brief in a criminal case, it must give the defendant notice and the opportunity to object. *U.S. v. Gerena*, 869 F.2d 82 (2d Cir. 1989) [if the court finds that privacy or fair trial interests cannot be otherwise protected and the interests outweigh public's First Amendment right of access, court should order redaction or sealing of the Title III material].

PEN REGISTER

Installation and use of a "pen register" by telephone company at police request does not constitute a "search" within Fourth Amendment under federal law. *Smith v. Maryland*, 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979). But it does under the law of various states, including Texas. *Richardson v. State*, 865 S.W.2d 944 (Tex.Crim.App. 1993)[pen register may be a search for purposes of Texas Constitution.]; *People v. Sporleder*, 666 P.2d 135 (Colo. 1983) [the government may not install a pen register without procurement of a search warrant based on probable cause, defendant's privacy expectation in telephone numbers dialed on a home telephone qualifies for constitutional protection under the state constitutional proscription of unreasonable searches and seizures].

OTHER ELECTRONIC COMMUNICATIONS

18 U.S.C. § 2510 includes cordless telephones (radio transmission between a handset and a base unit) and cellular telephones (a mobile telephone switching office transmits communications). The amendments expand the definition of "electronic communications" to include digitalized transmissions and electronic mail. Thus, typically law enforcement agents must obtain a court order to eavesdrop on communications of data and radio transmissions. 18 U.S.C. § 2510(12).

But see Edwards v. State Farm Ins. Co. 833 F.2d 535, 540 n. 9 (5th Cir. 1987) [the amendments do not apply to pending cases]; *U.S. v. Kim*, 803 F.Supp 352 (D.C. Hawaii) [court suppressed evidence obtained by turning on a cellular phone seized in a civil forfeiture action]; *U.S. v. Smith*, 978 F.2d 171 (5th Cir. 1992)[a defendant must assert an expectation of privacy when using a cordless extension and the signals between the handset and base unit are intercepted].

BURDEN OF PROOF

The initial burden of going forward to establish the illegality of the search or arrest is on the moving party. *U.S. v. De La Fuente*, 548 F.2d 528, 533 (5th Cir. 1977); *Chin Kay v. U.S.*, 311 F.2d 317 (9th Cir. 1962); *Chappell v. U.S.*, 342 F.2d 935 (D.C. Cir. 1965); *Wilson v. U.S.*, 218 F.2d 754 (10th Cir. 1955). However, where it is established that the search was made without a warrant, the burden shifts to the prosecution to produce "clear and convincing evidence" that the warrantless search meets constitutional requirements. *U.S. v. Buchannon*, 388 F.2d 961 (7th Cir. 1968); *Williams v. State*, 382 F.2d 48 (5th Cir. 1967); *Carlo v. U.S.*, 286 F.2d 841 (2d Cir. 1961); *Wrightson v. U.S.*, 222 F.2d 556 (2d Cir. 1955); *U.S. v. Jeffers*, 342 U.S. 48, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1951).

ELECTRONIC TRACKING DEVICES ("BEEPERS")

In applying the Fourth Amendment to cases involving the use of electronic tracking devices or "beepers" by law enforcement agents engaged in covert surveillance Courts have distinguished the beeper's *installation* from its monitoring. Thus, although the majority of published decisions address both installation and monitoring, the case law, which has emerged, does not resolve both issues identically.

Recently the Supreme Court in *United States v. Jones*, 132 S. Ct. 945 (2012), which reviewed the constitutionality of warrantless GPS tracking, may be one of the most important Fourth Amendment opinions since *Katz*. In an opinion authored by Scalia, the Court held that the installation of a GPS tracking device on Jones' vehicle, without a warrant, constituted an unlawful search under the Fourth Amendment. The Court rejected the government's argument that there is no reasonable expectation of privacy in a person's movement on public thoroughfares and emphasized that the Fourth Amendment provided some protection for trespass onto personal property.

Justice Sonia Sotomayor wrote a concurring opinion, agreeing that the government had obtained information by usurping Jones' property and by invading his privacy. However, she further reasoned that the Fourth Amendment was not only concerned with trespasses onto property. She stated that a Fourth Amendment search occurs whenever the government violates a subjective expectation of privacy that society recognizes as reasonable, which is particularly important in an era where physical intrusion is unnecessary to many forms of surveillance.

Justice Samuel Alito concurred in the judgment but criticized the framing of the question in terms of trespass to property. He believed that such a construction of the problem strained the language of the Fourth Amendment and that it would be better to analyze the case by determining whether the Government violated Jones' reasonable expectations of privacy.

The Court stopped after ruling that GPS tracking was a Fourth Amendment search. It said nothing about what conditions would make such a search constitutional under the Fourth Amendment nor did it set forth a presumptive warrant requirement for such GPS searches. Thus, substantial uncertainty continues to exist as to the conditions under which GPS searches are constitutional.

In March of 2013, the First Circuit examined a case in which FBI agents attached a GPS tracking device to the vehicle of a bank robbing suspect. *U.S. v. Sparks*, 711 F.3d 58 (1st Cir. 2013). Although the ruling in *Jones* controls the case, the First Circuit concluded that the good-faith exception "applied in cases like this one (or *Davis* itself), where new developments in the law have upended the settled rules on which the police relied." *Id.* at 68. The court noted that the officer's actions had been guided by binding precedent in that circuit. *Id.* at 67.

INSTALLATION: EXTERIOR OF VEHICLE

Historically, there was a tendency to the liberal use of transponders and GPS tracking devices with little regard to whether such measures required a warrant or probable cause. *U.S. v. Flynn*, 664 F.2d 1296 (5th Cir. 1982); *U.S. v. Michael*, 645 F.2d 252 (5th Cir. 1981) [en banc][deciding the question originally left open in *U.S. v. Holmes*, 537 F.2d 227, 228 (5th Cir. 1976) [whether a warrant is required for the attachment of an electronic tracking device to the "exterior" of an automobile in the negative]. *U.S. v. Garcia*, 474 F.3d 994, 80 CrL 491 (7th Cir. 2007); *U.S. v. Hernandez*, 647 F.3d 216 (5th Cir. 2011). More recently, the Supreme Court has decided that affixing a GPS device to a vehicle and tracking its movements on public streets constitutes a search within the meaning of the Fourth Amendment, and thus requires a warrant predicated on probable cause. *United States v. Jones*, 565 U.S. 400 (2012).

INSTALLATION: INTERIOR OF VEHICLE.

However, Courts have uniformly held that entry into the "interior" of the vehicle to install the "beeper" constitutes a search, since it involves an intrusion into an area where there is a "reasonable expectation of privacy". *U.S. v. Butts*, 729 F.2d 1514 (5th Cir. 1984) (en banc); *U.S. v. Cady*, 651 F.2d 290 (5th Cir. 1981); *U.S. v. Pretzinger*, 542 F.2d 517, 520 (9th Cir. 1976) ["no warrant is needed ...unless fourth amendment rights necessarily would have to be violated in order to initially install the device."]; *U.S. v. Tussell*, 441 F. Supp. 1092 (D. Pa. 1977); *U.S. v. Rowland*, 448 F. Supp. 22, 24 (N.D. Tex. 1977); *U.S. v. Cofer*, 444 F. Supp. 146 (W.D. Tex. 1978).

"Since the law enforcement officers had to open a locked door on the airplane cabin to enter and install the beeper there can be no question but that the installation constituted a search for which a warrant issued on the basis of probable cause was a prerequisite." *U.S. v. Cofer*, 444 F. Supp. at 149.

A warrant to install electronic transponder or aircraft does not authorize covert breaking and entry of premises where the aircraft is located. *U.S. v. Rowland*, 448 F. Supp. 22 (N.D. Tex. 1977) [a search warrant which allowed placing of electronic tracking device in airplane did not implicitly permit covert breaking and entering of premises in which the airplane was located so that agents could place the device in the airplane, where the agents could have informed the magistrate that entry into the hanger might have been necessary. Motion to Suppress granted].

INTERIOR OF PARCEL

People v. Salih, 219 Cal.Rptr. 603, 173 Cal.App.3d 1028 (Cal.Ct.App.1st Dist. 1985) [once a postal inspector learned that a mail parcel lawfully opened by customs officials contained heroin, he could insert an electronic beeper into the package].

MONITORING: SIGNAL EMITTED FROM INSIDE A "ZONE OF PRIVACY" AND REVEALS FACTS OTHERWISE NOT LEGALLY OBTAINABLE WITHOUT A WARRANT.

The Supreme Court has held that the monitoring of a beeper in a private dwelling, a location not open to visual surveillance, violates the rights of individuals having a valid right of privacy in the premises because the monitoring revealed facts that the government could not have otherwise obtained legally without a warrant. *U.S. v. Karo*, 468 U.S. 705, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984). Courts have routinely permitted such installation when government agents have lawful access to the object to which the device is attached. *U.S. v. Brock*, 667 F.2d 1311, 1319 (9th Cir. 1982), *cert. denied*, 460 U.S. 1022 (1983) [beeper legally installed in chemical canister while canister lawfully in government possession]. Even where a warrantless installation is lawful, a Fourth Amendment violation may occur when the monitored items are taken inside the defendant's home. *U.S. v. Cassity*, 631 F.2d 461, 464-65 (6th Cir. 1980) [installation of beepers lawful because items in rightful possession of government; remanded to determine whether expectation of privacy violated when, without warrant, government monitored items taken into defendant's home]; *U.S. v. Bailey*, 628 F.2d 938, 943-44 (6th Cir. 1980) [installation of beepers lawful while items in rightful possession of government; monitoring of beepers unlawful once items moved into private areas shielded from public view where defendants had legitimate expectation of privacy].

In *U.S. v. Michael*, 645 F.2d 252 (5th Cir. 1981) (en banc), *cert. denied*, 454 U.S. 950 (1981), the Fifth Circuit held that a reasonable suspicion of criminal activity, based on specific and articulable facts together with the rational influences that develop from those facts, suffices to support warrantless installation of a beeper. *U.S. v. Michael*, 645 F.2d at 645. Balancing the privacy interests of the defendant and the intrusiveness of the beeper installation against the government's interest in eliminating illegal drug manufacturing, the court concluded that the warrantless installation did not violate the Fourth Amendment. *U.S. v. Michael*, 645 F.2d at 258-59. *See also U.S. v. Kupper*, 693 F.2d 1129 (5th Cir. 1982); *U.S. v. Parks*, 684 F.2d 1078 (5th Cir. 1982); *U.S. v. Bailey*, 628 F.2d 938, 944 (6th Cir. 1980); *U.S. v. Moore*, 562 F.2d 106, 113 (1st Cir. 1977), *abrogation recognized by U.S. v. Sparks*, 711 F.3d 58 (1st Cir. 2013).

MONITORING: SIGNAL EMITTED FROM INSIDE A "ZONE OF PRIVACY" BUT REVEALS ONLY FACTS WHICH CAN BE LEGALLY OBTAINED WITHOUT A WARRANT

No warrant is required where monitoring of a "beeper" reveals only facts which can be legally obtained without a warrant, such as observing an conveyance's public movements, even where the signal itself is entitled from within a "zone of privacy". *U.S. v. Knotts*, 460 U.S. 276, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983) [signal emitted from within/inside the trunk of automobile but only revealed vehicles movement over public roads]; *U.S. v. Butts*, 729 F.2d 1514 (5th Cir. 1984) [en banc] [signal emitted from within/inside the aircraft but only revealed aircraft's movements through public airways].

But see State v. Kelly, 708 P.2d 820 (Hawaii 1985) [law enforcement agents who learned from customs agents that a photo album en route through the mail from Peru contained cocaine acted unlawfully by detaining the album for 10 days and installing an electronic tracking device inside it before making a controlled delivery to the addressee. Unlike the objects upon which beepers were installed in *U.S. v. Knotts* and *U.S. v. Karo*, the album was an object in which the addressee had a reasonable privacy interest even while it was in transit].

In *U.S. v. Knotts*, the Supreme Court held:

"The government surveillance conducted by means of the beeper in this case amounted principally to the following of an automobile on public streets and highways.... A person traveling in an automobile on public thoroughfare has no reasonable expectation of privacy in his movements from one place to another.... Nothing in the Fourth Amendment prohibited the police from augmenting the sensor faculties

bestowed upon them at birth with such enhancement as science and technology afforded them in this case." *U.S. v. Knotts*, 460 U.S. at 281-82.

As to the Eighth Circuit's concern that the warrantless electronic surveillance had "push[ed] fortuitously and unreasonably into the private spheres [the private cabin] protected by the Fourth Amendment," *see U.S. v. Knotts*, 662 F.2d 1981 (8th Cir. 1981), the Supreme Court noted "there is no indication that the beeper was used in any way to reveal information" from "within the cabin."

"As we have noted, nothing in this record indicates that the beeper signal was received or relied upon after it had indicated that the drum containing the chloroform had ended its automotive journey at rest on respondent's premises in rural Wisconsin." *U.S. v. Knotts*, 460 U.S. at 284-85.

The concurring opinion elaborates:

"...*Katz v. United States*, 389 U.S. 347 (1967), made quite clear that the Fourth Amendment protects against governmental invasions of a person's reasonable 'expectation[s] of privacy', even when those invasions are not accompanied by physical intrusions. Cases such as *Silverman v. United States*, 365 U.S. 505, 509-12 (1961) illustrate that the interior of a home is indeed within a person's reasonable expectation of privacy. When the government does engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment even if the same information could have been obtained by other means. I do not believe that *Katz*, or its progeny, have eroded that principle. *Cf. The Supreme Court, 1979 Term*, 94 HARV. L. REV. 75, 203-04 (1980)." *U.S. v. Knotts*, 460 U.S. at 286.

It is worth noting that a panel of the Fifth Circuit has held that where an electronic transmitting device had been secreted within an area in which defendant had a reasonable expectation of privacy, any monitoring from such a "zone of privacy" requires a warrant. *U.S. v. Butts*, 710 F.2d 1139, 1149 (5th Cir. 1983).

"The passenger compartment or cabin of a vehicle is an enclosed, self-contained area somewhat sheltered from public view and unexposed to public contact. Given these qualities, it seems self-evident that the interior of a vehicle outranks its rear bumper in its location on the privacy scale. A yacht, an ocean liner, a mobile home, a camper, and Air Force One are all vehicles, yet surely their interiors are cloaked by privacy's veil. Thus, we believe the interior installation of a tracking device implicates privacy interests more significantly than those considered in *Michael*." *U.S. v. Butts*, 710 F.2d at 1149.

See also U.S. v. Brock, 667 F.2d 1311, 1319 (9th Cir. 1982), *cert. denied*, 460 U.S. 1022 (1983) [monitoring of beeper lawfully installed in car traveling on public roads not search for Fourth Amendment purposes]; *U.S. v. Michael*, 645 F.2d 252, 257-58 (5th Cir.) [en banc], *cert. denied*, 454 U.S. 950 (1981) [monitoring of lawfully installed beeper on vehicle traveling on public roads lawful because legitimate expectation of privacy substantially reduced by exposure of car to public view]; *U.S. v. Cotton*, 770 F.2d 940 (11th Cir. 1985) [tracking on radar provides an independent source for plane's location and will therefore excuse illegal search through independent source doctrine].

DURATION OF TRACKING

Beeper warrants should specify a date or time limit upon the duration of the intrusive authority to monitor and maintain surveillance, but the lack of any such termination date will not render such warrant invalid. *U.S. v. Butts*, 710 F.2d 1139 (5th Cir. 1983) [en banc]; *See also U.S. v. Maynard*, 615 F.3d 544 (DC Cir. 2010), *aff'd sub nom. U.S. v. Jones*, 132 S. Ct. 945 (2012). *But see U.S. v. Cofer*, 444 F. Supp. 146 (W.D. Tex. 1978) [the court imposed a "30 day" limitation period].

"The Government seems to contend that the beeper is so much less intrusive than telephone wire tapping that there is no need for the warrant to specify a termination date for the surveillance. While the intrusiveness may be less than that of wiretapping the court cannot countenance the potentially unlimited duration of this type of surveillance. Citizens have a right to think that the government will not track them for months on end by resort to the latest electronic gadgetry." *U.S. v. Cofer*, 444 F. Supp. at 149.

See also U.S. v. Cady, 651 F.2d 290 (5th Cir. 1981) [duration determined by the actual period of monitored surveillance, not the maximum period allowed under the terms of the warrant]; *U.S. v. Long*, 674 F.2d 848 (11th Cir. 1982).

Cf. Berger v. New York, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040(1967)[holding electronic surveillance without limit violates Fourth Amendment]; *U.S. v. Lamonge*, 458 F.2d 197 (6th Cir. 1972) [wiretap case]; *U.S. v. Holmes*, 521 F.2d 859, 864-66 (5th Cir. 1976) [panel opinion] [no distinction between "beepers" and electronic wiretaps, emphasizing the unlimited duration of the authorization in that case].

STANDING TO CONTEST INSTALLATION

To contest the installation of an electronic surveillance device, the defendant must show a legitimate expectation of privacy in the place the device is to be installed. In *U.S. v. Braithwaite*, 709 F.2d 1450, 1454 (11th Cir. 1983), the court held that when the defendant had no legitimate expectation of privacy in a chemical drum to which a beeper had been attached or in a garage in which the drum had been stored, the defendant lacked standing to assert a Fourth Amendment violation. *U.S. v. Braithwaite*, 709 F.2d at 1454. In *Amnesty International v. Clapper*, 667 F.3d 163 (2nd Cir. 2011), the Obama administration's contention that various groups lacked standing to contest eavesdropping because they failed to show they were the subject of such activity or suffered hardships because of it was rejected for the second time.

USE OF ILLEGALLY OBTAINED EVIDENCE IN SUPPORT OF WIRETAP APPLICATION

The Supreme Court has held that with respect to electronic eavesdropping "Congress ...may extend the exclusionary rule and provide that illegally seized evidence is inadmissible against anyone for any purpose". *Alderman v. U.S.*, 394 U.S. 165, 175, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969). Congress has enacted just such a statutory grant of "standing" to courts and federal wiretaps. Specifically, Title III of the Omnibus Crime Control Act expressly grants standing to any "person who was a party to any intercepted wire or oral communication." 18 U.S.C. § 2510(11). Additionally, the statute expressly provides that such an "aggrieved person ...may move to suppress the contents of any wire or oral communication intercepted ...or evidence derived therefrom" on the grounds that the communication was unlawfully intercepted, the order of authorization was insufficient, or the interception was not made in conformity with the order of authorization. 18 U.S.C. § 2518(10)(a). Obviously, Congress intended to confer upon those individuals whose conversations were vicariously intercepted via wiretap, the same right to challenge the legality of that intrusion as the party whose telephones or conversations the wiretap was directed.

Likewise, the Title III statutory exclusionary rule applicable to wiretaps is in many other respects broader than the judicial exclusionary remedy designed to vindicate traditional Fourth Amendment violations. *See U.S. v. Dorfman*, 690 F.2d 1217, 1227-29 (7th Cir. 1982). For example, while the Fourth Amendment exclusionary rule has been held to apply to criminal trials, § 2515 expressly applies the wiretap's exclusionary rule to any proceeding, civil or criminal. While the Fourth Amendment exclusionary rule does not apply to grand juries. *U.S. v. Calandra*, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974).

Title III's suppression remedy applies even to a grand jury witness. *See* 18 U.S.C. § 2515; 18 U.S.C. § 3504; *Gelbard v. U.S.*, 408 U.S. 41, 92 S.Ct. 2357, 33 L.Ed.2d 179 (1972).

Similarly, § 2510(11) provides statutory standing to those whose conversations have been overheard even though it was not their telephone equipment or premises that were the target of the intrusion.

"For example, Congress clearly intended that the provisions of section 2518(10)(a), which defines the class entitled to make a motion to suppress, rather than judicially-developed notions of "standing", would control the question of who could bring such a motion." *U.S. v. Vest*, 813 F.2d 477, 482 (1st Cir. 1987).

Thus, in *U.S. v. Baker*, 589 F.2d 1008, 1012 n.6 (9th Cir. 1979), the Ninth Circuit held under similar circumstances, that where a defendant's conversations are intercepted by an otherwise valid wiretap (the probable cause for which was established through prior illegal wiretaps of others) the defendant has standing to complain, even though his conversations had not been intercepted by the prior illegal intrusions.

"Where a particular wiretap otherwise valid constitutes the 'fruits of an illegal wiretap', a particular defendant who could claim no flaws in the tap of his own telephone may have standing to question the validity of other tapes by reason of a failure in the foundational affidavit to set forth facts adequately showing for all of the wiretaps that traditional investigative techniques had been attempted, had failed or were unlikely to succeed." *U.S. v. Baker*, 589 F.2d 1008, 1012 n.6 (9th Cir. 1979).

Again, in *U.S. v. Marcello*, 508 F. Supp. 586 (E.D. La. 1981), *aff'd on other grounds*, and *U.S. v. Roemer*, 703 F.2d 805 (5th Cir.), *cert. denied*, 464 U.S. 935 (1983), the District Court held that defendants such as those before the Court have standing to complain about the use of illegally obtained evidence in establishing probable cause to eavesdrop upon conversations to which they were privy, even though they may not have been a party directly "aggrieved" by the initial illegality.

"The government has challenged the standing of defendants Marinello, Roemer, and Young to attack the early wiretap orders on grounds that as to these orders they are not 'aggrieved persons' within the meaning of 18 U.S.C. § 2518(10)(a) and *Alderman v. United States*, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969). I agree, however, with defendants' contention that each subsequent wiretap order issued in the long series of orders in this case built upon previously issued orders to establish probable cause. It is clear that all defendants eventually became 'aggrieved persons' at one point or another in the series of wiretap orders. Since the early wiretap orders formed the linchpin upon which all later findings of probable cause and the wiretap orders were based, I conclude that all defendants have standing to raise these challenges to the wiretap orders. Therefore, I have allowed counsel for all defendants to present their arguments on these motions." *U.S. v. Marcello*, 508 F. Supp. 586 at n.6.

Contra U.S. v. Fury, 554 F.2d 522, 526 (2d Cir. 1977); *U.S. v. Lanese*, 385 F. Supp. 525, 527 (N.D. Ohio 1974).

DEFENDANT AS EAVESDROPPER

When the defendant is the one who illegally intercepts and records a telephone conversation, the recording will be admissible against him regardless of the language in the Wiretap Act suggesting that same is inadmissible. *U.S. v. Underhill*, 813 F.2d 105 (6th Cir. 1987) [defendant making recordings in furtherance of illegal gambling activities; court refuses to read statute literally with absurd results].

XI. PERSONS ON PROBATION:

PROBATIONER'S FOURTH AMENDMENT RIGHTS

An individual's status as a probationer or parolee does not diminish his entitlement to Fourth Amendment protection from searches conducted by police in the course of general criminal investigations, particularly with respect to the admissibility of the fruits a criminal prosecution thereon, rather than at the probation or parole revocation proceedings.

"[i]t seems reasonable that (a parolee's relations with the police in general, and their powers over him, need be no different than those of the ordinary citizen." *U.S. v. Scott*, 678 F.2d 32, 34 (5th Cir. 1982).

May v. State, 582 S.W.2d 848, 852 (Tex.Crim.App. 1979); *U.S. v. Bradley*, 571 F.2d 787 (4th Cir. 1978).

But when the probationer is suspected of not complying with the terms of his probation, his Fourth Amendment protections are diminished. *Griffin v. Wisconsin*, 483 U.S. 868, 107 S.Ct. 3164, 97 LEd.2d 709 (1987) [search of probationer's residence by probation officer, accompanied by police officer who suspected probationer possessed firearm was permissible under a state statute that permitted searches of probationer's dwelling without consent, because of the "special needs" that arise out of the probationer/probation officer relationship].

One court has held that an escapee has no more right to privacy while on the lam than he would in his cell. *U.S. v. Roy*, 734 F.2d 108 (2d Cir. 1984).

PROBATIONERS FIFTH AMENDMENT RIGHTS

A probationer whose terms and conditions of probation require that he or she be truthful with their probation officer, must nevertheless assert their Fifth Amendment privilege as to questions regarding criminal offenses. And since the Fifth Amendment is not "self-executing" any statement made in response to a probation officer's questions may be used against the probationer in a criminal proceeding. *Minnesota v. Murphy*, 465 U.S. 420, 104 S.Ct. 1136, 79 LEd.2d 409 (1984) [probation office visit was not "custodial interrogation" and probationer was not threatened with revocation for not answering. If he was so threatened then statement could not be used where answers could incriminate him in a separate criminal proceeding].