Defender Guide to Search & Seizure in Michigan

2019

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PREFACE

The 2019 edition of the Defender Guide to Search and Seizure in Michigan covers Michigan state court practice in the area of search and seizure. It is a complement to the Defender Plea, Sentencing and Post-Conviction Book, Defender Trial Book, Defender Motions Book, Defender Habeas Book, Defender Guide to the Michigan Sentencing Guidelines and Defender Evidence Manual Annotated, which cover issues related to the trial and appeal of a state criminal case.

Format. Case summaries and the text of relevant evidence rules are provided. Within each section, cases are arranged by importance and content, rather than date of decision.

Date Coverage. The Defender Guide to Search and Seizure in Michigan contains material updated through July 2019.

Updates and Internet Coverage. The printed edition is published annually. Updated material is available at SADO's web site, www.sado.org. New appellate decisions are summarized there as they are released throughout the year.

Unpublished Decisions. Selected unpublished Court of Appeals opinions are reported in this edition. While not binding as precedent, unpublished opinions may be cited consistent with MCR 7.215(C). The unpublished opinions appearing in this book are available on the Court of Appeals web site (opinions after July, 1996) at: http://courts.mi.gov/opinions_orders/opinions_orders/Pages/default.aspx. For opinions before that date, a collection of selected opinions is maintained by the CDRC at www.sado.org; in addition, earlier unpublished opinions are available from Michigan Lawyers Weekly, 1-800-678-5297.

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WAS THERE A SEARCH?

Chapter 1: SEARCH - OVERVIEW

The following inquiries and order of inquiry are recommended when analyzing a search issue:

Was there a search?

Was state action involved in the search?

A search for purposes of the Fourth Amendment requires state (governmental) action. A search by a private citizen who is not acting as an agent of the state is not subject to Fourth Amendment protections. Search – State Action, Chapter 2.

Did the person searched have a reasonable expectation of privacy in the area searched? OR …

There is a search for Fourth Amendment purposes if a person had an expectation of privacy in the area searched that society is willing to accept as reasonable. Search – Reasonable Expectation of Privacy, Chapter 3.

Did the government trespass on a constitutionally protected property interest for the purpose of finding something or gathering information?

The property rights theory of a government intrusion has been revived in recent opinions of the United States Supreme Court and, hence, in Michigan. It is important to consider both theories of intrusion (privacy, property) when determining whether there has been a governmental intrusion amounting to a search under the Fourth Amendment. Search – Constitutionally Protected Property Interest, Chapter 4.

Does a defendant have standing to challenge the search?

A defendant has standing if either of the two theories of government intrusion apply (privacy, property). A defendant does not have standing to assert another person's Fourth Amendment rights. Search – Standing, Chapter 5.

Was the search in the curtilage of a home or in the open fields?

The curtilage of the home has the same Fourth Amendment rights as the home itself. But there is no expectation of privacy in open fields, and a search in open fields is not a search for purposes of the Fourth Amendment. Search – Curtilage/Open Fields, Chapter 6.

Was an item in plain view or open view?

A person does not have a reasonable expectation of privacy in an area or in items that any member of the public can see from a public place. Search – Plain View/Open View, Chapter 7.

Was the search reasonable?

Generally, there must be a warrant for a search to be reasonable under the Fourth Amendment. Search – Warrant, Chapter 8.

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Should unlawfully obtained evidence be excluded?

Generally, unlawfully obtained evidence is subject to suppression under the exclusionary rule, Exclusionary Rule, Chapter 21.

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WAS THERE A SEARCH?

CHAPTER 2: STATE ACTION

Snapshot: The Fourth Amendment applies only to **state action, not the conduct of private persons**. Private conduct relating to a search may be considered state action if the **police instigated** the search and the private person engaged in the search **intending to assist** the police.

KEY QUESTIONS:

- Did the police encourage or participate in a search?
- Was a search conducted by a private security guard?
- Was a non-law enforcement official a state actor?

Generally

The Fourth Amendment's protection against unreasonable searches and seizures applies to governmental action, not to action of private persons or entities not associated with the government and not acting as agents of the government. *Burdeau v McDowell*, 256 US 465; 41 S Ct 574; 65 L Ed 1048 (1921).

The Fourth Amendment does not apply to a search or seizure, even an unreasonable one, conducted by a private individual who is not acting as an agent of the government or with the participation or knowledge of any governmental official. *United States v Jacobsen*, 466 US 109; 104 S Ct 1652; 80 L Ed 2d 85 (1984).

Did the police encourage or participate in a search?

PRACTICE POINTER: State action may be found when the police direct a private citizen to take an action the citizen would not take as a matter of course without direction (such as directing an electronics store employee to remove a hard-drive the employee otherwise would not have removed). It is unlikely to be found, even if the police are involved, when a private citizen

takes an action the citizen would usually take absent direction (such as when hotel cleaning staff remove trash from a hotel room).

Apparently private action is a state-sponsored search if (1) the police instigated, encouraged, or participated in the search; and (2) the private individual engaged in the search with the intent of assisting the police. *United States v Lambert*, 771 F2d 83 (CA 6, 1985).

There was state action when the police directed an electronics store employee to remove the hard drive from the defendant's computer and place it into another computer to search it for child pornography. *People v Gingrich*, 307 Mich App 656; 862 NW2d 432 (2014).

Hotel cleaning staff were acting as private individuals when they removed the trash from the defendant's hotel room, and there was no governmental action, even though the police had directed the cleaning staff to save, secure, and mark trash bags obtained in the room. The staff were not asked to search the trash, only to preserve it, and they would have removed trash from the room in the course of their employment whether the police requested its preservation or not. *United States v Bruce*, 396 F3d 697, vacated in part on other grounds 405 F3d 1034 (CA 6, 2005).

The Fourth Amendment is not implicated when a defendant's blood is drawn for purposes of medical treatment. A blood draw taken drawn for medical reasons by medical personnel was not state action, even though an implied consent statute required the medical personnel to turn over the results of an analysis of the blood drawn to the prosecutor. The draw itself was for purposes of medical treatment and not taken at the direction of the police. *People v Perlos*, 436 Mich 305; 462 NW2d 310 (1990).

The seizure of the defendant's letters by a cellmate did not involve state action, so it did not implicate the Fourth Amendment. The defendant entrusted the letters to a cellmate to be smuggled out of jail, and the cellmate gave the letters to the police. The cellmate acted on his own initiative; there was no evidence that the police encouraged or authorized the cellmate's actions. *People v DeLeon*, 103 Mich App 225; 303 NW2d 447 (1981).

Relatives of the decedent were acting as private individuals (and there was no state action) when they discovered the defendant's diaries while cleaning the house where the defendant and the decedent formerly lived and then turned the diaries over to the prosecutor. The police did not encourage or authorize the seizure of the diaries. *People v Willey*, 103 Mich App 405; 303 NW2d 217 (1981).

Was a search conducted by a private security guard?

The Fourth Amendment does not apply to searches conducted by private security guards. *People v Holloway*, 82 Mich App 629; 267 NW2d 454 (1978).

There mere licensing of private security guards is not enough governmental involvement to convert the actions of private guards into state action. *City of Grand Rapids v Impens*, 414 Mich 667; 327 NW2d 278 (1982)) (*Miranda* case).

Was a non-law enforcement official a state actor?

Staff members of a state hospital who tested pregnant patients for evidence of cocaine use and turned the evidence over to the police were state actors for Fourth Amendment purposes. *Ferguson v City of Charleston*, 532 US 67; 121 S Ct 1281; 149 L Ed 2d 205 (2001).

A school official acting in an official capacity during school hours is a state actor for purposes of the Fourth Amendment. *People v Ward*, 62 Mich App 46; 233 NW2d 180 (1975); see also *New Jersey v TLO*, 469 US 325; 105 S Ct 733; 83 L Ed 2d 720 (1985).

A juvenile court neglect-hearing coordinator, whose duties included keeping order in the courtroom, was a state actor for purposes of the Fourth Amendment. *People v Webb*, 96 Mich App 493; 292 NW2d 239 (1980).

WAS THERE A SEARCH?

Chapter 3: REASONABLE EXPECTATION OF PRIVACY

CHAPTER 3: SEARCH - REASONABLE EXPECTATION OF PRIVACY *(continued)*

Snapshot: The Fourth Amendment protection against **unreasonable searches** is triggered when the government intrudes in an area where a person has a **reasonable expectation of privacy**. The test for whether a person has a reasonable expectation of privacy has a subject and an objective element: There is a reasonable expectation of privacy if a person has an **expectation of privacy (subjective)** that society is willing to consider **reasonable (objective)**. The "subjective" element considers facts showing a manifestation of expectation. **In most cases, it is the objective element that is at issue**.

PRACTICE POINTER: For decades and until recently, the preeminent test for determining whether there was a governmental intrusion under the Fourth Amendment has been the reasonable expectation of privacy test – Fourth Amendment protection is triggered when the government intrudes in an area where an individual has an expectation of privacy that society considers reasonable. The privacy test is covered in this chapter. Recently, however, courts have revived the property rights test – Fourth Amendment protection is triggered when the government trespasses on a constitutionally recognized property interest for the purpose of gathering information. The property test is covered in the next chapter, Constitutionally Protected Property Interest, Chapter 4.

Cases in these two chapters demonstrate the different outcomes that may result depending on which test is applied. See, e.g., *Tierney* (no reasonable expectation of privacy in front porch, no search); *Jones* (dog sniff at front door did not invade a reasonable expectation of privacy, no search); *Jardines* (dog sniff at front door was trespass on constitutionally protected area to gather

information, search). If case law holds that there is no reasonable expectation of privacy in a certain area, consider whether there might be an intrusion on a constitutionally recognized property right to assert a violation of the Fourth Amendment.

Generally

The Fourth Amendment protects not only property interests but certain expectations of privacy as well. *Katz v United States*, 389 US 347; 88 S Ct 507; 19 L Ed 2d 576 (1967).

A person has Fourth Amendment protection if that person has a reasonable expectation of privacy in the area invaded by the government. *Katz v United States*, 389 US 347; 88 S Ct 507; 19 L Ed 2d 576 (1967).

The test for whether a person has a reasonable expectation of privacy has two elements: (1) did the person manifest a subjective expectation of privacy in the area searched; and (2) is society prepared to recognize that expectation as objectively reasonable. *California v Ciraolo*, 476 US 207; 106 S Ct 1809; 90 L Ed 2d 210 (1986).

Whether a person has a reasonable expectation of privacy in an area the government invades is determined considering the totality of the circumstances. *People v Smith*, 420 Mich 1; 360 NW2d 841 (1984).

What a person seeks to preserve as private may be constitutionally protected under Fourth Amendment, even in an area accessible to the public. *Katz v United States*, 389 US 347; 88 S Ct 507; 19 L Ed 2d 576 (1967).

The test most often associated with legitimate expectations of privacy (the *Katz* test) supplements, rather than displaces, the traditional property-based understanding of the Fourth Amendment. *Byrd v United States*, ___ US ___; 138 S Ct 1518; 200 L Ed 2d 805 (2018).

Below is a non-exhaustive list of areas and circumstances where courts have ruled on a reasonable expectation of privacy. The list begins with the home (the first among Fourth Amendment equals), then proceeds alphabetically.

Home

A person has the greatest expectation of privacy in that person's home. For purposes of the Fourth Amendment, "the home is first among equals." *Collins v Virginia*, ___ US ___; 138 S Ct 1663; 201 L Ed 2d 9 (2018).

The right of a person to retreat into that person's home and "there be free from unreasonable governmental intrusion" is at the "very core" of the Fourth Amendment. *Florida v Jardines*, 569 US 1; 133 S Ct 1409; 185 L Ed 2d 495 (2013).

Electronic surveillance

The use of thermal-imaging technology to detect relative amounts of heat emanating from within the home without a warrant violates the Fourth Amendment. The technology might detect unlawful conduct, but it would also detect lawful conduct and information from the interior of the home. The use of sense-enhancing technology (that is not in common public use) to obtain information regarding the interior of a home that could not otherwise be obtained without physical intrusion is a search. *Kyllo v United States*, 533 US 27; 121 S Ct 2038; 150 L Ed 2d 94 (2001).

Government monitoring of an electronic tracking device placed in a shipment of chemicals that was taken home by a suspected drug dealer intruded on a legitimate expectation of privacy because it obtained information about the interior of a private residence that was not open to visual surveillance. *United States v Karo*, 468 US 705; 104 S Ct 3296; 82 L Ed 2d 530 (1984).

Aerial surveillance

Viewing the backyard within the curtilage of a home from the public airways above was not a search for Fourth Amendment purposes. The defendant may have had an expectation of privacy in his backyard, but it was not one that society is prepared to consider reasonable given that the officers only saw what anyone flying over in the public airways could freely observe. *California v Ciraolo*, 476 US 207; 106 S Ct 1809; 90 L Ed 2d 210 (1986).

Curtilage

The curtilage is the area "immediately surrounding and associated with the home"; it is treated as part of the home itself for Fourth Amendment purposes. *Oliver v United States*, 466 US 170; 104 S Ct 1735; 80 L Ed 2d 214 (1984).

- See Search – Curtilage/Open Fields, Chapter 6.

The defendant's front porch was within the curtilage of his home: "The front porch is the classic exemplar of an area adjacent to the home and to which the activity of home life extends." Officers violated the Fourth Amendment when they trespassed on the defendant's front porch for the purpose of gathering information. *Florida v Jardines*, 569 US 1; 133 S Ct 1409; 185 L Ed 2d 495 (2013).

A canine sniff at the defendant's front door was not a search. The defendant did not have a reasonable expectation of privacy in the front porch of his parents' house because it was not "part of the house." The porch did not have the characteristics of a living space; it was unheated and used primarily as a storage space. *People v Tierney*, 266 Mich App 687; 703 NW2d 204 (2005).

The defendant did not have a reasonable expectation in his front porch because there is no reasonable expectation at a front entry, including a porch, that is open to the public. A canine sniff is not a search if the canine is legally present at its vantage when its senses are aroused. The warrantless canine sniff at defendant's front door was not a search and did not violate the Fourth Amendment. *People v Jones*, 279 Mich App 86; 755 NW2d 224 (2008).

> **PRACTICE POINTER:** *Tierney* and *Jones* should be revisited considering the holding in *Jardines*. *Tierney*, *Jones*, and *Jardines* together provide an example of the different outcomes that may arise based on which theory of governmental intrusion is applied, privacy expectation or property rights.

Hotel Room

A hotel room can be the object of Fourth Amendment protection just as much as a home can. *Hoffa v United States*, 385 US 293; 87 S Ct 408; 17 L Ed 2d 374 (1966).

Individuals have a reasonable expectation of privacy in their motel or hotel rooms equal to the expectation they would have had in their homes. *People v Oliver*, 417 Mich 366; 338 NW2d 167 (1983).

Tenants

Generally, a tenant has a reasonable expectation of privacy in the area rented. See *Chapman v United States*, 365 US 610; 81 S Ct 776; 5 L Ed 2d 828 (1961); *Rakas v Illinois*, 439 US 128, 148; 99 S Ct 421, 433; 58 L Ed 2d 387 (1978) (equating the privacy interest in an apartment to that in a home).

Landlord-tenant law determines whether a person's expectation of privacy is objectively reasonable under the Fourth Amendment. *United States v Washington*, 573 F3d 279 (CA 6, 2009).

A landlord's mere authority to evict a person does not deprive that person of an objectively reasonable expectation of privacy. *United States v Washington*, 573 F3d 279 (CA 6, 2009).

Guests and Visitors

An overnight guest has a legitimate expectation of privacy in the host's home. *Minnesota v Olson*, 495 US 91; 110 S Ct 1684; 109 L Ed 2d 85 (1990).

A visitor who is not an overnight guest but merely "present with the consent of the householder" does not have a legitimate expectation in the host's home. *Minnesota v Carter*, 525 US 83; 119 S Ct 469; 142 L Ed 2d 373 (1998).

A visitor to an apartment did not have a legitimate expectation of privacy in the apartment that he was visiting. There was insufficient evidence to demonstrate that the visitor was an overnight guest, even though he was found sleeping in the apartment. *People v Parker*, 230 Mich App 337; 584 NW2d 336 (1998).

The defendant had a reasonable expectation of privacy in the townhouse his girlfriend was renting. The defendant occasionally stayed at his parents' house and did not pay for rent or utilities at the townhouse. But he did occasionally buy groceries consumed at the townhouse and, overall, the evidence showed that he had been residing in the townhouse full-time for over four months. *People v Wagner*, 114 Mich App 541; 320 NW2d 251 (1982).

The defendant had a reasonable expectation of privacy in his mother's house (where he had been living for two weeks, had some clothing stored, and was free to come and go as he pleased), even though he had a different address where he received his mail. *People v Mack*, 100 Mich App 45; 298 NW2d 657 (1980).

Homeless persons

> **PRACTICE POINTER:** If you are asserting the Fourth Amendment rights of a homeless client, an argument under the property rights analysis for a governmental intrusion under the Fourth Amendment will likely be more effective than an argument under the privacy expectation analysis.

- See Search – Constitutionally Protected Property Interest, Chapter 4.

There is an unfortunate dearth of court opinions on the Fourth Amendment rights of homeless persons. Among the lower federal and state courts to have addressed the question, most have applied the reasonable expectation of privacy analysis. Applying this analysis, some courts have concluded that homeless persons have a reasonable expectation of privacy in their personal property left in public places (but not if left on private property). See. e.g., *Pottinger v City of Miami*, 810 F Supp 1551 (SD Fla, 1992). Other courts have concluded that homeless persons do not have a reasonable expectation of privacy in their personal belongings left on public or private property. See, e.g., *Whiting v State*, 389 Md 334; 885 A2d 785 (2005).

The same inconsistency applies to decisions regarding personal property in homeless shelters. See, e.g., *Cmty for Creative Non-Violence v Unknown Agents of US Marshals Serv*, 791 F Supp 1 (DDC, 1992) (reasonable expectation); *People v Nalbandian*, 188 AD2d 328; 590 NYS2d 885 (1992) (no reasonable expectation).

In *Lavan v City of Los Angeles*, 693 F3d 1022 (CA 9, 2012), the Ninth Circuit applied the property rights analysis of Fourth Amendment protection to find that the city had meaningfully interfered with a constitutionally protected property interest of homeless persons when it destroyed their unabandoned papers and personal effects. Property rights protection appears to be the more fruitful direction to advance the Fourth Amendment rights of homeless persons.

Abandoned property

Abandoned property is not protected by the Fourth Amendment. *Abel v United States*, 362 US 217; 80 S Ct 683; 4 L Ed 2d 668 (1960).

A person does not have a reasonable expectation of privacy in property the person abandons, so the search or seizure of abandoned property is presumptively reasonable. *People v Rasmussen*, 191 Mich App 721; 478 NW2d 752 (1991).

Because of the presumption of reasonableness, a defendant bears the burden of showing that the property was not abandoned. *People v Taylor*, 253 Mich App 399; 655 NW2d 291 (2002).

The required proof to demonstrate abandonment "should reasonably lead to an exclusive inference of 'throwing away.'" *People v Rasmussen*, 191 Mich App 721; 478 NW2d 752 (1991).

Items

The defendant abandoned items found in the wastebasket of his hotel room after he checked out. *Abel v United States*, 362 US 217; 80 S Ct 683; 4 L Ed 2d 668 (1960).

The defendant effectively abandoned a package sent by a delivery service, even though he was the true sender who caused its delivery. The defendant's name was not listed as sender on the package, and there was no apparent connection between the defendant and the return address on the package. The defendant repudiated any connection to the package, and thus abandoned it, when he withheld information that he was the source. *People v Zahn*, 234 Mich App 438; 594 NW2d 120 (1999).

The defendant abandoned his sunken vessel when he literally abandoned ship and did not seek the vessel's recovery. The defendant's abandonment was voluntary

because he sent out a distress call and accepted the aid of the Coast Guard when it responded (even though the vessel sank before the Coast Guard arrived). The defendant did not make any effort to reestablish control over the vessel; rather a salvage company raised the vessel, apparently at the direction of the defendant's insurance company. *People v Rasmussen*, 191 Mich App 721; 478 NW2d 752 (1991).

A briefcase left in a hotel room after defendants checked out was abandoned property, and the defendants had no reasonable expectation of privacy in the briefcase. Although the defendants went back to the hotel to recover the briefcase, they ultimately told hotel staff to "forget about it." At that point, the briefcase was abandoned. *People v Romano*, 181 Mich App 204; 448 NW2d 795 (1989).

> **PRACTICE POINTER:** Disavowal of ownership of an item (direct or implied) or a stated intent not to pursue possession of an item is strong evidence of abandonment.

Abandonment of items during flight

Defendant abandoned a "rock" of cocaine when he discarded it while fleeing from the police. *California v Hodari D*, 499 US 621; 111 S Ct 1547; 113 L Ed 2d 690 (1991).

Defendant abandoned a plastic bag when he discarded it while fleeing from the police. *People v Lewis*, 199 Mich App 556; 502 NW2d 363 (1993).

The defendant did not lose his expectation of privacy in a paper bag that he discarded while fleeing from the police because the police lacked reasonable suspicion to detain him in the first place and the subsequent police pursuit of the defendant was the result of the unlawful detention attempt. *People v Shabaz*, 424 Mich 42; 378 NW2d 451 (1985).

Abandoned luggage

The act of leaving the airport without claiming one's luggage, in itself, is not abandonment for Fourth Amendment purposes. *United States v Sanders*, 719 F2d 882 (CA 6, 1983).

The defendant abandoned her luggage when she entered a cab to leave the airport without her luggage, claimed that she had no luggage, and disclaimed ownership of the specific luggage. When the defendant disclaimed ownership of the luggage, she also disclaimed any concern that the contents of the luggage remain private. *United States v Tolbert*, 692 F2d 1041 (CA 6, 1982).

The defendant did not abandon her suitcase, even though she left the airport for over three hours without claiming it. The defendant never disclaimed the suitcase, consistently refused to consent to its search, and explained to government agents that she left the suitcase at the airport because she was not going directly home. The defendant's words and actions indicated that she had an interest in keeping the contents of her suitcase private. She had a reasonable expectation of privacy in the suitcase, and the search of the luggage without probable cause violated the Fourth Amendment. *United States v Sanders*, 719 F2d 882 (CA 6, 1983).

Structures

The defendant has the burden of showing that property searched was not abandoned. Whether property is abandoned is determined by examining the totality of the circumstances. A court ruling on abandonment of real property considers the following factors:

> (1) the outward appearance, (2) the overall condition, (3) the state of the vegetation on the premises, (4) barriers erected and securely fastened in all openings, (5) indications that the home is not being independently serviced with gas or electricity, (6) the lack of appliances, furniture, or other furnishing typically found in a dwelling house, (7) the length of time that it takes for temporary barriers to be replaced with functional doors and windows, (8) the history surrounding the premises and prior use, and (9) complaints of illicit activity occurring in the structure.

People v Taylor, 253 Mich App 399; 655 NW2d 291 (2002).

The defendant did not have a reasonable expectation in a condemned house, even though the defendant owned the house. The house had been declared "unfit for human occupancy" (because it lacked water service) and posted with a notice (which the defendant had removed) stating that it was unlawful for any person to use of occupy the building. The court followed two relevant points from *Rakas v Illinois*, 439 US 128 (1978): "[F]irst, an overall reasonable expectation of privacy—not the existence (or the lack) or a property right—controls the analysis and, second, the wrongful presence weighs against a reasonable expectation of privacy." *People v Antwine*, 293 Mich App 192; 809 NW2d 439 (2011).

> **PRACTICE POINTER:** *Antwine* and other cases where an owner of abandoned property is claiming a Fourth Amendment violation should be revisited considering the resurgence of the property rights theory of Fourth Amendment protection. The court's statement in *Antwine* that privacy expectations are more critical to a Fourth Amendment violation analysis than property rights no longer appears viable under recent property rights cases.

> The property rights theory of protection should always be assessed in cases involving real property.

There was a reasonable inference that a house was abandoned because it appeared vacant and unoccupied from the exterior; the openings were covered with boards or entirely exposed; there was no running water, gas, or electricity; there were no appliances; the only furniture inside was a card table and some boxes for sitting; and raw sewage stood in the basement. The police had received complaints that the house was being used for drug trafficking for years. And the defendant gave a different address to identify his residence. The fact that the defendant may have had a valid lease to the property did not overcome the objective indicia of abandonment. *People v Taylor*, 253 Mich App 399; 655 NW2d 291 (2002).

A rented trailer was not abandoned where some of the tenants' belongings were still in the trailer, the tenants had left back rent at the owner's place of business, and the tenants told the owner that they wished to continue renting the trailer. *People v Nash*, 110 Mich App 428; 313 NW2d 307 (1981).

Trash

The warrantless search of the defendants' trash left on the curb in front of their house for pick-up did not violate the Fourth Amendment. The defendants may have had an expectation of privacy in the trash that was contained in opaque bags that were tied at the opening. But any expectation of privacy the defendants may have had was not one that society was willing to accept as objectively reasonable; the plastic garbage bags left on the side of the street were readily accessible to animals, children, scavengers, or other members of the public, and the trash was placed for collection by a collector who might sort through it. The defendants did not have a reasonable expectation of privacy in items they discarded for collection as trash. *California v Greenwood*, 486 US 35; 108 S Ct 1625; 100 L Ed 2d 30 (1988).

Defendant did not have a reasonable expectation of privacy in garbage bags left on the curb for collection, and the search and seizure of the bags by the police did not violate the Fourth Amendment. Trash placed on the curb for collection is "public" and thus available for inspection by a third-party or the police. *People v Pinnix*, 174 Mich App 445; 436 NW2d 692 (1989).

> **PRACTICE POINTER:** If trash is seized and searched from trash containers that are outside a house but within the curtilage of the house, an argument may be made that, while there was no reasonable expectation of privacy in the trash itself, the police intruded upon a constitutionally protected property interest for the purpose of obtaining information when they accessed the trash. See *People v Nelson*, unpublished per curiam opinion of the Court of Appeals, issued August 19, 2014 (Docket No. 316624) (search

of trash container within curtilage violated the Fourth Amendment property rights protection). See Search – Constitutionally Protected Property Interest, Chapter 4.

Bodily integrity

Breath

A preliminary breath test (PBT) is a search under the Fourth Amendment. *People v Chowdhury*, 285 Mich App 509; 775 NW2d 845 (2009).

A breathalyzer, which generally requires "deep lung" breath for chemical analysis, implicates bodily integrity and is a search under the Fourth Amendment. *Skinner v R Labor Executives' Ass'n*, 489 US 602; 109 S Ct 1402; 103 L Ed 2d 639 (1989).

Blood

Taking a blood sample is a search, and for the search to be consistent with the Fourth Amendment, there must be a warrant to obtain the blood sample or taking the sample must come within an exception to the warrant requirement. The search incident to arrest exception to the warrant requirement does not apply to a blood draw because of the blood draw's intrusive nature. *Birchfield v North Dakota*, 579 US ___; 136 S Ct 2160; 195 L Ed 2d 560 (2016).

Drawing an individual's blood for investigative purposes is a search under the Fourth Amendment and is unreasonable absent a warrant. Penetrating the skin into one's veins infringes a on "deep-rooted" expectation of privacy that society is prepared to recognize as reasonable. But the defendant did not have a reasonable expectation of privacy in her blood once it was seized. *People v Woodard*, 321 Mich App 377; 909 NW2d 299 (2017).

An individual who was involved in an auto accident does not have a reasonable expectation of privacy in the results of a blood test made for medical purposes that is turned over to the police by medical personnel under the implied consent statute, MCL 257.625a(6). The individual may have an expectation of privacy in blood test results, but it is not an expectation that society is willing to consider reasonable under the circumstances contemplated in the implied consent statute. Individuals have a limited expectation of privacy while driving, and the state has a strong interest in reducing deaths caused by drunken driving. Under the totality of the circumstances and on balance, the Fourth Amendment does not apply to blood drawn and results obtained under the statute. *People v Perlos*, 436 Mich 305; 462 NW2d 310 (1990).

Urine

Taking a urine sample for testing is an intrusion on a reasonable expectation of privacy, and thus, a search under the Fourth Amendment. Passing urine is highly private, generally done in private, and doing so in public is generally prohibited. Further, a urine sample can reveal a host of private medical facts about the individual from whom it is taken. *Skinner v R Labor Executives' Ass'n*, 489 US 602; 109 S Ct 1402; 103 L Ed 2d 639 (1989).

Canine sniff

A canine sniff of the defendant's luggage was not a search under the Fourth Amendment. A canine sniff obtains limited information; it exposes only the presence or absence of narcotics; it does not expose noncontraband items. *United States v Place*, 462 US 696; 103 S Ct 2637; 77 L Ed 2d 110 (1983).

The use of a well-trained narcotics-detection dog (that does not expose noncontraband items that otherwise would remain hidden from public view) during a lawful traffic stop, generally does not implicate legitimate privacy interests. The trained dog detects contraband only; any interest a person may have in possessing contraband cannot be considered legitimate. *Illinois v Caballes*, 543 US 405; 125 S Ct 834; 160 L Ed 2d 842 (2005).

> **PRACTICE POINTER:** The Colorado Supreme Court recently held that a warrantless dog sniff violated the state constitution because the dog could detect (and was trained to detect) lawful activity (marijuana in the vehicle). *People v McKnight*, ___ P3d ___, 2019 WL 2167746 (Colo, May 20, 2019). A similar argument can now be made under the Michigan Constitution.

Commercial premises

- See Search – Warrant Exceptions – Special Needs – Administrative Searches, Chapter 17.

The expectation of privacy in commercial premises is less than a similar expectation in an individual's home. *Minnesota v Carter*, 525 US 83; 119 S Ct 469; 142 L Ed 2d 373 (1998).

A business establishment or an industrial facility "enjoys certain protections" under the Fourth Amendment, including a reasonable expectation of privacy in the interior of its covered buildings. *Dow Chem Co v United States*, 476 US 227; 106 S Ct 1819; 90 L Ed 2d 226 (1986).

Taking aerial photographs of an industrial plant complex from navigable airspace is not a search under the Fourth Amendment. *Dow Chem Co v United States*, 476 US 227; 106 S Ct 1819; 90 L Ed 2d 226 (1986).

Entry into a commercial place that is open to the public does not violate a person's reasonable expectation of privacy. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1; 672 NW2d 351 (2003).

Employees

The privacy expectations of employees in the workplace depend on the context of the employment and work environment; such expectations must be addressed on a case-by-case basis. *O'Connor v Ortega*, 480 US 709; 107 S Ct 1492; 94 L Ed 2d 714 (1987).

Offices

The defendant, an employee of a state hospital, had a reasonable expectation of privacy in his office, including his desk and file cabinet. The defendant had occupied his office for years; it was private; he did not share it with anyone; he kept personal correspondence, material and items in his desk and filing cabinet; and the property seized was personal (not state) property. *O'Connor v Ortega*, 480 US 709; 107 S Ct 1492; 94 L Ed 2d 714 (1987).

The defendant did not have a reasonable expectation of privacy in the laboratory assigned to him as a graduate student at a university. The defendant did not have a key to the laboratory; he shared the laboratory with university employees who were permanently assigned to the space; and the professor who monitored his project, custodial staff, security staff, and at least one other persons had keys to the laboratory. *People v Powell*, 235 Mich App 557; 599 NW2d 499 (1999).

Conversations

A participant in a conversation does not have a reasonable expectation that another participant in the conversation will not record or otherwise disclose the content of the conversation. As long as one participant in a conversation consents, there is no violation of the Fourth Amendment if police electronically monitor or record the conversation. *People v Collins*, 438 Mich 8; 475 NW2d 684 (1991).

Electronic surveillance

- See ***Home*** – *Electronic surveillance*, this chapter; ***Conversations***, this chapter; ***Movements***, this chapter; ***Phones***, this chapter.

Surveillance of restroom stalls in a shopping mall's men's room by video cameras concealed in the ceiling violated the defendant's reasonable (if limited) expectation of privacy while in a restroom stall. *People v Kalchik*, 160 Mich App 40; 407 NW2d 627 (1987).

Warrantless remote video surveillance of the defendant's farm from a utility-pole camera for ten weeks did not violate the defendant's reasonable expectations of privacy because the camera recorded the same view of the farm as that enjoyed by passersby on public roads. *United States v Houston*, 813 F3d 282 (CA 6, 2016).

Email

A subscriber has a reasonable expectation of privacy in the contents of emails stored with, sent, or received through a commercial internet service provider (ISP). A subscriber generally has an expectation of privacy in email because it may contain intimate conversations and insights. And the expectation is one that society is willing to consider reasonable given the prominent role that email has taken in modern communication. Because email has fundamental similarities to traditional forms of communication, "it would defy common sense to afford emails lesser Fourth Amendment protection." Email is protected by the Fourth Amendment and may not be searched without a warrant. *United States v Warshak*, 631 F3d 266, 288 (CA 6, 2010).

Knock and talk

An officer may approach a home and talk without invading a reasonable expectation of privacy because the officer is doing no more than any private citizen might do. *People v Frederick*, 500 Mich 228; 895 NW2d 541 (2017).

- See Seizure – Consensual Encounters (Knock and Talk), Chapter 26.

Letters/packages for delivery

There is a legitimate expectation of privacy in letters and other sealed packages sent by United States mail or a private carrier. *United States v Jacobsen*, 466 US 109; 104 S Ct 1652; 80 L Ed 2d 85 (1984).

Generally, both the sender and the addressee have a legitimate expectation of privacy in a mailed or sent item while it is on the way. The sender's legitimate expectation of privacy ends on delivery. *People v Zahn*, 234 Mich App 438; 594 NW2d 120 (1999).

A person who was the "true sender" of a package did not have a reasonable expectation of privacy in a package because his name was not listed as sender on

the package, and there was no apparent connection between the person and the return address on the package. *People v Zahn*, 234 Mich App 438; 594 NW2d 120 (1999).

Luggage

A person "possesses a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment." *United States v Place*, 462 US 696; 103 S Ct 2637; 77 L Ed 2d 110 (1983).

A bus passenger had a reasonable expectation of privacy in his carry-on luggage, which travelers generally use for personal items they prefer to have close at hand. The passenger sought to preserve his privacy in the contents of the carry-on because it was opaque and he placed it directly above his head. While the passenger could expect some contact with his luggage (by, for instance, other passengers storing their carry-ons), he reasonably did not expect exploratory manipulation of the luggage. *Bond v United States*, 529 US 334; 120 S Ct 1462; 146 L Ed 2d 365 (2000).

Movements

Individuals have a reasonable expectation of privacy in the "whole of their physical movements," so individuals have a reasonable expectation of privacy in cell site location information (CSLI) that tracks nearly exactly their movements and follows a cell phone user beyond public streets into private residences, doctor's officers, and many other potentially revealing locations. The government violated the Fourth Amendment when it accessed 127 days of the defendant's CSLI without a warrant. *Carpenter v United States*, ___ US ___; 138 S Ct 2206; 201 L Ed 2d 507 (2018).

The defendant did not have a reasonable expectation of privacy in his public movements as tracked over seven hours on the day of his arrest in real-time GPS coordinates on his cell phone. One cannot expect privacy in one's public movements, and, if the defendant wished to avoid detection, he could have chosen not to carry his cell phone or to turn it off. *United States v Riley*, 858 F3d 1012 (CA 6, 2017).

> **PRACTICE POINTER:** Cases like *Riley* should be revisited considering *Carpenter*. *Carpenter* addressed the "turn it off" reasoning when it found that cell phones have become "almost a feature of human anatomy," which individuals "compulsively carry" with them all the time.

A person traveling in a vehicle on public roadways has no reasonable expectation of privacy in his or her movements from one place to another. By travelling on public streets, a person voluntarily conveys to anyone who wishes to look the direction travelled, the stops made, and even the final destination when the vehicle exits the

public roads onto private property. *United States v Knotts*, 460 US 276; 103 S Ct 1081; 75 L Ed 2d 55 (1983).

Open fields

Open fields are not protected by the Fourth Amendment. Any subjective expectation of privacy that a defendant has in an open field is not one that society recognizes as reasonable or legitimate. *Oliver v United States*, 466 US 170; 104 S Ct 1735; 80 L Ed 2d 214 (1984).

- See Search – Curtilage/Open Fields, Chapter 6.

Phones

A caller does not have a reasonable expectation of privacy in numbers dialed from the caller's phones because the caller disclosed that information to the third-party telephone company. Further, a pen register, that tracks numbers dialed, does not reveal the contents of the conversations in phone calls. *Smith v Maryland*, 442 US 735; 99 S Ct 2577; 61 L Ed 2d 220 (1979).

The defendant did not have a reasonable expectation of privacy in the number called from a pay phone because the defendant disclosed that information to the third-party phone company. *People v Gadomski*, 274 Mich App 174; 731 NW2d 466 (2007).

- See *People v Dickerson*, unpublished per curiam opinion of the Court of Appeals, issued May 19, 2015 (Docket No. 320554), applying the holding in *Gadomski* to numbers dialed and messages sent from a cell phone.

Cell phone data

A warrant is required for the search of data stored on a cell phone. Data on a cell phone is different from data stored in physical records by quantity and quality. A search of internet browsing history on a cell phone could reveal a person's private interests and concerns (such as searches for symptoms of a certain disease). And historic information on a cell phone can be used to reconstruct the user's minute by minute location. Cell phone data cannot be searched incident to arrest because data is not a danger to police or others and, once the phone itself is in custody, the potential for loss of evidence is exceedingly low. *Riley v California*, 573 US 373; 134 S Ct 2473; 189 L Ed 2d 430 (2014).

> **PRACTICE POINTER:** The warrantless search of cell phone data cannot be justified by the search incident to arrest exception because data is not a danger to police or others and, once the phone itself is in custody, the

potential for loss of evidence is exceedingly low. Further, cellphone data may contain a wide array of intimate, personal information.

The warrantless search of photographs on the defendant's smartphone violated the Fourth Amendment and could not be justified as a search incident to arrest. *United States v Bah*, 794 F3d 617 (CA 6, 2015).

Cell site location information

Individuals have a reasonable expectation of privacy in cell site location information (CSLI) because it tracks nearly exactly their movements in and to and from public and private places. The government violated the Fourth Amendment when it accessed 127 days of the defendant's CSLI without a warrant. *Carpenter v United States*, ___ US ___; 138 S Ct 2206; 201 L Ed 2d 507 (2018).

Plain view/open view

"What a person knowingly exposes to the public, even in [the person's] own home or office, is not a subject of Fourth Amendment protection." *Kyllo v United States*, 533 US 27; 121 S Ct 2038; 150 L Ed 2d 94 (2001).

- See Search – Plain View/Open View, Chapter 7.

Records

A bank depositor does not have a reasonable expectation of privacy in bank records, checks, and deposit slips. Bank financial statements and deposit slips contain only voluntarily conveyed information to the banks and exposed to bank employees in the ordinary course of business. *United States v Miller*, 425 US 435; 96 S Ct 1619; 48 L Ed 2d 71 (1976).

The defendant did not have a reasonable expectation of privacy (no standing) in business and bank records held by third parties. *People v Earls*, 477 Mich 1119; 730 NW2d 241 (2007).

Vehicle

Vehicle overall

A person who owns and possesses a vehicle almost always has a reasonable expectation of privacy in the vehicle. *Byrd v United States*, ___ US ___; 138 S Ct 1518; 200 L Ed 2d 805 (2018).

A motorist's privacy interest in his or her vehicle is less substantial than the privacy interest in a home, but it is nevertheless important and deserving of constitutional protection. *Arizona v Gant*, 556 US 332; 129 S Ct 1710; 173 L Ed 2d 485 (2009).

Rental vehicle

A person has a reasonable expectation of privacy in a rental car in the person's possession and control, even if that person is not listed on the rental car agreement. The fact that a person who is not listed on a rental agreement drives the rental car might be a breach of contract, but that has no effect on the Fourth Amendment analysis. *Byrd v United States*, ___ US ___; 138 S Ct 1518; 200 L Ed 2d 805 (2018).

The defendant no longer had a reasonable expectation of privacy in a rental car after signing an agreement terminating the rental and after the rental company had refunded the defendant's deposit. By terminating the agreement, the defendant surrendered his expectation of privacy in the car. *People v Merch*, 86 Mich App 355; 272 NW2d 656 (1978).

Vehicle's interior

A person has "a lesser expectation of privacy" in a vehicle because "its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view." *United States v Knotts*, 460 US 276; 103 S Ct 1081; 75 L Ed 2d 55 (1983).

There is no "legitimate" expectation of privacy that shields the part of a car's interior that is visible from the outside to passersby or police officers. *Texas v Brown*, 460 US 730; 103 S Ct 1535; 75 L Ed 2d 502 (1983).

The expectation of privacy of the occupant of a vehicle that is parked on a public street is no greater than if the occupant had been driving on a public street because pedestrians (and police officers) could approach and look into the vehicle. *People v Anthony*, ___ Mich App ___; ___ NW2d ___ (2019) (2019 WL 290026).

The use of a flashlight to look inside a vehicle that was parked on a public street was not a search under the Fourth Amendment. The defendant did not have a reasonable expectation of privacy in the interior of the parked vehicle that was open to view to anyone passing by, and if an officer's observations would not be a search in the daylight, the same observation is not transformed into a search by use of a flashlight in nighttime darkness. *People v Barbee*, 325 Mich App 1; 923 NW2d 601 (2018).

Passengers

A passenger does not normally have a legitimate expectation of privacy in someone else's car, especially in areas like the glove compartment or trunk. *Rakas v Illinois*, 439 US 128; 99 S Ct 421; 58 L Ed 2d 387 (1978).

A passenger did not have a reasonable expectation of privacy in the interior of the car he was riding in, but he did have a reasonable expectation of privacy in his backpack that was in the interior of the car. A passenger's personal property is not subsumed by the vehicle that carries it, and Fourth Amendment rights are not left on the curb when a passenger gets in a car. *People v Mead*, ___ Mich ___; ___ NW2d ___ (2019) (2019 WL 1769597).

> **PRACTICE POINTER:** An individual may have a reasonable expectation of privacy in part of a larger area where the person does not have such an expectation (in a container a passengers brings into a car, for example, or a particular room in a house that the individual does not own or possess).

License plates/vehicle identification numbers

There is no reasonable expectation of privacy in a license plate number, and running a computer check on a license plate number is not a search for Fourth Amendment purposes. *People v Jones*, 260 Mich App 424; 678 NW2d 627 (2004).

There is no reasonable expectation of privacy in the vehicle identification number (VIN) plate on a car dashboard because of the important role the VIN plays in the pervasive government regulation of automobiles and the efforts the federal government has taken to ensure that the VIN is placed in plain view. *New York v Class*, 475 US 106; 106 S Ct 960; 89 L Ed 2d 81 (1986).

WAS THERE A SEARCH?

CHAPTER 4: CONSTITUTIONALLY PROTECTED PROPERTY INTEREST

Search – Constitutionally Protected Property Interest

Snapshot: The Fourth Amendment protection against unreasonable searches is triggered when the government **trespasses** on **a constitutionally protected area** for the purpose of finding something or **obtaining information**. A governmental **trespass alone is not a search**; it must be coupled with an effort to obtain information. Constitutionally protected areas include **persons, homes, papers and effects**. A trespass may be accomplished by the **slightest intrusion** on the area or effect. The property rights analysis is distinct from the reasonable expectation of privacy analysis; if there is a governmental intrusion on a constitutionally protected area for information**, it does not matter whether a defendant had a reasonable expectation of privacy**, it is a search under the Fourth Amendment.

PRACTICE POINTER: For decades and until recently, the preeminent test for determining whether there was a governmental intrusion under the Fourth Amendment has been the reasonable expectation of privacy test – Fourth Amendment protection is triggered when the government intrudes in an area where an individual has an expectation of privacy. The privacy test is covered in the previous chapter, Reasonable Expectation of Privacy, Chapter 3. Recently, however, courts have revived the property rights test – Fourth Amendment protection is triggered when the government trespasses on a constitutionally recognized property right for the purpose of gathering information. The property test is covered in this chapter.

Cases in chapters 3 and 4 demonstrate the different outcomes that may result depending on which test for intrusion is applied. See, e.g., *Tierney* (no reasonable expectation of privacy in front porch, no search); *Jones* (dog sniff at front door did not invade a reasonable expectation of privacy, no search); *Jardines* (dog sniff at front door was trespass on constitutionally protected area to gather information, search). If case law holds that there is no

> reasonable expectation of privacy in a certain area, consider whether there might be an intrusion on a constitutionally recognized property right to assert a violation of the Fourth Amendment.

The test most often associated with legitimate expectations of privacy (the *Katz* test) supplements, rather than displaces, the traditional property-based understanding of the Fourth Amendment. *Byrd v United States*, ___ US ___; 138 S Ct 1518; 200 L Ed 2d 805 (2018).

There is a search under the Fourth Amendment when the government: (1) trespasses upon a constitutionally protected area, (2) to obtain information. *United States v Jones*, 565 US 400; 132 S Ct 945; 181 L Ed 2d 911 (2012).

> **PRACTICE POINTER:** The watershed ruling in *Jones* was based on the common-law concept of trespass, but *Jones* did not provide clear boundaries for what amounts to a common-law trespass, so it may be important to follow the facts of decisions following *Jones* to analogize to the circumstances in a particular case. Also see *Taylor v City of Saginaw*, 922 F3d 328 (CA 6, 2019) (this chapter), where the court consulted the Restatement (Second) of Torts for guidance.

Constitutionally protected areas are "persons, houses, papers, and effects." US Const, Am IV; *Florida v Jardines*, 569 US 1; 133 S Ct 1409; 185 L Ed 2d 495 (2013).

A governmental trespass alone is not a search under the Fourth Amendment. For a governmental trespass to be a search it must be conjoined with an attempt to find something or to obtain information. *United States v Jones*, 565 US 400; 132 S Ct 945; 181 L Ed 2d 911 (2012); *People v Frederick*, 500 Mich 228; 895 NW2d 541 (2017).

Police officers conducted a warrantless search when they installed a GPS device on the undercarriage of the defendant's vehicle and then used the device to monitor the vehicle's movements. The vehicle was an "effect" under the Fourth Amendment, so it was a constitutionally protected area. The officers trespassed on the vehicle by attaching the GPS device to it. The trespass was for the purpose of obtaining information (the vehicle's movements). Attaching the device was a search and attaching it without a warrant violated the Fourth Amendment. Having made this determination, it was unnecessary to address the government's arguments that the defendant did not have a reasonable expectation of privacy in the undercarriage of his vehicle or his travel on public roads; the protected-property trespass for information was sufficient to establish a governmental intrusion and a violation of the Fourth Amendment. *United States v Jones*, 565 US 400; 132 S Ct 945; 181 L Ed 2d 911 (2012).

Police officers conducted a warrantless search under the Fourth Amendment when they brought a dog to the defendant's front door on the front porch of his house to sniff for contraband. The porch was part of the curtilage of the house ("[t]he front porch is the classic exemplar of an area adjacent to the home and to which the activity of home life extends"), so it was a constitutionally protected area. The officers trespassed on the front porch because they exceeded the customary license to approach a home by the front path and knock on the door ("knock and talk") by bringing a dog along to sniff at the door (for which there is no customary license). The trespass was for the purpose of obtaining information (to discover if there was marijuana inside the home). The officers conduct was a search because they trespassed on a constitutionally protected area to obtain information, and the warrantless search violated the Fourth Amendment. *Florida v Jardines*, 569 US 1; 133 S Ct 1409; 185 L Ed 2d 495 (2013).

- *People v Tierney*, 266 Mich App 687 (2005) and *People v Jones*, 279 Mich App 86; 755 NW2d 224 (2008) should be revisited in light of *Jardines*. See Search – Reasonable Expectation of Privacy, Chapter 3.

Chalking tires to determine whether a vehicle remained in the same location longer than allowed under the city's parking regulations was a search under the Fourth Amendment. Vehicles are a constitutionally protected area. Marking the vehicles' tires with chalk was a trespass because, under the common law, a trespass is an intrusion, however slight, on a chattel. And the trespass was for the purposes of obtaining information (how long the vehicles remained in the same location). Chalking tires to check for parking violations without a warrant or probable cause violated the Fourth Amendment. *Taylor v City of Saginaw*, 922 F3d 328 (CA 6, 2019).

> **PRACTICE POINTER:** An intrusion is a trespass, even if the intrusion is slight (like chalking a tire).

Officers exceeded the scope of a knock and talk when they knocked on one defendant's door at 4:00 a.m. and the other defendant's door at 5:30 a.m. The Court reasoned, "Just as there is no implied license to bring a drug-sniffing dog to someone's front porch, there is generally no implied license to knock at someone's door in the middle of the night." Because the officers were not within the scope of a knock and talk, they were trespassers. The officers were searching for marijuana butter when they approached the homes and knocked on the doors, so they trespassed to obtain information. This was a warrantless search under the property-rights analysis and, thus, a violation of the Fourth Amendment. *People v Frederick*, 500 Mich 228; 895 NW2d 541 (2017).

The police conducted a search when they directed an electronics store employee to attach the defendant's hard drive to another computer for the purpose of searching

the hard drive for child pornography. A computer hard drive (which can contain vast amounts of personal information) is a constitutionally protected effect. Physically removing the defendant's hard drive from his computer was a trespass. And the trespass made for the purposes of obtaining information (child pornography). The warrantless search violated Fourth Amendment protections. *People v Gingrich*, 307 Mich App 656; 862 NW2d 432 (2014).

The search of a trash container located within the curtilage of the defendant's house without a warrant or an applicable exception violated the Fourth Amendment. The curtilage of a home is a constitutionally protected area. Entry onto the curtilage without license was a trespass. The trespass was made for the purposes of searching the defendant's trash for information. This was a search, regardless of whether the defendant had a reasonable expectation of privacy in the trash. *People v Nelson*, unpublished per curiam opinion of the Court of Appeals, issued August 19, 2014 (Docket No. 316624).

There was no trespass when officers pulled alongside the defendant's parked vehicle and looked inside. *People v Barbee*, 325 Mich App 1; 923 NW2d 601 (2018).

WAS THERE A SEARCH?

CHAPTER 5: STANDING

Snapshot: To have **standing** to challenge a search under the Fourth Amendment, a person must have a suffered a governmental intrusion **on that person's** privacy expectation or property interest. A person may not challenge a search based on another person's privacy expectation or property interest – **there is no third-party standing** to raise a constitutional search challenge. Fourth Amendment standing is not the same as Article III – **Fourth Amendment standing is not jurisdictional.**

Introductory notes on Fourth Amendment standing

A person must have standing to challenge a search under the Fourth Amendment.

Whether a person has standing depends entirely on the subjects of the previous two chapters: A person has standing if there was a governmental intrusion on 1) that person's reasonable expectation of privacy or 2) on that person's constitutionally protected property interest (to obtain information). If neither of these circumstances exists, a person does not have standing to challenge a search.

Accordingly, to determine whether there was standing under given circumstances, one can review the previous two chapters and easily discern where a person did or did not have standing.

A person does not have standing to challenge an intrusion on another person's privacy expectation or property interest (no third-party standing).

Because Fourth Amendment standing depends entirely on substantive issues (privacy, property), the Michigan Supreme Court has recently questioned the value of "standing" as discrete issue:

> Although use of the term ["standing"] persists in search and seizure contests, *Rakas* [*v Illinois*, 439 US 128 (1978)] dispensed with the rubric of standing in the Fourth Amendment context…. [R]ather than framing it as a standing issue,

the question is whether the defendant has stated a substantive Fourth Amendment claim on which relief may be granted. People v Mead, ___ Mich ___; ___ NW2d ___ (2019) (2019 WL 2302730).

- Whether or not "standing" is discarded as a discrete issue should not affect the analysis of a Fourth Amendment claim because the substantive issues (privacy, property) are the deciding factors either way.

The previous two chapters offer multiple cases examining the substantive issues. This chapter focuses on cases addressing third-party standing.

> **PRACTICE POINTER:** Fourth Amendment standing is not the same as Article III standing. Article III standing is jurisdictional and must be assessed before reaching the merits. Fourth Amendment standing is "subsumed" under Fourth Amendment doctrine; it is not a jurisdictional doctrine and does not need to be addressed before reaching other aspects of the merits of a Fourth Amendment claim. See *Byrd v United States*, ___ US ___; 138 S Ct 1518; 200 L Ed 2d 805 (2018).

Generally

A defendant cannot assert a claim for suppression based on an unlawful invasion of the person or property of a third party. *Rakas v Illinois*, 439 US 128; 99 S Ct 421; 58 L Ed 2d 387 (1978).

There is no "target" standing. A person does not have standing to contest a Fourth Amendment violation simply because the person was the one against whom evidence was sought or used. *Rakas v Illinois*, 439 US 128; 99 S Ct 421; 58 L Ed 2d 387 (1978).

There is no "automatic" standing A defendant charged with a crime of possession may seek the exclusion of evidence only if their own Fourth Amendment rights have in fact been violated. *United States v Salvucci*, 448 US 83; 100 S Ct 2547; 65 L Ed 2d 619 (1980).

> **PRACTICE POINTER:** *Salvucci* and similar cases holding that a person may not have standing to challenge evidence related to a possession charge are based solely on whether there is a reasonable expectation of privacy in the property seized. *Salvucci* itself states that "property rights are neither the beginning nor the end" of a Fourth Amendment inquiry. *Salvucci* and similar cases should be revisited given the resurgence of the property rights theory of Fourth Amendment violation.

There is no coconspirator exception to the Fourth Amendment standing rule. A person does not have standing to assert the Fourth Amendment rights of a coconspirator. *United States v Padilla*, 508 US 77; 113 S Ct 1936; 123 L Ed 2d 635 (1993).

The right to be free from unreasonable searches and seizures cannot be invoked by a third party; the right is personal. *People v Mahdi*, 317 Mich App 446; 894 NW2d 732 (2016).

A defendant bears the burden of establishing standing to challenge a search or seizure. Standing is determined by examination of the totality of the circumstances. Relevant factors to the determination include 1) ownership, 2) possession or control of the area searched or the item seized, 3) historical use of the item or property, 4) ability to regulate access, 5) the circumstances surrounding the search, 6) subjective anticipation of privacy, and 7) the objective reasonableness of the expectation of privacy considering the specific facts of the case. *People v Mahdi*, 317 Mich App 446; 894 NW2d 732 (2016).

Did a person have Fourth Amendment standing?

A passenger in a vehicle has standing to challenge a stop of the vehicle. *Brendlin v California*, 551 US 249; 127 S Ct 2400; 168 L Ed 2d 132 (2007).

A passenger has standing to challenge the search of areas inside a vehicle where the passenger has a reasonable expectation of privacy (for example, in the backpack the passenger brought with him into the vehicle in this case). *People v Mead*, ___ Mich ___; ___ NW2d ___ (2019) (2019 WL 1769597).

A passenger had standing to challenge the search of his duffle bag that was located in the trunk of the car he was in. The passenger had a reasonable expectation of privacy in the bag just as he would have in luggage at an airport. The passenger did not disclaim ownership of the bag. The warrantless search of the bag violated the passenger's Fourth Amendment rights. *United States v Iraheta*, 764 F3d 455 (CA 5, 2014)

> **PRACTICE POINTER:** A person's Fourth Amendment rights in a certain area are not extinguished simply because that certain area is located within a larger area in which the person does not have Fourth Amendment rights. That is, a person may have standing to challenge the search of bedroom or a closet or a container in a dwelling in which they do not have standing overall or in a container in a vehicle in which they do not have standing overall.

The defendant had standing to challenge the search and seizure of items from his mother's apartment. Police officers recovered items indicating that defendant resided at the apartment, including defendant's tax paperwork and a collections notice listing the apartment as his address. Defendant's clothing and personal items

were found in the apartment. And defendant answered to the door to the apartment when officers arrived, indicating control over and ability to regulate access to the apartment. Defendant had a reasonable and legitimate expectation of privacy in the area searched and the items seized. *People v Mahdi*, 317 Mich App 446; 894 NW2d 732 (2016).

The defendant had standing to challenge the seizure of audiotapes from his home. Although the content of the tapes was illegally obtained by defendant, "the legality of a person's possession cannot be the lynchpin of their Fourth Amendment standing." *United States v. Carnes*, 309 F3d 950 (CA 6, 2002).

Passengers in a vehicle did not have standing to challenge the search of the glove compartment or the area under the seat of the vehicle because they did not (and could not) assert any property or possessory interest in the vehicle. *Rakas v Illinois*, 439 US 128; 99 S Ct 421; 58 L Ed 2d 387 (1978).

The defendant lacked standing to challenge the search of a vehicle in which he had no property or possessory interest. The fact that defendant was engaged to the owner did not endow him with an ownership interest or a reasonable expectation of privacy in the vehicle. And even if the defendant's fiancée allowed him to use the vehicle, defendant did not show a continuous use of the vehicle or a right to access it. *People v Earl*, 297 Mich App 104; 822 NW2d 271 (2012).

The defendant lacked standing to challenge the search of a computer containing his emails files. The owner of the computer consented to the search, and the computer was in the owner's residence. Defendant did not control access to the computer; the owner's children and grandchildren regularly accessed the computer. *People v Brown*, 279 Mich App 116; 755 NW2d 664 (2008).

The defendant lacked standing to assert his daughter's statutory right to confidentiality when a social worker reported the daughter's statements to law enforcement, which led to the search of the defendant's residence. *People v Wood*, 447 Mich 80; 523 NW2d 477 (1994).

The defendant did not have standing to challenge the search of an apartment in a multi-unit apartment building that he owned. The defendant did not have a privacy expectation in the apartment because it was rented to another person, and he did not have a possessory interest in the items taken from the apartment. *People v Hunt*, 171 Mich App 174; 429 NW2d 824 (1988).

A person who is merely visiting a hotel or motel room does not have standing to challenge a search of the room. *People v Lorey*, 156 Mich App 731; 402 NW2d 84 (1986).

WAS THERE A SEARCH?

CHAPTER 6: CURTILAGE/OPEN FIELDS

Snapshot: The **curtilage** of a home is the area **immediately surrounding** and associated with the home. The curtilage is treated as **part of the home** for Fourth Amendment purposes. "**Open fields**," on other hand, are areas in which there is no reasonable expectation of privacy regardless of whether they are fenced or "no trespassing" signs are posted. An intrusion into an open field is **not a search** for Fourth Amendment purposes

PRACTICE POINTERS: Whether an area outside a home is part of the curtilage or an "open field" is a critical distinction in determining whether there has been a search under the Fourth Amendment. If an area intruded on is part of the curtilage, there is a search. If the area is an open field, there is not a search. This distinction is especially critical given the resurgence of the property-based analysis of a governmental intrusion. To determine whether an area is curtilage or open fields, consider the Key Questions below.

The central question in determining whether an area is curtilage is whether the area harbors the intimate activity associated with the sanctity of the home and the privacies of life.

Generally, posting "no trespassing" signs does not convert an open field into a constitutionally protected area.

Viewing an area from a public vantage point, where it is open to view by any member of the public, is not an intrusion or a search, regardless of whether the area viewed is curtilage or open fields.

KEY QUESTIONS

- Was the area close to the home?
- Was the area within an enclosure around the home?
- Was the area used for home-life activities?
- Were steps taken to protect the area from the public?
- Was the area viewed from a public place?

Generally

The curtilage is the area "immediately surrounding and associated with the home"; it is treated as part of the home itself for Fourth Amendment purposes. *Oliver v United States*, 466 US 170; 104 S Ct 1735; 80 L Ed 2d 214 (1984).

"The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened." *Collins v Virginia*, 584 US ___; 138 S Ct 1663; 201 L Ed 2d 9 (2018).

Whether a part of one's property is curtilage generally involves a fact-intensive analysis that considers (1) the proximity of the area to the home, (2) whether the area is within an enclosure around the home, (3) how that the area is used, and (4) what the owner has done to protect the area from observation by passersby. *United States v Dunn*, 480 US 294; 107 S Ct 1134; 94 L Ed 2d 326 (1987).

The four factors identified in *Dunn* are not to be applied mechanically; rather, the factors are useful tools in answering the primary inquiry in a curtilage determination: whether the area harbors the intimate activity associated with the sanctity of the home and the privacies of life. *United States v Dunn*, 480 US 294; 107 S Ct 1134; 94 L Ed 2d 326 (1987); *People v Powell*, 477 Mich 860; 721 NW2d 180 (2006).

It is not a Fourth Amendment violation to view an area within the curtilage if the area is viewed from a public place. *California v Ciraolo*, 476 US 207; 106 S Ct 1809; 90 L Ed 2d 210 (1986) (viewing backyard within the curtilage of a home from the public airways above was not a search for Fourth Amendment purposes, even though it was a focused observation rather than a casual flight).

- See Search – Plain View/Open View, Chapter 7.

"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." *Oliver v United States*, 466 US 170; 104 S Ct 1735; 80 L Ed 2d 214 (1984).

Open fields, even those that are naturally secluded, fenced, or posted against trespassing, are not protected by the Fourth Amendment. Any subjective expectation of privacy that a defendant has in an open field is not one that society recognizes as reasonable or legitimate. *Oliver v United States*, 466 US 170; 104 S Ct 1735; 80 L Ed 2d 214 (1984).

There is no constitutional difference between police observations conducted while in a public place and while standing in the open fields. *United States v Dunn*, 480 US 294; 107 S Ct 1134; 94 L Ed 2d 326 (1987).

- The Michigan Supreme Court granted oral argument on the application on March 29, 2019, in *People v Towne* on issues including some related to curtilage/open fields. 924 NW2d 250 (2019). The Court of Appeals found that an officer who was standing 20-25 yards from a home on the tree line was not within the home's curtilage when he smelled marijuana smoke. Because he was not within the curtilage, he was not trespassing on a constitutionally protected area. Because the officer was not trespassing on a constitutionally protected area, the "plain view" (or more properly described "open view") doctrine applied. *People v Towne*, unpublished per curiam opinion of the Court of Appeals, issued December 19, 2017 (Docket No. 322820).

Area was within the curtilage

The partially enclosed top portion of the defendant's driveway where a motorcycle was parked was within the curtilage of the home. The driveway ran alongside the front lawn past the front perimeter of the home. The top portion of the driveway was a few yards past the front perimeter of the home, enclosed on two sides by a brick wall, and enclosed on a third side by the home. A visitor would not walk on the top portion of the driveway to reach the front door of the house. The top portion of the driveway was "an area adjacent to the home and to which the activity of home life extends." An officer made an unconstitutional warrantless search when he walked up the driveway to the top portion, removed a tarp from the motorcycle, took a picture of the motorcycle, and ran a check on its license plates. *Collins v Virginia*, 584 US ___; 138 S Ct 1663; 201 L Ed 2d 9 (2018).

The defendant's front porch was within the curtilage of his home: "The front porch is the classic exemplar of an area adjacent to the home and to which the activity of home life extends." Officers violated the Fourth Amendment when they trespassed on the defendant's front porch for the purpose of gathering information. *Florida v Jardines*, 569 US 1; 133 S Ct 1409; 185 L Ed 2d 495 (2013).

> **PRACTICE POINTER:** In *People v Tierney*, 266 Mich App 687; 703 NW2d 204 (2005), the court concluded that an enclosed front porch was not "part of the house" and, thus, the defendant had no reasonable expectation of privacy

> in it. There was no doorbell at the screen door entrance to the porch, while there was one at the interior door. A "welcome" sign was located adjacent to the interior door. The porch did not have the characteristics of a living space; it was unheated and used primarily as a storage space. And it was common practice in the Upper Peninsula to use porches to keep out harsh winter conditions when entering or leaving a house. *Tierney* and similar cases should be revisited considering the ruling in *Jardines*.

Officers intruded on the curtilage of the defendant-petitioner's home when they formed a perimeter around the home with several officers stationed about five to seven feet from the home itself while two officers performed a knock and talk. The officers could see through windows into the home. Officers were also positioned in the backyard. Under the "commonsense approach," the area five to seven feet from the home was within the curtilage; "an arm's length from one's house is the classic exemplar of an area adjacent to the home and to which the activity of home life extends." Likewise, "the law seems relatively unambiguous that a backyard abutting the home constitutes curtilage and receives constitutional protection." This was especially true in this case, even though there was no fence around the backyard, because there were no neighbors behind the house and the backyard was not visible from the road. *Morgan v Fairfield Co, Ohio*, 903 F3d 553 (CA 6, 2018).

A log house 18 to 20 feet from and disconnected from a frame house was an outbuilding within the curtilage of the frame house. *People v Bawiec*, 228 Mich 32; 199 NW 702 (1924).

An officer violated the Fourth Amendment by remaining within the curtilage of a probationer's home for 90 minutes. The officer went to the probationer's home to administer a portable alcohol blood test and believed that the probationer was home but not answering the door. The officer, without a warrant, walked around the home five to ten times, within arm's length of the home, knocking on and peering into windows. *Brennan v Dawson*, 752 Fed Appx 276 (CA 6, 2018).

Area was not within the curtilage

> ***NOTE:*** *If an area is not within the curtilage, it is an open field. This subsection summarizes cases where whether the area was curtilage or open fields was a close call.*

A barn was not within the curtilage of the defendant's house. It was located 60 yards from the house, and it did not lie within the area surrounding the house that was enclosed by a fence. Of special significance, officers had objective data demonstrating that the barn was not used for intimate activities of the home. And the defendant did little to protect the barn from observation by persons standing in the open fields; interior fences on the property were designed for containing

livestock, not preventing persons from observing the inside of the enclosed areas. Officers did not violate the Fourth Amendment when they 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 door. *United States v Dunn*, 480 US 294; 107 S Ct 1134; 94 L Ed 2d 326 (1987).

The defendant's driveway was not within the curtilage of his condominium, even though it was immediately adjacent to the condominium. There was no gate, fence, or hedgerow surrounding the condominium; it was common for neighbors to walk by each other's vehicles over the course of a day; and the driveway was shared with a neighboring family. The defendant's car was parked in front of the condominium (not behind the front of the condominium), and it was not covered with a tarp. An officer who walked onto the driveway (to install a warrant-authorized GPS tracking device) did not violate the Fourth Amendment by doing so. *United States v Coleman*, 923 F3d 450 (2019).

Officers did not intrude on the curtilage of the defendant's home when they looked into his backyard from their position in a public alley. *United States v Poole*, 407 F3d 767 (CA 6, 2005).

The defendant's backyard (where she was growing marijuana) was not within the curtilage of her home, and she had no reasonable expectation of privacy in it. The backyard was not enclosed and was in plain view of the defendant's neighbors. She made no effort whatsoever to protect an expectation of privacy in the backyard. "There is no principled reason for distinguishing between people passing by the front of the house and people passing by the back." And growing large marijuana plants in a totally unobstructed area is "not one of those intimate activities whose presence defines the curtilage for Fourth Amendment purposes." *People v Powell*, 477 Mich 860; 721 NW2d 180 (2006).

The defendant could not reasonably expect that individuals would not enter his driveway up to his house due to fact that driveway was open and ungated and that "no trespassing" signs were not displayed. *People v Taormina*, 130 Mich App 73; 343 NW2d 236 (1983).

An outbuilding near a farmhouse was within the farmhouse's curtilage. *People v Mackey*, 121 Mich App 748; 329 NW2d 476 (1982).

The defendant had not done anything to protect his backyard from the public, such as putting up a fence or "no trespassing" signs. *People v Radandt*, unpublished per curiam opinion of the Court of Appeals, issued December 2, 2014 (Docket No. 314337).

Area was in the open fields

An area in the woods behind the defendant's house was in the open fields, even though it was fenced in by chicken wire and had "No Trespassing" signs. The fact that it was on defendant's property did not change the status of the area. *Oliver v United States*, 466 US 170; 104 S Ct 1735; 80 L Ed 2d 214 (1984).

Police officers did not violate the Fourth Amendment when they entered the condominium complex where the defendant lived, even though the complex had a "private property" sign at its entrance. There was no gate preventing outsiders from entering the complex, the sign itself did not require permission to enter, prohibit outside visitors, or even state "no trespassing," and residents could have visitors without permission. Also, the Postal Service delivered mail to mailboxes inside the complex, and anyone could drive onto the streets of the condominium complex unimpeded. *United States v Coleman*, 923 F3d 450 (2019).

The area where evidence of murder was discovered was an open field. The area was one-quarter mile from the road, it was fenced only on two sides, and was not obstructed by gates or signs. *People v Rotar*, 137 Mich App 540; 357 NW2d 885 (1984).

WAS THERE A SEARCH?

CHAPTER 7: PLAIN VIEW/OPEN VIEW

Snapshot: **Plain view** and **open view** are circumstances in which there is **no search** for Fourth Amendment purposes because an individual does not have a reasonable expectation of privacy in items or areas that are in plain or open view. The **plain view** doctrine allows officers to seize, without a warrant, items in plain view if the officers are **lawfully in a position** from which they view the item and the item's **incriminating character is immediately apparent**. The **plain view** doctrine applies when there is a **lawful intrusion** into a constitutionally protected area. Under the **open view** doctrine, viewing items that are readily visible from an area that is not constitutionally protected (from which **any member of the public** might see the items) is not a search for Fourth Amendment purposes.

KEY QUESTIONS

- Was the officer lawfully in the position from which he viewed the item?
- Was the incriminating character of the item immediately apparent without further search?
- Was the item in "open view" so it could be viewed from a vantage point that was not constitutionally protected?

PRACTICE POINTER: Michigan courts have recently refined a distinction between the "plain view" doctrine and the "open view" doctrine. The plain view doctrine applies if an officer sees items while lawfully intruding onto a constitutionally protected area (e.g., by consent or during a protective sweep). The open view doctrine applies if the officer views items from an area that is not constitutionally protected (i.e., the items are open to public view). See *People v Barbee*, 325 Mich App 1; 923 NW2d 601 (2018). This distinction is often blurred, especially in older cases. Cases that were decided under the

plain view doctrine are listed under the open view doctrine if that doctrine would more properly apply.

- The Michigan Supreme Court granted oral argument on the application on March 29, 2019, in *People v Towne* on issues including "if the proper scope of a knock and talk was not exceeded in this case, whether the plain view or exigent circumstances exceptions to the warrant requirement permitted the police to forcibly enter the defendant's home based on an officer's perceptions while posted at the rear of the home in the curtilage or in an 'open field.'" 924 NW2d 250 (2019).

Generally

An officer must be lawfully in a position from which the officer views an incriminating item for the plain view doctrine to apply. *People v Champion*, 452 Mich 92; 549 NW2d 849 (1996).

The incriminating character of an object must be immediately apparent without further search to justify its seizure under the plain view doctrine. *Arizona v Hicks*, 480 US 321; 107 S Ct 1149; 94 L Ed 2d 347 (1987).

An item's incriminating character is immediately apparent if an officer has probable cause to believe the item is seizable without further search. *People v Mahdi*, 317 Mich App 446; 894 NW2d 732 (2016).

Probable cause to believe that an item in plain view is contraband or incriminating does not require "near certainty." *People v Champion*, 452 Mich 92; 549 NW2d 849 (1996).

No searching, no matter how minimal, may be done under the auspices of the plain view doctrine. See *Arizona v Hicks*, 480 US 321; 107 S Ct 1149; 94 L Ed 2d 347 (1987).

A plain-view warrantless seizure of incriminating evidence cannot be justified if it is effectuated by an unlawful trespass. *Collins v Virginia*, 584 US ___; 138 S Ct 1663; 201 L Ed 2d 9 (2018).

The discovery of evidence need not be "inadvertent" for the plain view doctrine to apply. *Horton v California*, 496 US 128; 110 S Ct 2301; 110 L Ed 2d 112 (1990); *People v Cooke*, 194 Mich App 534; 487 NW2d 497 (1992).

The plain view doctrine is based on police convenience, not exigency. "It would be unreasonably inconvenient to require the police, once they have made a valid intrusion and have discovered probable evidence in plain view, to leave, obtain a

warrant, and return to resume a process already in progress." *People v Champion*, 452 Mich 92; 549 NW2d 849 (1996).

There is no search for Fourth Amendment purposes when an officer views items or activity with the officer's normal vision from a vantage point that is not within a constitutionally protected area. *People v Barbee*, 325 Mich App 1; 923 NW2d 601 (2018).

"What a person knowingly exposes to the public, even in [the person's] own home or office, is not a subject of Fourth Amendment protection." *Kyllo v United States*, 533 US 27; 121 S Ct 2038; 150 L Ed 2d 94 (2001).

Information gleaned as a result of observation of an object in open view can form the basis of probable cause or reasonable suspicion to proceed further without violating the Fourth Amendment. *People v Barbee*, 325 Mich App 1; 923 NW2d 601 (2018).

The open view doctrine allows officers to look into a constitutionally protected area that is open to public view, but it does not allow entry into a constitutionally protected area; further justification for entry is required. See *United States v Dunn*, 480 US 294; 107 S Ct 1134; 94 L Ed 2d 326 (1987) (officers obtained warrant to search a barn based on what they saw in the barn from an open field).

Was the officer lawfully in the position from which he viewed the item?

An officer was lawfully in a position from which he viewed an incriminating red running suit because the intrusion into the area where the suit was found was justified as a protective sweep. *Maryland v Buie*, 494 US 325; 110 S Ct 1093; 108 L Ed 2d 276 (1990).

Firefighters were lawfully in a position to view marijuana plants growing in the defendant's townhouse because their entry was justified by the community caretaking exception. *People v Slaughter*, 489 Mich 302; 803 NW2d 171 (2011).

Officers were lawfully in a position from which they viewed cocaine residue and an electronic scale in the defendant's bedroom because their intrusion into the bedroom was justified as a protective sweep. *People v Shaw*, 188 Mich App 520; 470 NW2d 90 (1991).

An officer was lawfully in a position to view the home screen of a phone because the owner of the phone asked her to retrieve the phone from a car. *People v Lopez*, unpublished per curiam opinion of the Court of Appeals, issued March 26, 2019 (Docket No. 341089).

Officers were not lawfully within the curtilage of house when they discovered marijuana plants, so the plain view doctrine did not apply. *Morgan v Fairfield Co, Ohio*, 903 F3d 553 (CA 6, 2018).

Officers were not lawfully in a position to view information stored on the hard drive of the defendant's computer because the defendant had a constitutionally protected property interest in the computer and the hard drive was accessed to collect information. The plain view doctrine did not apply. *People v Gingrich*, 307 Mich App 656; 862 NW2d 432 (2014).

Officers were not lawfully in a position to view marijuana plants in a shed attached to the back of the defendant's home. The officers' intrusion immediately into the defendant's backyard was not a proper knock and talk and was not justified by any other exception to the warrant requirement. The plain view doctrine did not apply. *People v Galloway*, 259 Mich App 634; 675 NW2d 883 (2003).

Officers were not lawfully in a position to view a bag containing marijuana in a car because they based their search on their observation of an occupant of the car smoking a hand-rolled cigarette, but no hand-rolled cigarette was found in the car. *People v Martinez*, 192 Mich App 57; 480 NW2d 302 (1991).

Officers were not lawfully in a position to view marijuana plants in the defendant's shed. The officers were executing a search warrant that did not include the shed. The seizure of the marijuana plants was not justified by the plain view doctrine. *People v Mackey*, 121 Mich App 748; 329 NW2d 476 (1982).

Was the item's incriminating character immediately apparent?

The incriminating character of a device was immediately apparent, even though the full nature of the device was unknown at the time. An officer who was conducting a consent search for weapons observed a homemade device with electrical switches and a motion detector in the shower stall of a bathroom that was used by female tenants in the defendant's house. The officer used a flashlight to look through a small hole below the motion detector and saw what he thought was a camera lens. Seizing the device by removing several screws was justified under the plain view doctrine. *People v Wilkens*, 267 Mich App 728; 705 NW2d 728 (2005).

The incriminating character of photographs and personal letters in an expandable envelope was immediately apparent. An officer was searching the defendant's office pursuant to a warrant (that did not include photographs and personal letters) when he opened an expandable envelope. The envelope was lawfully opened (under the warrant), and the defendant's diminished privacy interest in the contents of the envelope allowed the officer to make a cursory review of the items in it. The officer immediately recognized the person in the photographs and the stationary on which

the letters were written. *People v Fletcher*, 260 Mich App 531; 679 NW2d 127 (2004).

The incriminating character of a phone was immediately apparent because the phone's visible home screen showed a picture of the defendant "holding up what looked like a wad of cash, and with a black semi-automatic, looked like a real handgun, in his lap." *People v Lopez*, unpublished per curiam opinion of the Court of Appeals, issued March 26, 2019 (Docket No. 341089).

The incriminating character of stereo equipment was not immediately apparent because the equipment had to be moved to locate its serial numbers. An officer was in the defendant's apartment on a lawful but unrelated search. Merely inspecting the parts of the equipment that came into view during the lawful search would not have been an independent search because it would not have been an additional invasion of the defendant's privacy. But moving the equipment was a new search that was not supported by probable cause; the officer had only reasonable suspicion that the equipment was stolen until he moved the equipment and recorded the serial numbers. *Arizona v Hicks*, 480 US 321; 107 S Ct 1149; 94 L Ed 2d 347 (1987).

The incriminating character of financial documents and a map was not immediately apparent; the officers had to read the documents to determine their incriminating nature. Neither the intrinsic nature of the documents nor their appearance gave the officers probable cause to believe they were associated with criminal activity. (But their admission was harmless error.) *United States v Garcia*, 496 F3d 495 (CA 6, 2007).

The incriminating nature of a twist tie, cigarette filter, spoon, and prescription bottle with liquid was not immediately apparent, and the officer did not have probable cause to believe it was. The officer testified that, in his experience, the items were frequently used with methamphetamine. But the connection between the items and illegal activity was not enough to make the items intrinsically incriminating. "[W]hen an item appears suspicious to an officer but further investigation is required to establish probable cause as to its association with criminal activity, the item is not immediately incriminating." *United States v McLevain*, 310 F3d 434 (CA 6, 2002).

The incriminating character of the defendant's wallet, keys, and cell phone was not immediately apparent. An officer had to search through the wallet to see if it contained a large amount of cash or an incriminating rewards card. An officer had to conduct further investigation of the keys to see if they were for a particular vehicle and a particular residence. An officer had to conduct further investigation of the cell phone by searching through text messages for any connection to the crime. The seizure of the items was not justified by the plain view exception to the warrant requirement. *People v Mahdi*, 317 Mich App 446; 894 NW2d 732 (2016).

The incriminating nature of clothing was not immediately apparent, and the clothing was not contraband. Seizing the clothing was not justified by the plain view doctrine. *People v Jordan*, 187 Mich App 582; 468 NW2d 294 (1991).

Was the item in "open view" such that it could be viewed from a vantage point that was not constitutionally protected?

There is no legitimate expectation of privacy under the Fourth Amendment shielding that portion of the interior of an automobile that may be viewed from outside the vehicle by either inquisitive passersby or diligent police officers. *People v Anthony*, ___ Mich App ___; ___ NW2d ___ (2019) (2019 WL 290026).

There is no search for Fourth Amendment purposes when an officer views items or activity with the officer's normal vision from a vantage point that is not within a constitutionally protected area and the area viewed was open to public gaze. *People v Barbee*, 325 Mich App 1; 923 NW2d 601 (2018).

Viewing the interior of a greenhouse through its open roof from a helicopter flying at 400 feet was not a search for Fourth Amendment purposes. The defendant had no reasonable expectation of privacy in the greenhouse because he left the sides and roof partially open, and officers viewed marijuana plants in the greenhouse while traveling in public airways. *Florida v Riley*, 488 US 445; 109 S Ct 693; 102 L Ed 2d 835 (1989).

Defendant's movements inside a car parked on a public street were in open view to officers who observed the movements. Officers pulled up next to the parked car, shined a flashlight through the car's window, and observed the defendant leaning back, appearing to pull something from his waist area, and then leaning forward as if to put something under the seat. After the defendant got out of the car, an officer shined a flashlight on the car's floorboard and saw a gun. Defendant's Fourth Amendment rights were not violated by the officers' conduct because the defendant did not have a reasonable expectation of privacy in the interior of the parked car (the general public could look into the interior from any number of angles) and the officers did not trespass on a constitutionally protected property interest by merely shining a flashlight into the interior of the car. *People v Barbee*, 325 Mich App 1; 923 NW2d 601 (2018).

The defendant did not have a reasonable expectation of privacy in his condemned house; officers were lawfully searching the house for other persons who might be in the house when they discovered marijuana plants in "plain view." The defendant's "vague assertions" that his "mere ownership" of the house created a reasonable expectation of privacy were unsupported by case law, and any property right the defendant might have had was outweighed by his wrongful presence in the house. *People v Antwine*, 293 Mich App 192; 809 NW2d 439 (2011).

An officer did not violate the defendant's Fourth Amendment rights when the officer who was lawfully on the porch of defendant's house looked through a window into the front room and saw incriminating items. The defendant had no actual, subjective expectation of privacy in the contents of the room because the window blinds were not drawn. It was irrelevant that the officer used a flashlight to see the contents of the room; "the plain [or open] view rule does not go into hibernation at sunset." *People v Custer (On Remand)*, 248 Mich App 552; 640 NW2d 576 (2001).

WAS THE SEARCH REASONABLE?

CHAPTER 8: WARRANT

CHAPTER 8: WAS THE SEARCH REASONABLE?

CHAPTER 8: WAS THE SEARCH REASONABLE?

WARRANT *(continued)*

Snapshot: A search warrant must be supported by an **affidavit** that establishes **probable cause** for the search, it must state the **place** to be searched and the **items** to be seized **with particularity**, and it must be issued by a **neutral and detached** magistrate. **Deficient portions** of a search warrant may be **severed**, and the sufficient portions remain valid. **Probable cause** for a search warrant may be based on an **informant's tip**. **Violations** of any **statutory** requirements related to a search warrant or its contents **do not require suppression** of the evidence acquired through that violation. An argument for **suppression** must be based on a **constitutional violation**.

KEY QUESTIONS:

- Was there probable cause to search?
  - Did the affidavit support probable cause to search?
  - Was there a sufficient nexus between the place to be searched and the evidence sought?
  - Was the affidavit based on stale information?
  - Did the affidavit contain hearsay?
  - Did the affidavit contain false statements?
- Was probable cause based on an informant's tip?
  - Did the informant speak from personal knowledge?
  - Had the informant provided reliable information in the past?
  - Was the tip corroborated?
- Was the warrant for a tracking device?
- Was the warrant anticipatory?
- Did the warrant describe the place to searched, the items to be seized, and the offense being investigated with particularity?
- Was the warrant overbroad?
- Was the warrant issued by a neutral and detached magistrate?
- Did officers exceed the scope of the warrant?
- Did the execution of the warrant make the search unreasonable?
  - Did officers violate the knock and announce rule?
  - Were occupants detained during the search?

Generally

A search must be reasonable. US Const, Am IV.

Whether a search is reasonable is a fact-intensive determination and must be measured by examining the totality of the circumstances. *People v Williams*, 472 Mich 308; 696 NW2d 636 (2005).

Generally, a warrant is required for a search to reasonable. *Riley v California*, 573 US 373; 134 S Ct 2473; 189 L Ed 2d 430 (2014).

"[N]o 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." US Const, Am IV.

"No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation." Const 1963, art 1, § 11.

> **PRACTICE POINTER:** A search warrant must be supported by an affidavit that establishes probable cause for the search, it must state the place to be searched and the items to be seized with particularity, and it must be issued by a neutral and detached magistrate.

Was there probable cause to search?

> **PRACTICE POINTER:** The same analysis that applies to a determination of probable cause for a search also applies to a determination of probable cause for an arrest. *People v Levine*, 461 Mich 172; 600 NW2d 622 (1999). See Seizure – Arrest, Chapter 30.

Under the federal and Michigan constitutions, a search warrant may not be issued unless probable cause exists to justify the search. *People v Waclawski*, 286 Mich App 634; 780 NW2d 321 (2009).

Probable cause for a search warrant exists when "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *People v Franklin*, 500 Mich 92; 894 NW2d 561 (2017).

- See also Seizure – Arrest, Chapter 30, for cases addressing probable cause.

Did the affidavit support probable cause to search?

A magistrate's finding of probable cause must be based upon all the facts related in the supporting affidavit. *People v Keller*, 479 Mich 467; 739 NW2d 505 (2007).

To demonstrate the required probable cause for a search warrant, an affidavit must contain facts that indicate a fair probability that evidence of a crime will be located on the premises of the proposed search. *United States v Abboud*, 438 F3d 554 (CA 6, 2006).

An affidavit supporting a search warrant must contain facts within the knowledge of the affiant and not mere conclusions or beliefs. *People v Martin*, 271 Mich App 280; 721 NW2d 815 (2006).

The personal knowledge element necessary to support probable cause in an affidavit should be derived "from the information provided or material facts," not from the informant's or affiant's statement that he or she has personal knowledge. *People v Stumpf*, 196 Mich App 218; 492 NW2d 795 (1992).

The affiant may not draw his or her own inferences. The affidavit must state facts from which the magistrate can draw inferences that support probable cause. *Riley v California*, 573 US 373; 134 S Ct 2473; 189 L Ed 2d 430 (2014).

A court may consider the experience of an affiant when determining whether there is probable cause to issue a search warrant. *People v Darwich*, 226 Mich App 635; 575 NW2d 44 (1997).

An affidavit that supports probable cause is not required to state a substantial basis for inferring that defenses do not apply. *People v Ventura*, 316 Mich App 671; 894 NW2d 108 (2016).

A warrant that is supported by an affidavit that is not signed is presumed invalid, but the presumption may be overcome by a showing that the affidavit was made on oath before a magistrate. *People v Mitchell*, 428 Mich 364; 408 NW2d 798 (1987).

An affidavit containing only generalized boilerplate recitations to illustrate the elements for certain types of criminal conduct without particularized facts is not sufficient to establish probable cause. *United States v Weaver*, 99 F3d 1372 (CA 6, 1996).

A search warrant was issued on probable cause based on an officer's affidavit that stated that the defendant showed the officer "coin envelopes" in response to an inquiry about heroin, that the defendant refused to sell the officer heroin, and that the officer had participated in over one hundred narcotics raids and had seen coin

envelopes used to package cocaine on numerous occasions, suggesting that the coin envelopes that the defendant showed the officer contained heroin. *People v Whitfield*, 461 Mich 441; 607 NW2d 61 (2000).

An officer's statement that "affiants have received reliable information from a credible person and believe" that heroin is stored in a home was inadequate to establish probable cause. *Aguilar v State of Tex*, 378 US 108; 84 S Ct 1509; 12 L Ed 2d 723 (1964), abrogated on other grounds by *Illinois v Gates*, 462 US 213 (1983).

> **PRACTICE POINTER**: "Suspicion" or "belief" do not establish probable cause for a search warrant.

A warrant that was authorized on a mere affirmation of suspicion and belief that evidence of a crime would be found at a private dwelling was invalid because it was not supported by probable cause. *Nathanson v United States*, 290 US 41; 54 S Ct 11; 78 L Ed 159 (1933).

An affiant's statement that she believed that alcoholic beverages were being unlawfully manufactured and sold on the defendant's premises because her husband had purchased moonshine there was not sufficient to establish probable cause for a search warrant. The affiant conceded that she had never seen the defendant sell alcoholic beverages to her husband and that her husband had never told her that he purchased alcoholic beverages from defendant. The statement was conclusory. *People v Zoder*, 15 Mich App 118; 166 NW2d 289 (1968).

Was there a sufficient nexus between the place to be searched and the evidence sought?

> **PRACTICE POINTER:** An affidavit must state facts to show a connection between the place to be searched and the items to be seized. That connection can be shown (among other ways) by internet connections, documents indicating a connection, common practices of persons involved in certain offenses, or likely places for evidence to be hidden. If no connection can be inferred from the facts in the affidavit, there is no probable cause on which to issue a search warrant.

In order for probable cause to support a search warrant, there must be a nexus between the place to be searched and the evidence sought; that nexus can be inferred from the type of crime being investigated, the nature of things to be seized, the extent of an opportunity to conceal the evidence elsewhere, and the normal inferences that may be drawn as to likely hiding places. *United States v Elbe*, 774 F3d 885 (CA 6, 2014).

An affidavit supporting the request for a search warrant must tie the defendant to the specific location to be searched in order to provide a substantial basis for inferring a fair probability that evidence of a crime is there. *People v Kazmierczak*, 461 Mich 411; 605 NW2d 667 (2000).

There was a sufficient nexus between the home that agents sought to search and the child pornography the agents sought to find on the computer at the home to support probable cause for a search warrant. The affidavit established that the defendant's internet account name was associated with the home by tying the name to the defendant with evidence of internet addresses from two hotels where the defendant viewed, downloaded or shared files related to child pornography; a few months later, the agents tied the internet account name to the internet account at the home where the agents observed the defendant and where the defendant paid utility bills. *United States v Elbe*, 774 F3d 885 (CA 6, 2014).

There was a sufficient nexus between the defendant's home and the business location that officers sought to search and the business records the officers sought to find. It is a simple fact that records of illegal business activity and personal financial records are usually kept at either a business location or a person's home. *United States v Abboud*, 438 F3d 554 (CA 6, 2006).

An affidavit stating that officers conducted a trash pull and found a marijuana "roach," marijuana residue, and letters to the defendant in the trash was sufficient to establish probable cause for a search warrant for evidence of marijuana production and trafficking in a residence. The pull revealed evidence of illegal activity in the residence. The fact that an unreliable anonymous tip was also described in the affidavit did not make the warrant invalid because the roach and residue from the trash pull established probable cause. *People v Keller*, 479 Mich 467; 739 NW2d 505 (2007).

An affidavit supported probable cause to search the defendant's home for marijuana, even though an undercover officer's marijuana dealings with the defendant took place at the defendant's store only. The affidavit stated that the defendant had provided marijuana to an individual and instructed that individual to sell the marijuana in the back of the defendant's store. The affidavit stated that no significant quantities of marijuana were found at the defendant's store. It also stated that, based on the affiant's experience, individuals who cultivate marijuana routinely store it in their homes in order to prevent law enforcement officers from discovering it. The affidavit sufficiently connected the crime to the defendant's home. *People v Darwich*, 226 Mich App 635; 575 NW2d 44 (1997).

Was the affidavit based on stale information?

A search warrant is deemed to be stale "if the probable cause, while sufficient at some point in the past, is now insufficient as to evidence at a specific location." *United States v Abboud*, 438 F3d 554 (CA 6, 2006).

A search warrant must be supported on probable cause existing at the time the warrant is issued. *People v Humphrey*, 150 Mich App 806; 389 NW2d 494 (1986).

Stale information may not be used to establish probable cause for a search warrant. *United States v Frechette*, 583 F3d 374 (CA 6, 2009).

A lapse of time between the occurrence of the underlying facts and the issuance of a search warrant does not automatically render the warrant stale. *People v Gillam*, 93 Mich App 548; 286 NW2d 890 (1979).

The length of time between the events listed in the affidavit and the application for the warrant is salient but not controlling. *United States v Abboud*, 438 F3d 554 (CA 6, 2006).

Whether a search warrant is stale does not depend on whether there is recent information to confirm that a crime is being committed; it depends on whether probable cause is sufficiently fresh to presume that the items to be seized remain on the premises. *People v Osborn*, 122 Mich App 63; 329 NW2d 533 (1982).

Probable cause is more likely to be "sufficiently fresh" when a history of criminal activity is involved. *People v Gillam*, 93 Mich App 548; 286 NW2d 890 (1979).

Evidence of ongoing criminal activity will generally defeat a claim of staleness. *United States v Greene*, 250 F3d 471 (CA 6, 2001).

In determining probable cause to search, the time factor must be weighed and balanced in light of other variables including whether the crime is a single instance or an ongoing pattern, whether the inherent nature of a scheme suggests that it is probably continuing, and whether the property to be seized is likely to be promptly disposed of or retained. *People v Russo*, 439 Mich 584; 487 NW2d 698 (1992).

In analyzing whether information is stale, factors to be considered include whether the crime was a single instance or a conspiracy; whether the criminal is nomadic or entrenched; whether the property to be seized is of enduring utility to its user; and whether the place to be searched was a forum of convenience or an operational base. *United States v Frechette*, 583 F3d 374 (CA 6, 2009).

> **PRACTICE POINTER:** A claim that a warrant is based on stale information has a greater chance of success if the offense at issue is based on a single, discrete act (such as a single sale of a controlled substance or a single instance of illegal gambling). Information relating to ongoing offenses (such as possessing child pornography, bank fraud, or a controlled substance enterprise) is generally not stale. This is similar to probable cause in the arrest context where dated evidence of an ongoing infraction (such as driving with a suspended license) is generally not considered stale.

Information that the defendant had purchased a one-month subscription to a child pornography web site 16 months before the search was not stale. Child pornography is not a fleeting crime; the defendant had lived in the same home over the 16-month period between the subscription purchase and the issuance of the warrant; child pornography has an infinite lifespan; and the place to be searched (the defendant's home) was a "secure operational base." *United States v Frechette*, 583 F3d 374 (CA 6, 2009).

Information that the defendant had subscribed to a child pornography web site 13 months before the issuance of the search warrant was not stale because the crime is generally carried out in the secrecy of the home and over a long period; the same time limitations that apply to more fleeting crimes do not control the staleness inquiry for child pornography. *United States v Paull*, 551 F3d 516 (CA 6, 2009).

Information relating to bank fraud in 1999 was not stale when the search warrant was issued in 2002. The crime involved a systematic and ongoing transfer of funds, the defendant was entrenched (he owned several convenience stores in the area), business records are generally retained, and the activity occurred in a secure operational base (the defendant's home and business). *United States v Abboud*, 438 F3d 554 (CA 6, 2006).

A search warrant based on six-and-a-half-year-old information regarding evidence of pornography in the defendant's home was not stale. The crime was ongoing, and the evidence was the kind that is likely to be retained. The information was sufficient to support a fair probability that the evidence would be retained at the defendant's home. *People v Russo*, 439 Mich 584; 487 NW2d 698 (1992).

"Dated" information indicating that the defendant kept business records in her home computer while engaging in fraudulent activity involving the business records was not stale, even though no dates were actually provided in the supporting affidavit. The affidavit indicated that the defendant had engaged in fraudulent activity over a two-year period, and electronic business records are generally kept for a long time. Even if the defendant had attempted to erase the information from the computer's hard drive, skilled personnel can retrieve information the average

user thought was deleted. *People v Sobczak-Obetts*, 253 Mich App 97; 654 NW2d 337 (2002).

A search warrant issued 72 hours after an informant observed a transfer of controlled substances was not based on stale information. The observation along with the defendant's statement to the informant that the defendant was "never out of dope" provided probable cause to believe that controlled substances remained on the premises. *People v Humphrey*, 150 Mich App 806; 389 NW2d 494 (1986).

A search warrant executed seven days after the alleged delivery of heroin at issue was not based on stale information because there was corroborative information obtained at least 24 hours before the warrant's issuance. *People v Gillam*, 93 Mich App 548; 286 NW2d 890 (1979).

Information about illegal gambling and liquor sales six days before the warrant was issued was stale. The information was not updated by police officers' follow-up investigation and surveillance because the application for the warrant did not contain information derived from those activities, leading to the conclusion that the illegal conduct was not ongoing. *People v Wright*, 367 Mich 611; 116 NW2d 786 (1962).

Information that the defendant made a single sale of marijuana three days before the warrant was issued was stale. An informant's supporting affidavit did not allege continuing drug sales or even that the defendant possessed marijuana after the sale. There was absolutely no evidence to suggest that the defendant would possess marijuana three days after the sale to the informant. *People v David*, 119 Mich App 289; 326 NW2d 485 (1982).

Did the affidavit contain hearsay?

A warrant affidavit may contain hearsay if there is a substantial basis for crediting the hearsay and the hearsay statements are reasonably corroborated by other matters within the affiant's knowledge. *Jones v United States*, 362 US 257; 80 S Ct 725; 4 L Ed 2d 697 (1960), overruled on other grounds by *United States v Salvucci*, 448 US 83 (1980).

A search warrant may be issued based on an affidavit that contains hearsay if the police have conducted an independent investigation to verify the information. *People v Harris*, 191 Mich App 422; 479 NW2d 6 (1991).

Statements containing multiple levels of hearsay may be used to establish probable cause for search warrant where the ordinary requirements of personal knowledge and reliability or credibility are met for each level of hearsay. *People v Echavarria*, 233 Mich App 356; 592 NW2d 737 (1999).

Hearsay in an out-of-state police complaint indicating that defendant had admitted to using his home computer to solicit sex from underaged boys was properly used to support probable cause for a search warrant for the defendant's computer files because it was confirmed by an independent police investigation. A police detective communicated personally with an out-of-state detective who confirmed the defendant's admission that he traveled to Illinois to engage in sexual activities with a minor he had been chatting with on the internet. *People v Waclawski*, 286 Mich App 634; 780 NW2d 321 (2009).

An affidavit that contained hearsay from a known person supported probable cause for a search warrant. The affidavit contained details indicating that the known person spoke from personal knowledge, and police officers independently corroborated the information. *People v Harris*, 191 Mich App 422; 479 NW2d 6 (1991).

An affidavit that consisted almost entirely of uncorroborated hearsay was insufficient to support probable cause. The affidavit included an informant's statement that, three days before the warrant was sought, the informant was on the suspect premises and saw a quantity of marijuana "expressly for the purpose of unlawful distribution." The affidavit presented no underlying facts to support the informant's knowledge regarding distribution or the detective's own "belief" that these quantities of marijuana were present "for the purpose or with the intention of unlawful possession, sale or transportation." *United States v Weaver*, 99 F3d 1372 (CA 6, 1996).

Did the affidavit include false statements?

> **PRACTICE POINTER:** False statements in an affidavit do not render the entire affidavit invalid; rather, the affidavit may nonetheless support probable cause if probable cause can be established absent the false statements. This rule is like the rule regarding overbroad statements in a warrant (see below, this chapter). Deficient portions of an affidavit or a search warrant are severable.

If a defendant establishes by a preponderance of the evidence that an affiant committed perjury or made statements with a reckless disregard for the truth, a court must set aside the affidavit's false material and determine whether the affidavit's remaining content is sufficient to establish probable cause. If not, the affidavit lacks probable cause on its face, the search warrant must be voided, and the fruits of the search must be excluded. *Franks v Delaware*, 438 US 154; 98 S Ct 2674; 57 L Ed 2d 667 (1978); *People v Franklin*, 500 Mich 92; 894 NW2d 561 (2017).

An affidavit supported probable cause for a search warrant (for a blood draw), even though it included numerous recklessly false allegations and reckless omissions (as

demonstrated by videotape of the traffic stop). In the affidavit, the officer omitted the fact that the defendant had paper in his mouth less than 15 minutes before administration of a PBT, omitted the fact that the officer had administered a field test in a non-standardized way, misrepresented that the defendant's speech was slurred, and misrepresented that the defendant was unable to touch his nose. But the remaining allegations in the affidavit indicating that there was a strong odor of intoxicants, that the defendant had watery eyes, and that the defendant drove through a red light were sufficient to establish probable cause for the blood draw. *People v Mullen*, 282 Mich App 14; 762 NW2d 170 (2008).

A false statement in a supporting affidavit did not invalidate the search warrant. The false statement was not necessary to establish probable cause because the remainder of the affidavit contained sufficient information for that purpose. *People v Williams*, 240 Mich App 316; 614 NW2d 647 (2000).

An affidavit supported probable cause even though it arguably contained a false statement regarding when the defendant took a lie detector test and omitted the fact that he passed the test. The affidavit contained substantial and detailed information of IP addresses, encryption software use, usernames, and internet connection locations to support a fair probability that evidence regarding the defendant's attempt to extort a presidential candidate by threatening to release his tax returns would be found at the defendant's house. *United States v Brown*, 857 F3d 334 (CA 6, 2017).

> **PRACTICE POINTER:** An officer executing a search warrant may do so in a "good faith" belief that it is valid even though there are material omissions and false statements in the supporting affidavits or other defects in the warrant depending on the nature of the defects and the circumstances surrounding the search. See Exclusionary Rule – Exceptions – Good Faith, Chapter 23.

Was probable cause based on an informant's tip?

- For more cases addressing probable cause based on an informant's tip see Seizure - Arrest, Chapter 30.

Whether an anonymous informant's tip is sufficient to establish probable cause for a search warrant is determined by the totality of the circumstances. *Illinois v Gates*, 462 US 213; 103 S Ct 2317; 76 L Ed 2d 527 (1983).

Michigan case law tracks federal precedent regarding the existence of probable cause based on an anonymous tip. *People v Levine*, 461 Mich 172; 600 NW2d 622 (1999).

> **PRACTICE POINTER:** In *Illinois v Gates*, 462 US 213 (1983), the Supreme Court abandoned the *Aguilar-Spinelli* two-prong test for determining whether an anonymous informant's tip established probable cause to support a search warrant and replaced it with the totality of the circumstances test. The *Aguilar-Spinelli* test required a showing of the credibility of both the informant and the information, as well as the basis for the informant's knowledge. That is no longer the test for the constitutional sufficiency of an informant's statement.

MCL 780.653 provides the statutory requirements for probable cause to support a search warrant:

> The judge or district court magistrate's finding of reasonable or probable cause shall be based upon all the facts related within the affidavit made before him or her. The affidavit may be based upon information supplied to the complainant by a named or unnamed person if the affidavit contains 1 of the following:
>
> (a) If the person is named, affirmative allegations from which the judge or district court magistrate may conclude that the person spoke with personal knowledge of the information.
>
> (b) If the person is unnamed, affirmative allegations from which the judge or district magistrate may conclude that the person spoke with personal knowledge of the information and either that the unnamed person is credible or that the information is reliable.

MCL 780.653(b) derives from the now defunct *Aguilar-Spinelli* test. *People v Hawkins*, 468 Mich 488; 668 NW2d 602 (2003).

A violation of MCL 780.653(b) does not implicate the exclusionary rule absent a constitutional violation because the requirements are statutory, not constitutional, and the exclusionary rule does not apply to statutory violations unless the plain language of the statute indicates a legislative intent that the exclusionary rule should apply to its violation. MCL 780.653 does not provide that the exclusionary rule applies to its violation. *People v Hawkins*, 468 Mich 488; 668 NW2d 602 (2003).

> **PRACTICE POINTER**: A violation of the statutory requirements for an unnamed informant's tip does not implicate the exclusionary rule. An argument that evidence should be excluded due to deficiencies in an informant's statement must be based on a constitutional violation; that is, the tip must be deficient under the totality of the circumstances.

An informant's veracity or reliability and basis of knowledge are relevant considerations, but the absence of one does not render a tip insufficient to support a determination of probable cause. *People v Levine*, 461 Mich 172; 600 NW2d 622 (1999).

Information from identified citizens or police officers is presumptively reliable. *People v Powell,* 201 Mich App 516; 506 NW2d 894 (1993).

It is not necessary to vouch for the credibility of a named informant in a search warrant affidavit. *People v Ulman*, 244 Mich App 500; 625 NW2d 429 (2001).

Did the informant speak from personal knowledge?

An informant must speak from personal knowledge. This requirement eliminates the use of rumors or reputations to form the basis for the circumstances requiring a search. A mere recitation that the informant speaks from personal knowledge is not sufficient; the personal knowledge element should be derived from the information provided or from material facts. If personal knowledge can be inferred from the stated facts, that is sufficient to find that the informant spoke with personal knowledge. *People v Stumpf*, 196 Mich App 218; 492 NW2d 795 (1992).

A confidential informant's personal knowledge was established because the informant performed a controlled buy at a prearranged location, which was observed by a police officer, and after the buy the informant provided the defendant's name, information about the defendant's ownership of a house, and a bag of heroin to the officer. *People v James*, ___ Mich App ___; ___ NW2d ___ (2019) (2019 WL 452826).

A named informant's allegations in affidavits for warrants to search a bar and residence behind the bar contained statements that indicated that the informant spoke from personal knowledge regarding prostitution and drug use in the basement of the bar and in the residence. The informant was a longtime employee of the bar and worked on a day that certain events related to the search occurred; she described the events of that day in detail; she accurately described key members of the bar's management team, and described the two locations that the defendant used for illegal purposes. The affidavits containing the informant's allegations were adequate to support a finding of probable cause. *People v Martin*, 271 Mich App 280; 721 NW2d 815 (2006).

An affidavit relating information from an unknown informant was sufficient to establish probable cause for a search warrant. The informant provided specific details regarding shipments, dates, and the defendant's address, indicating personal knowledge. The affiant conducted an independent investigation that corroborated the information the informant provided. And the affidavit indicated

that the police had utilized information provided by the informant in other warrant requests with successful results. *People v Stumpf*, 196 Mich App 218; 492 NW2d 795 (1992).

An affidavit for a search warrant was insufficient because there was no indication or inference that the informant spoke from personal knowledge. The only facts in the affidavit alleging that criminal activity had taken place were the informant's statement that the defendant was involved in dealing stolen vehicle parts and that he would be leaving town in the suspect van on New Year's weekend with a load of stolen parts. There was nothing in the affidavit to indicate the source of this information. The search warrant was defective because the affidavit did not comply with the personal knowledge requirement. *People v Spencer*, 154 Mich App 6; 397 NW2d 525 (1986).

The affidavit for a tracking-device warrant lacked sufficient information for a magistrate to determine that the confidential informant had personal knowledge of the allegations. The informant's statement that the defendant "was trafficking large quantities of prescription drugs from his home in Madison Heights Michigan to the State of Ohio" was generalized with no particular details, and thus it was not sufficient to support a finding that the informant spoke with personal knowledge. *People v Ray*, unpublished per curiam opinion of the Court of Appeals, issued August 11, 2016 (Docket No. 327235).

Had the informant provided reliable information in the past?

An informant's past performance is relevant to the informant's reliability. An informant's reliability was established by an officer's affidavit that stated that the officer had used the unnamed informant at least three times in the past resulting in three arrests and more than three convictions. *People v Echavarria*, 233 Mich App 356; 592 NW2d 737 (1999).

> **PRACTICE POINTER:** An informant's record of providing reliable information is an important factor in determining whether a tip provided probable cause.

An officer's affidavit that was based on a confidential informant's tip that the defendant sold cocaine and heroin from his residence was sufficient to establish probable cause for a search warrant for the residence. The affidavit explained that the officer had used the informant to conduct a controlled narcotics purchase from the defendant at the residence and that the informant had proved to be a credible and reliable source in the past. *United States v Crumpton*, 824 F3d 593 (CA 6, 2016).

Was the tip corroborated?

An anonymous tip may support probable cause if the information is sufficiently corroborated by independent sources, such as police investigation. *People v Levine*, 461 Mich 172; 600 NW2d 622 (1999).

Independent police investigation that verifies information provided by an informant can support issuance of a search warrant. *People v Ulman*, 244 Mich App 500; 625 NW2d 429 (2001).

> **PRACTICE POINTER:** An informant's tip will support probable cause if the informant's statements are corroborated. An accurate prediction of a suspect's future conduct is an important corroborating factor.

A search warrant may issue on probable cause supported by an informant's tip if the police have conducted an independent investigation to confirm the accuracy and reliability of the information regardless of the knowledge and reliability of the source. *People v Waclawski*, 286 Mich App 634; 780 NW2d 321 (2009).

A tip from a confidential informant that several persons and a large quantity of marijuana would be present at a residence was corroborated and supplemented by a police officer's further investigation that included surveillance information that was consistent with the tip and verification through official records of the names of individuals that the informant said were likely to be present at the residence. *People v Levine*, 461 Mich 172; 600 NW2d 622 (1999).

Was the warrant for a tracking device?

An affidavit provided probable cause to issue a warrant for the placement of a tracking device on the defendant's vehicle because it indicated that the police had observed the defendant when he drove to another suspected drug trafficker's home in his vehicle, stayed only a few minutes and left; the defendant had prior controlled substance convictions; and the vehicle defendant drove was registered in his father's name, which, the affidavit stated based on the affiant's experience, was a common practice of drug dealers meant to conceal their identity. *United States v Coleman*, ___ F3d ___ (CA 6, 2019).

An affidavit did not provide probable cause for the placement of a tracking device on the defendant's vehicle because the affidavit contained only a generalized allegation from an informant that the defendant was "trafficking large quantities of prescription drugs from his home in Madison Heights Michigan to the State of Ohio" without any particularized facts to support the allegation. The affidavit was both constitutionally and statutorily insufficient to support the warrant. *People v*

Ray, unpublished per curiam opinion of the Court of Appeals, issued August 11, 2016 (Docket No. 327235).

Was the warrant anticipatory?

An "anticipatory warrant" is a warrant based upon an affidavit showing probable cause that at some future time (but not presently) certain evidence of crime will be located at a specified place. Most anticipatory warrants contain a specified "triggering event" for their execution. Anticipatory warrants require a magistrate to determine "(1) that it is *now probable* that (2) contraband, evidence of a crime, or a fugitive *will be* on the described premises (3) when the warrant is executed." For an anticipatory warrant that includes a triggering event to meet the probable cause requirement, two "prerequisites of probability" must be satisfied: there must be a fair probability that contraband or evidence will be found in a particular place if the triggering event occurs, and there must be probable cause to believe that the triggering event will occur. *United States v Grubbs*, 547 US 90; 126 S Ct 1494; 164 L Ed 2d 195 (2006).

> **PRACTICE POINTER:** An anticipatory warrant is valid if there is probable cause to believe that evidence will be found in a particular place if a triggering event occurs *and* probable cause to believe that the triggering event will occur.

An anticipatory search warrant must be conditioned on narrowly defined circumstances. The narrowly defined circumstances need not be described on the warrant itself, a description in the affidavit is sufficient as the affidavit and the warrant are to read together. *People v Kaslowski*, 239 Mich App 320; 608 NW2d 539 (2000).

An anticipatory warrant conditioned on successful delivery of a videotape to the defendant's residence did not violate the Fourth Amendment. The supporting affidavit stated that the defendant had purchased a video tape containing child pornography from a website operated by undercover postal officers and that a controlled delivery at the defendant's residence had been arranged. The affidavit further stated, "Execution of this search warrant will not occur unless and until the parcel has been received by a person(s) and has been physically taken into the residence." Probable cause was established because there would be evidence of crime at the defendant's residence if the triggering event occurred and it was likely that the event would occur because the defendant had ordered the videotape and directed its delivery to his residence. *United States v Grubbs*, 547 US 90; 126 S Ct 1494; 164 L Ed 2d 195 (2006).

An anticipatory search warrant was conditioned on narrowly defined circumstances. Police officers intercepted a package containing controlled substances as it was in

transit for delivery by UPS. The officers requested a warrant to place a "beeper" in the package that would alert officers if the package was opened. The affidavit described the operation and stated that the officers intended to enter the residence if the beeper alerted, that they would recover the package if the beeper did not alert within a reasonable time, and that, if the parcel was not successfully delivered, no search would be made. The warrant and affidavit together established probable cause, and the warrant was valid. *People v Kaslowski*, 239 Mich App 320; 608 NW2d 539 (2000).

Did the warrant describe the place to searched, the items to be seized, and the crime of investigation with particularity?

The Fourth Amendment requires search warrants to demonstrate particularity in (1) the description of the place or item to be searched, and (2) the identification of the persons or things to be seized. US Const, Am IV.

The particularity requirement prevents the authorization of "a general, exploratory rummaging in a person's belongings." *Coolidge v New Hampshire*, 403 US 443; 91 S Ct 2022; 29 L Ed 2d 564 (1971).

A search warrant should also state the crime being investigated with particularity. *United States v Abboud*, 438 F3d 554 (CA 6, 2006).

A search warrant "satisfies the particularity requirement if its text constrains the search to evidence of a specific crime." *United States v Castro*, 881 F3d 961 (CA 6, 2018).

Place to be searched

The Michigan and the United States constitutions both state that a warrant shall not issue without particularly describing the place to be searched. *People v McGhee*, 255 Mich App 623; 662 NW2d 777 (2003).

The place to be searched must be sufficiently described to enable the executing officer to locate and identify the premises with reasonable effort while eliminating any reasonable probability that another premises might be mistakenly searched. *People v Hampton*, 237 Mich App 143; 603 NW2d 270 (1999).

If a multi-unit dwelling is involved, a search warrant must specify the particular sub-unit to be searched, unless the multi-unit character of the dwelling is not apparent and the police officers did not know and did not have reason to know of its multi-unit character. *People v Toodle*, 155 Mich App 539; 400 NW2d 670 (1986).

A warrant that was "technically defective" because it stated an incorrect address for defendant's apartment was not invalid. The police had the defendant's apartment under surveillance for over a month, the affidavit gave an accurate description of the house in which defendant's apartment was located, the incorrect address was for an apartment next door where defendant had formerly resided and which was listed as defendant's address given for the defendant's vehicle registration with the Secretary of State. *People v Westra*, 445 Mich 284; 517 NW2d 734 (1994).

A warrant that described the places to be searched by their common addresses and by descriptions of the premises at those addresses described the place to be searched with particularity. *People v Martin*, 271 Mich App 280; 721 NW2d 815 (2006).

A warrant that included an incorrect address (which was that of a vacant lot next door to the house to be searched) was not invalid because the supporting affidavit contained a description of the house sufficient to point out a definitely discernable place with reasonable certainty (a two-story, two-family frame dwelling with asbestos siding). *People v Blount*, 100 Mich App 351; 299 NW2d 3 (1980).

The extensive inaccuracies and errors in the supporting affidavit and search warrant for a vehicle rendered the search invalid under the Fourth Amendment. Every aspect of the description of the vehicle was incorrect, including the make, model, vehicle identification number, and license plate number. Although the affidavit correctly stated the location of the vehicle in the sheriff's garage, that information was of limited usefulness in identifying the vehicle because many vehicles are located in the sheriff's garage. The extensive errors created a reasonable probability that the wrong vehicle could have been mistakenly searched. *Knott v Sullivan*, 418 F3d 561 (CA 6, 2005).

> **PRACTICE POINTER:** A warrant does not state the place to be searched with particularity if the description creates a reasonable probability that the wrong location could have been mistakenly searched.

Items to be seized

The degree of specificity required in a search warrant depends on the circumstances and types of items involved. *People v Zuccarini*, 172 Mich App 11; 431 NW2d 446 (1988).

A magistrate may not accompany the police to the scene of a search and determine on the spot what is to be seized. *Lo-Ji Sales, Inc v New York*, 442 US 319; 99 S Ct 2319; 60 L Ed 2d 920 (1979).

A search warrant was invalid for failure to particularly describe the persons or things to be seized. An officer prepared an application for the warrant that included a detailed description of various weapons and explosive devices to be seized, and it was accompanied by a detailed affidavit that set forth the basis for the officer's belief that the listed items were concealed on the defendant's premises. But the warrant did not include this information; rather it simply described the items to be seized as a "single dwelling residence ... blue in color." Essentially, it did not describe the items to be seized at all. The warrant was so plainly invalid that the search was warrantless; the Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents. *Groh v Ramirez*, 540 US 551; 124 S Ct 1284; 157 L Ed 2d 1068 (2004).

A search warrant was invalid for failure to particularly describe the items to be seized; aside from specifying copies of two adult films previously purchased by an investigator, the warrant did not particularly describe any items and left it to the discretion of the officers conducting the search to decide which items were likely to be obscene and thus subject to seizure. *Lo-Ji Sales, Inc v New York*, 442 US 319; 99 S Ct 2319; 60 L Ed 2d 920 (1979).

A warrant that described the items to be seized as all money and property acquired through the trafficking of narcotics and ledgers, records or paperwork showing trafficking in narcotics was sufficiently particular to pass constitutional muster since the executing officers' discretion in determining what was subject to seizure was limited to items related to drug trafficking. *People v Zuccarini*, 172 Mich App 11; 431 NW2d 446 (1988).

The crime being investigated

The search warrant listed only one crime, bank fraud. Accordingly, it was not valid as to evidence of other crimes, specifically tax evasion, and evidence collected to support charges for that crime was subject to suppression. The fact that the affidavit supported probable cause for tax evasion did not save the omission; incorporation of affidavits into search warrants applies to particularity and to probable cause, but not to crimes for which the evidence is sought. *United States v Abboud*, 438 F3d 554 (CA 6, 2006).

Warrants to search cell phones based on probable cause that evidence of home invasions existed on the phones satisfied the particularity requirement even though the warrant authorized searches for evidence of "a crime" rather than "the crime." It would have been problematic if the warrant stated "the crime" because officers were investigating several home invasions. *United States v Castro*, 881 F3d 961 (CA 6, 2018).

Was the warrant overbroad?

> **PRACTICE POINTER:** A warrant with overbroad descriptions is not necessarily wholly invalid; the overbroad descriptions can be severed from the warrant leaving the validly particular portions intact. If there are sufficiently particular descriptions of items in portions of the warrant, those items are validly seized and so are items in plain view during the search. But if the overbroad portions make up the greater part of the warrant overall, the warrant is arguably invalid overall.

Where a portion of a search warrant is valid and a portion is invalid for lack of probable cause or generality, the court may sever the valid portions of the warrant and admit any evidence seized under those portions. *People v Kolniak*, 175 Mich App 16; 437 NW2d 280 (1989).

If a search warrant contains overly broad descriptions and sufficiently specific descriptions, the overly broad portion of the warrant may be severed from the rest of the warrant. Only the items seized under the overly broad portion must be suppressed. Anything described in the valid portion of the warrant and items discovered in plain view are not subject to suppression. *People v Keller*, 479 Mich 467; 739 NW2d 505 (2007).

In assessing whether a search warrant is severable, a court must divide the warrant into categories, evaluate the constitutionality of each category, and determine whether the valid categories make up the greater part of the warrant. To determine whether the valid categories are the greater part, a court should evaluate the relative scope and invasiveness of the valid and invalid parts of the warrant. *People v Keller*, 479 Mich 467; 739 NW2d 505 (2007).

Warrants to search cell phones based on probable cause that evidence of home invasions existed on the phones satisfied the particularity requirement. The warrant enumerated specific items related to the home invasions, and the overbroad portion of the warrant could be severed. *United States v Castro*, 881 F3d 961 (CA 6, 2018).

Even if a search warrant issued for the defendants' residence was overly broad in its inclusion of evidence of distribution of marijuana (currency, packing materials), the distribution category of evidence was severable from rest of warrant. The valid portion of the warrant was the greater part because it was extremely broad, allowing officers to search the entire home and investigate containers where marijuana might be found. *People v Keller*, 479 Mich 467; 739 NW2d 505 (2007).

A warrant authorizing the search of the defendant's computers and computer storage media for evidence pertaining to child sexually abusive material was not

overbroad. The warrant did not authorize an overall open search of every file on the defendant's computer. Computer forensics personnel examined the computers and storage media using software and protocols that limited their review of the data to files that were related to the crime alleged. The defendant's argument that the search could have revealed information subject to the attorney-client privilege (since he was a lawyer) was unavailing because the privilege belongs to the client, not the attorney, and there was no evidence that files that would have been subject to the privilege were accessed in the search. *People v Waclawski*, 286 Mich App 634; 780 NW2d 321 (2009).

A search warrant authorizing a search for "all firearms" was not overly broad because specific facts were alleged in the affidavit indicating that the house was the site for drug trafficking and the affidavit alleged that firearms are often kept by persons involved in drug use. *People v Zuccarini*, 172 Mich App 11; 431 NW2d 446 (1988).

A warrant authorizing a search for all firearms on the premises was arguably overbroad because the supporting affidavit referenced only one gun, a sawed-off shotgun. But officers reasonably relied on the authorization to search for all weapons because the sawed-off shotgun was owned by a gang member who had just fired the weapon five times in public in an attempt to murder a person and had promised to complete his attempt. It would not have been unreasonable for officers to conclude that there would be additional illegal weapons on the premises given the defendant possessed one illegal weapon, was a gang member, was willing to use a gun to kill someone, and was attempting to kill a person because she had called the police. *Messerschmidt v Millender*, 565 US 535; 132 S Ct 1235; 182 L Ed 2d 47 (2012).

Was the warrant issued by a neutral and detached magistrate?

A warrant "ensures that the inferences to support a search are drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Riley v California*, 573 US 373, 382; 134 S Ct 2473, 2482; 189 L Ed 2d 430 (2014).

> **PRACTICE POINTER:** A magistrate is not neutral or detached if the magistrate was involved in the search authorized by the warrant, had a role in investigating the crime alleged in the warrant, or is also a law enforcement officer.

A search warrant is invalid if the issuing magistrate also was an active participant in the investigation or prosecution of the underlying crime. *People v Payne*, 424 Mich 475; 381 NW2d 391 (1985).

A local justice abdicated his role as a neutral and detached magistrate when he assisted in (and led) a generalized search himself and then authorized a search warrant. *Lo-Ji Sales, Inc v New York*, 442 US 319; 99 S Ct 2319; 60 L Ed 2d 920 (1979).

The state attorney general who was actively in charge of the criminal investigation was not a neutral and detached magistrate, even though he was authorized to issue warrants as a justice of the peace. *Coolidge v New Hampshire*, 403 US 443; 91 S Ct 2022; 29 L Ed 2d 564 (1971).

A magistrate's status as a deputy sheriff rendered the magistrate incapable of satisfying the "neutral and detached" requirement for a valid search warrant under the Fourth Amendment. *People v Payne*, 424 Mich 475; 381 NW2d 391 (1985).

Did the execution of the warrant make the search unreasonable?

Did officers violate the knock and announce rule?

> **PRACTICE POINTER:** Violations of Michigan's knock and announce statute or the federal knock and announce rule do not implicate the exclusionary rule. An argument for exclusion cannot be successfully asserted based on a knock and announce violation. The only remedies available to a party injured by such a violation are civil. See also, Exclusionary Rule, Chapter 21.

The Michigan knock and announce statute allows the police to make a forced entry to execute a warrant if, after giving notice of their authority and purpose, the police are refused admittance to the premises. MCL 780.656. Similar conditions apply to forced entry under the constitutional knock and announce rule. *Hudson v Michigan*, 547 US 586; 126 S Ct 2159; 165 L Ed 2d 56 (2006).

Violation of Michigan's knock and announce statute (MCL 780.656) does not implicate the exclusionary rule. The statute does not prescribe exclusion for its violation, and knock and announce principles do not control the execution of a valid search warrant; they only delay entry for a brief period. Accordingly, suppression is not the remedy for evidence acquired in violation of the statute. Rather, relief for a violation may be found through civil action. *People v Stevens (After Remand)*, 460 Mich 626; 597 NW2d 53 (1999).

Violation of the constitutional knock and announce rule does not implicate the exclusionary rule, and evidence discovered in a search following a violation is not subject to suppression. The social costs of applying the exclusionary rule to knock and announce violations are considerable and outweigh any deterrent effect of the rule's application. Applying the exclusionary rule to knock and announce violations

would generate a constant flood of alleged failures to observe the rule and would cause police officers to refrain from timely entry after knocking and announcing, producing preventable violence against the officers in some cases and the destruction of evidence in others. The deterrence benefits would not be considerable because ignoring knock and announce principles only prevents the destruction of evidence or avoids life-threatening resistance that are both dangers that suspend the requirement when there is reasonable suspicion that they exist. Further, many forms of police misconduct are deterred by civil-rights suits and the prospect of internal police discipline. *Hudson v Michigan*, 547 US 586; 126 S Ct 2159; 165 L Ed 2d 56 (2006).

Even if the police violated the federal or Michigan statutory knock and announce requirement while acting under a valid search warrant, suppression of the evidence was not the appropriate remedy, so it was unnecessary to decide whether there was such a violation. *People v Vasquez (After Remand)*, 461 Mich 235; 602 NW2d 376 (1999).

It is not necessary for police officers to knock and announce their presence when executing a search warrant when circumstances present a threat of physical violence or if there is reason to believe that evidence would likely be destroyed if advance notice were given or if knocking and announcing would be futile. *Hudson v Michigan*, 547 US 586; 126 S Ct 2159; 165 L Ed 2d 56 (2006).

The Michigan knock and announce statute is satisfied by substantial compliance with its provisions. *People v Zuccarini*, 172 Mich App 11; 431 NW2d 446 (1988).

The statute does not require the physical act of knocking on a door. Officers substantially complied with the statute when they approached a trailer with the word "police" on their clothing, activated their overhead lights, announced their presence on a loudspeaker, observed an occupant looking out a window of the trailer, and waited thirty seconds after their announcement before entering. *People v Fetterley*, 229 Mich App 511; 583 NW2d 199 (1998).

Police officers violated the statute by entering less than five seconds after knocking and announcing their presence. Nothing in the case indicated that evidence was subject to immediate destruction or the defendants were armed. *People v Asher*, 203 Mich App 621; 513 NW2d 144 (1994).

Were occupants detained during the search?

Police officers may take reasonable action to secure the premises and to ensure their own safety and the efficacy of the search when executing a search warrant. *Los Angeles Co, California v Rettele*, 550 US 609; 127 S Ct 1989; 167 L Ed 2d 974 (2007).

Unreasonable actions in executing a search warrant that would violate the Fourth Amendment include the use of excessive force, restraints that cause unnecessary pain or are imposed for a prolonged and unnecessary period of time, or an unnecessarily prolonged detention. *Los Angeles Co, California v Rettele*, 550 US 609; 127 S Ct 1989; 167 L Ed 2d 974 (2007).

Officers who executed a valid search warrant, unaware that the suspects had moved out of the home three months earlier, acted reasonably when they ordered the innocent residents out of bed and ordered them to stand for a few minutes before allowing them to dress. The deputies had the authority to secure the house to protect their safety, the suspects were known to possess a firearm that could have been concealed in the bedding, and the detention was not longer than necessary to protect the officers' safety. *Los Angeles Co, California v Rettele*, 550 US 609; 127 S Ct 1989; 167 L Ed 2d 974 (2007).

Officers acted reasonably when they detained an occupant in handcuffs for two to three hours while a search was in progress because the warrant sought weapons and evidence of gang membership. In such inherently dangerous situations, the use of handcuffs minimizes the risk of harm to both officers and occupants. The governmental interest in safety outweighed the occupant's interest in the marginal intrusion, especially because the case involved the detention of four occupants by two officers executing the search. *Muehler v Mena*, 544 US 93; 125 S Ct 1465; 161 L Ed 2d 299 (2005).

A police officer reasonably handcuffed the defendant during a search for narcotics because a search for narcotics is the sort of circumstance that may give rise to sudden violence and minimizing the risk of harm to the police and the occupants by exercising unquestionable command over the situation was a legitimate government interest. *People v Zuccarini*, 172 Mich App 11; 431 NW2d 446 (1988).

A valid warrant to search for contraband implicitly carries with it the limited authority to detain the occupants at the premises while a proper search is conducted. The justifications for this limited detention include the prevention of flight, officer safety, and the orderly completion of the search. Further, it was reasonable for officers to detain an occupant outside the premises and require him to reenter. *Michigan v Summers*, 452 US 692; 101 S Ct 2587; 69 L Ed 2d 340 (1981).

The *Summers* rule, which allows officers executing a search warrant to detain the occupants of the premises, is limited to the immediate vicinity of the premises to be searched. It did not apply to two occupants who left the premises that was to be searched as officers were preparing to execute a search warrant when officers followed them and detained them a mile away from the premises. The factors a court may consider in determining whether a detention was in the immediate vicinity of the premises to be searched include the lawful limits of the premises,

whether the occupant was within the line of sight of the premises, and the ease of reentry from the occupant's location. *Bailey v United States*, 568 US 186; 133 S Ct 1031; 185 L Ed 2d 19 (2013).

Did officers exceed the scope of the warrant?

Officers did not exceed the scope of the search warrant when they seized computers, videos, and business records (including tax forms) where the warrant authorized the seizure of equipment and written documentation used in the reproduction or storage of the activities and day-to-day operations of a bar. The officers were also authorized to seize the keys to a safety deposit box because the box could contain items described by the search warrant. The officers lawfully seized weapons found on the premises for their own safety and to ensure they were lawfully possessed. *People v Martin*, 271 Mich App 280; 721 NW2d 815 (2006).

A warrant authorizing the search of a place and certain named persons did not authorize the search of a person who was not named in the warrant, who did not live there and was just visiting, and for whose arrest the police did not have probable cause. *People v Burbank*, 137 Mich App 266; 358 NW2d 348 (1984).

A warrant authorizing the search of a bar and a bartender did not authorize the search of patrons who just happened to be in the bar when the warrant was executed. *Ybarra v Illinois*, 444 US 85; 100 S Ct 338; 62 L Ed 2d 238 (1979).

Police officers exceeded the scope of a search warrant that authorized the search of the basement area of the apartment building when they searched apartments that were also located in the basement. The evidence discovered in the apartments was properly excluded, but the evidence that was found in the common areas of the basement was admissible because this evidence was discovered while officers were acting within the scope of the warrant. *People v Hunt*, 171 Mich App 174; 429 NW2d 824 (1988).

> **PRACTICE POINTER**: If officers exceed the scope of a search warrant, the evidence that was discovered when they did so is subject to suppression, but the evidence discovered when officers were acting within the scope of the warrant will still be admissible. This is another example of the "severance" principle that applies to many legal aspects regarding search warrants.

WAS THE SEARCH REASONABLE?

CHAPTER 9: WARRANT EXCEPTIONS – AUTOMOBILE EXCEPTION

Snapshot: Police officers may search a vehicle without a warrant if they have **probable cause** to believe the vehicle contains **evidence of a crime**. The exception includes the search of **containers** within the vehicle that might conceal the object of the search. The exception applies even if the police had the time and opportunity to obtain a warrant.

PRACTICE POINTER: If probable cause to search a vehicle is based on a canine sniff, consider a challenge (under the Michigan Constitution) based on the canine's ability or training to detect lawful activity (presence of marijuana) in the vehicle. See *People v McKnight*, ___ P3d ___, 2019 WL 2167746 (Colo, May 20, 2019) (warrantless dog sniff violated the state constitution because the dog could detect (and was trained to detect) lawful activity (marijuana in the vehicle)).

KEY QUESTIONS:

- Was there probable cause for the search?
- Was the area searched a "vehicle" for purposes of the exception?
- Was the search limited to places where the object of the search could be found?
- Did the search otherwise exceed the scope of the exception?

Generally

The automobile exception allows officers to search an automobile without having obtained a warrant so long as they have probable cause for the search. *Collins v Virginia*, 584 US ___; 138 S Ct 1663; 201 L Ed 2d 9 (2018); *California v Acevedo*, 500 US 565; 111 S Ct 1982; 114 L Ed 2d 619 (1991); *People v Kazmierczak*, 461 Mich 411; 605 NW2d 667 (2000).

Probable cause to issue a search warrant (or for application of the automobile exception) exists where there is "a substantial basis for inferring a fair probability that contraband or evidence of a crime will be found in a particular place." *People v Kazmierczak*, 461 Mich 411; 605 NW2d 667 (2000).

The automobile exception allows officers with probable cause to search a vehicle without obtaining a warrant even if there is time and opportunity to do so. *People v Clark*, 220 Mich App 240; 559 NW2d 78 (1996).

The automobile exception is justified by the ready mobility of vehicles and by the reduced expectation of privacy arising from pervasive and continuing governmental regulation of vehicles capable of traveling on public highways. *Collins v Virginia*, 584 US ___; 138 S Ct 1663; 201 L Ed 2d 9 (2018).

The automobile exception includes closed containers in the vehicle that might conceal the object of the search. *People v Kazmierczak*, 461 Mich 411; 605 NW2d 667 (2000).

The scope of a warrantless search is defined by the object of the search and the places in which there is probable cause to believe that it may be found, not by the nature of the container containing the contraband. *United States v Ross*, 456 US 798; 102 S Ct 2157; 72 L Ed 2d 572 (1982).

A search of containers under the automobile exception is not qualified by the ownership of a particular container in the vehicle or by a showing of individualized probable cause for each container searched so long as the container might conceal the object of the search. *Wyoming v Houghton*, 526 US 295; 119 S Ct 1297; 143 L Ed 2d 408 (1999).

It does not matter if the vehicle was drivable at the time of the search for the automobile exception to apply. The exception was established because of the mobility of automobiles in general. The exception is based on law rather than fact. If it were otherwise, numerous evidentiary hearings would be required over issues such as flat tires, dead batteries, or other issues that may have hindered mobility in a particular case. If there is probable cause to search a vehicle, the search of the

vehicle is permissible under the exception. *People v Carter*, 250 Mich App 510; 655 NW2d 236 (2002) (automobile exception applied to burned, undrivable vehicle).

The automobile exception applies to immobilized vehicles. The propriety of a car search does not depend on a reviewing court's assessment of the likelihood that a car could have been driven away or that its contents could have been tampered with during the time required to obtain a warrant in a particular case. *Michigan v Thomas*, 458 US 259; 102 S Ct 3079; 73 L Ed 2d 750 (1982) (automobile exception applied to an impounded car in police custody).

Was there probable cause for the search?

Officers had probable cause to believe that cocaine would be found in the defendant's vehicle based on their knowledge that the defendant had transported drugs in other vehicles. The officers were aware that the defendant used vehicles in his drug-trafficking activities and that the defendant stored cocaine at his residence where the vehicle was located, and a tipster had informed them that a shipment of cocaine had just come in to the defendant. This was enough to create a "fair probability" that cocaine would be found in the vehicle. *United States v Smith*, 510 F3d 641 (CA 6, 2007).

There was probable cause for a warrantless search of the defendant's vehicle. The defendant admitted criminal activity, and nitrous oxide canisters in the vehicle were within the officer's plain view. This gave the officer probable cause that defendant had committed a crime and that evidence of the crime was in the vehicle. *People v Wood*, 503 Mich 931; 923 NW2d 884 (2019).

An officer had probable cause to search the defendant's vehicle based on the strong odor of unburnt marijuana coming from the vehicle alone. The officer smelled the unburnt marijuana as he approached the vehicle following a traffic stop. The officer was qualified to recognize the odor based on his previous experience in fifteen to twenty marijuana cases. The Court overruled its prior opinion that the smell of marijuana, alone, was not enough to establish probable cause for a vehicle search. *People v Kazmierczak*, 461 Mich 411; 605 NW2d 667 (2000).

Officers had probable cause for the warrantless search of the defendant's truck based on the strong odor of burnt marijuana emanating from the truck. The officers pulled up alongside the parked truck and engaged in a consensual encounter with the occupants during which they smelled the burnt marijuana. The subsequent search of the truck was justified by the automobile exception. *People v Anthony*, ___ Mich App ___; ___ NW2d ___ (2019) (2019 WL 290026).

The alert at the vehicle's trunk from a dog trained to detect cocaine by smell gave officers probable cause to search the entire vehicle. *People v Clark*, 220 Mich App 240; 559 NW2d 78 (1996).

There was probable cause for the warrantless search of the defendant's vehicle. Officers pulled the defendant's car over, arrested the defendant after he had stepped out of the car, and found assorted pills and drug paraphernalia on the defendant's person. This gave the officers probable cause to believe that the car contained more controlled substances. *People v Harmelin*, 176 Mich App 524; 440 NW2d 75 (1989).

There was no probable cause for a search conducted by chalking the tires of parked cars to track how long the car had been parked there. The chalking was a search for Fourth Amendment purposes because it was a common-law trespass on a constitutionally protected area (property) and it was done to obtain information (time parked). The city chalked the car tires when the cars were legally parked; the city did so without "even so much as individualized suspicion of wrongdoing." The automobile exception did not apply. *Taylor v City of Saginaw*, 922 F3d 328 (CA 6, 2019).

Officers lacked probable cause to believe that evidence of a robbery (firearms and jewelry) would be found in the defendant's car. The officers had been informed that the defendant was suspected of stealing firearms and jewelry, but the officers apprehended the defendant in a nearby apartment building, not in or near his car. The officers had no information that would support anything beyond a mere suspicion that evidence of a crime might be in the car, which does not justify a warrantless vehicle search. *United States v Haynes*, 301 F3d 669 (CA 6, 2002).

The defendant's potentially evasive action did not give officers probable cause to search the vehicle in which the defendant was riding. After pulling over the vehicle, officers observed the defendant slipping what appeared to be a small prescription bottle under the passenger seat and searched the vehicle. The defendant's conduct was not so obviously evasive as to give rise to probable cause that drugs were in the vehicle; it could have been anything that defendant dropped. The officers had to infer that the defendant's actions were evasive; that something was in the bottle; and that the "something" was contraband. The officers possessed only a mere suspicion, which does not justify a warrantless vehicle search. *People v Pitts*, 40 Mich App 567; 199 NW2d 271 (1972).

Was the area searched a "vehicle" for purposes of the exception?

The automobile exception is also known as the "vehicle exception." The exception applies to all vehicles, including (among other vehicles) boats, ships, wagons, and trucks. See *Carroll v United States*, 267 US 132; 45 S Ct 280; 69 L Ed 543 (1925).

A motor home parked in a public parking lot was a vehicle for purposes of the automobile exception. Although a motor home has some attributes of a home, it is capable of being moved quickly and is subject to pervasive regulation as a vehicle capable of traveling on the public highways. *California v Carney*, 471 US 386; 105 S Ct 2066; 85 L Ed 2d 406 (1985).

A motor home parked in a private driveway was a vehicle for purposes of the automobile exception. The motor home was "parked in a driveway connected to a public street," and there were no utility lines connected to it. An objective observer could reasonably conclude that the motor home was being used as a vehicle, not as a residence. *United States v Markham*, 844 F2d 366 (CA 6, 1988).

- *Markham* should be revisited considering *Collins* (below, this chapter). The mere fact that a driveway is connected to a public street will not justify a search if the portion of the driveway in which the vehicle (such as a motor home) is located is within a house's curtilage.

Was the search limited to places where the object of the search could be found?

A passenger's purse that was inside a vehicle could have contained drugs that were the object of the search. The search did not exceed the scope of the automobile exception. Further, it did not matter that the searching officers did not have probable cause as to the passenger; probable cause to search the vehicle permits the search of any container in the vehicle regardless of ownership. *Wyoming v Houghton*, 526 US 295; 119 S Ct 1297; 143 L Ed 2d 408 (1999).

Did the search otherwise exceed the scope of the exception?

When police have probable cause to search an auto at the scene, they may do so later at the station without a warrant. Officers had probable cause to search and did search the defendant's vehicle at the time of his arrest. A second search eight hours later after the vehicle was impounded did not exceed the scope of the automobile exception because the justification for the initial warrantless search did not "vanish" in the interim. *Florida v Meyers*, 466 US 380; 104 S Ct 1852; 80 L Ed 2d 381 (1984).

Officers' intrusion into the curtilage of the defendant's house to search the defendant's motorcycle exceeded the scope of the automobile exception. The exception extends no further than the automobile itself; it does not permit invasion into the space around a vehicle. The officer had probable cause to believe that the motorcycle was the one that had previously eluded the officer's attempted traffic stop, but that probable cause did not justify the officer in walking up the driveway without a warrant, removing a tarp covering the motorcycle, taking a picture,

running the plates, and confirming the bike was stolen. Probable cause to search the vehicle did not additionally justify the curtilage invasion. The Court reasoned that expanding the scope of the automobile exception to include the area surrounding a vehicle would "both undervalue the core of the Fourth Amendment protection afforded to the home and its curtilage and untether the automobile exception from the justifications underlying it." *Collins v Virginia*, 584 US ___; 138 S Ct 1663; 201 L Ed 2d 9 (2018).

> **PRACTICE POINTER:** Probable cause to search a vehicle does not justify an invasion onto the curtilage of a home to search the vehicle.

There is no "automobile exception" to the requirements of a consent search. Once a court has determined that a defendant had a legitimate expectation of privacy in the place searched, the same law governs consent searches whether the place to be searched is a person's pocket, car, or home. A driver's consent to search the vehicle did not extend to a passenger's backpack in the vehicle because the driver did not have actual or apparent authority to consent to the search of the backpack. *People v Mead*, ___ Mich ___; ___ NW2d ___ (2019) (2019 WL 1769597).

> **PRACTICE POINTER:** If the search of a vehicle is based on the driver's (or owner's) consent, that consent does not necessarily extend to the entire vehicle, and it does not extend to areas over which the driver does not have apparent or actual authority, such as a container that a passenger brings into the vehicle.

WAS THE SEARCH REASONABLE?

CHAPTER 10: WARRANT EXCEPTIONS – BORDER SEARCHES

Snapshot: Border searches are an exception to the Fourth Amendment warrant requirement for reasonable searches. Customs agents at the border **do not need probable cause or reasonable suspicion to conduct routine searches** of an entrant's person or effects. **Further detention** of **persons** at the border generally **requires reasonable suspicion**, but this is not necessarily so with vehicles at the border. The same rules generally apply to **permanent checkpoints** located some distance from the border. But **reasonable suspicion** is required for the investigatory stop of a vehicle by border patrol agents on **roving patrol**.

Border stops

The Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border. *United States v Flores-Montano*, 541 US 149; 124 S Ct 1582; 158 L Ed 2d 311 (2004).

Searches at the border are made "pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country" and are reasonable simply because they occur at the border. *United States v Ramsey*, 431 US 606; 97 S Ct 1972; 52 L Ed 2d 617 (1977).

Congress has granted the Executive plenary authority to conduct routine searches and seizures at the border without probable cause or warrant to regulate the collection of duties and prevent the introduction of contraband into the country. *United States v Montoya de Hernandez*, 473 US 531; 105 S Ct 3304; 87 L Ed 2d 381 (1985).

Routine searches of the persons and effects of entrants at the border are not subject to any requirement of reasonable suspicion, probable cause, or warrant; first-class mail entering the country may be opened without a warrant on less than probable

cause; automotive travelers may be stopped at fixed checkpoints near the border without individualized suspicion even if the stop is based largely on ethnicity; and boats on inland waters with ready access to the sea may be hailed and boarded with no suspicion whatever. *United States v Montoya de Hernandez*, 473 US 531; 105 S Ct 3304; 87 L Ed 2d 381 (1985).

The government's authority to conduct suspicionless inspections at the border included the authority to remove a vehicle's fuel tank and disassemble it. The expectation of privacy is less at the border than in the interior. The reasons that might support a suspicion requirement for highly intrusive searches of persons do not apply to vehicles. Complex balancing tests have no place in the context of border searches of vehicles. And although the Fourth Amendment protects property as well as privacy, the interference with a motorist's possessory interest in a vehicle's fuel tank is justified by the paramount interest in protecting the border. *United States v Flores-Montano*, 541 US 149; 124 S Ct 1582; 158 L Ed 2d 311 (2004).

The detention of a traveler at the border, beyond the scope of a routine customs search and inspection, is justified at its inception if customs agents, considering all the facts surrounding the traveler and the traveler's trip, reasonably suspect that the traveler is smuggling contraband, and the detention may last as long as necessary to resolve the suspicion. *United States v Montoya de Hernandez*, 473 US 531; 105 S Ct 3304; 87 L Ed 2d 381 (1985).

Customs and border protection officers' search of a motorist's vehicle was lawful under the border-search exception to the Fourth Amendment's warrant and probable cause requirements, even though the motorist arrived at border area inadvertently, had not intended to cross border, and sought only to turn around. The officers were entitled to conduct suspicionless searches on outbound persons and effects that had not yet crossed border, and there was no reliable way for officers to differentiate between someone who had just the crossed border or intended to cross the border and a motorist seeking only to turn around. *DE v John Doe*, 834 F3d 723 (CA 6, 2016).

Checkpoints

A permanent checkpoint some distance from the border that requires all vehicles to stop is reasonable because the stops are not random. It was constitutional for the border patrol, after routinely stopping or slowing automobiles at the permanent checkpoint, to refer motorists selectively to a secondary inspection area for questions about citizenship and immigration status on basis of criteria that would not sustain a roving-patrol stop, and there was no constitutional violation even if such referrals were made largely on basis of apparent Mexican ancestry. *United States v Martinez-Fuerte*, 428 US 543; 96 S Ct 3074; 49 L Ed 2d 1116 (1976).

A passenger had a reasonable expectation of privacy in his carry-on luggage during an immigration inspection of bus passengers at a permanent border patrol checkpoint. *Bond v United States*, 529 US 334; 120 S Ct 1462; 146 L Ed 2d 365 (2000).

Roving patrols

The Fourth Amendment's protection against unreasonable searches and seizures extends to roving patrol stops by border patrol agents. *United States v Arvizu*, 534 US 266; 122 S Ct 744; 151 L Ed 2d 740 (2002).

Border patrol agents on roving patrol (not at the border or its functional equivalent) must have reasonable suspicion to believe that the occupants are illegal aliens to make an investigatory vehicle stop. If an agent has reasonable suspicion, the agent may make a brief stop to question the occupants about their citizenship and immigration status and ask them to explain any suspicious circumstances. Factors to consider when determining if reasonable suspicion exists include: (1) the area's proximity to the border; (2) characteristics of the area; (3) usual traffic patterns; (4) the agent's experience in detecting illegal activity; (5) behavior of the driver; (6) particular aspects or characteristics of the vehicle; (7) information about recent illegal trafficking of aliens or narcotics in the area; and (8) the number of passengers and their appearance and behavior. *United States v Brignoni-Ponce*, 422 US 873; 95 S Ct 2574; 45 L Ed 2d 607 (1975).

A border patrol agent on roving patrol had reasonable suspicion that illegal activity was afoot, based on the defendant's route among other reasons, for an investigatory stop of the defendant's minivan. The defendant was traveling on a little-used backroad that was known to be used by smugglers to avoid a checkpoint on the main road. The stop took place at a time when officers would regularly be leaving the backroads at the end of their shifts. The minivan turned away from a recreational area, diminishing the likelihood that the defendant and the other occupants were out for a picnic. And children in the minivan waved mechanically at the officer's vehicle for a full four to five minutes. *United States v Arvizu*, 534 US 266; 122 S Ct 744; 151 L Ed 2d 740 (2002).

A vehicle's occupants' apparent Mexican ancestry did not provide reasonable suspicion to justify a roving patrol stop. *United States v Brignoni-Ponce*, 422 US 873; 95 S Ct 2574; 45 L Ed 2d 607 (1975).

> **PRACTICE POINTER:** Ancestry does not justify reasonable suspicion for a roving patrol vehicle stop, but ancestry alone can justify additional detention and investigation at the border without offending the Fourth Amendment.

WAS THE SEARCH REASONABLE?

CHAPTER 11: WARRANT EXCEPTIONS – CONSENT

Snapshot: Consent is an exception to the warrant requirement for search and seizure. It must be **voluntary**; that is, it must be unequivocal, specific, and freely and intelligently given. Consent may be **limited in scope**, and it can be **revoked** at any time, although not retroactively.

A search conducted pursuant to consent is an exception to the warrant requirement. *People v Borchard–Ruhland*, 460 Mich 278; 597 NW2d 1 (1999); *Schneckloth v Bustamonte*, 412 US 218; 93 S Ct 2041; 36 L Ed 2d 854 (1973).

KEY QUESTIONS:

- Was consent voluntary?
  - Or was it the result of coercion?
  - Or was it mere acquiescence to a claim of lawful authority?
- Did conduct amount to non-verbal consent?
- Was the search within the scope of the consent?
- Was the consent given by defendant or someone else?

    - Did the third party have authority to consent to the search?
    - Could a reasonable officer believe that the third-party had authority to consent to the search?
- Was consent revoked?
- Was consent attenuated from an unlawful search?
- Was the search conducted pursuant to an implied consent statute?

Was consent voluntary?

Consent to a search must be voluntary. To be voluntary, consent must be "unequivocal, specific, and freely and intelligently given." Consent to a search is not voluntary if it is the result of coercion or duress. The burden is on the prosecution to demonstrate that consent was valid. *People v Chowdhury*, 285 Mich App 509; 775 NW2d 845 (2009).

The validity of consent is evaluated under the totality of the circumstances. Circumstances to be considered include subtly coercive police questions and the possibly vulnerable state of the person who consents. *Schneckloth v. Bustamonte,* 412 US 218; 93 S Ct 2041; 36 L Ed 2d 854 (1973).

Factors a court should consider when evaluating whether consent was voluntary include:

- the age, intelligence, and education of the suspect;
- whether the suspect understands the right to refuse consent;
- the length and nature of the detention;
- the use of coercive or punishing conduct by the police; and
- indications of more subtle forms of coercion that might flaw the suspect's judgment.

People v Grzelak, unpublished per curiam opinion of the Court of Appeals, issued October 20, 2015 (Docket No. 323208), quoting *United States v Cochrane*, 702 F3d 334 (CA 6, 2012).

The police are not required to advise a suspect of the right to refuse consent. Knowledge of the right to consent is one factor to be considered when analyzing the totality of circumstances surrounding consent, but the government does not need to establish such knowledge for consent to be effective. *People v Borchard–Ruhland*, 460 Mich 278; 597 NW2d 1 (1999); *Ohio v Robinette*, 519 US 33; 117 S Ct 417; 136 L Ed 2d 347 (1996).

Officers are not required to advise bus passengers of their right to refuse to consent to searches. Officers may approach bus passengers at random and request their consent to search, provided that under the totality of the circumstances a

reasonable person would understand that he is free to refuse or terminate the encounter. An officer spoke to bus passengers one by one in a polite, quiet voice, and he left the aisle free so that passengers could exit. Nothing the officer said would suggest to a reasonable person that he or she was barred from leaving the bus. The officer's display of his badge and the existence of his holstered gun were not coercive. The consent to search was voluntary. *United States v Drayton*, 536 US 194; 122 S Ct 2105; 153 L Ed 2d 242 (2002).

The defendant was not coerced into consenting to a blood draw. The arresting officer told the defendant, who drove for a living, that he would temporarily lose his license and be subject to the mandatory imposition of six points against his driving record under the implied consent law if he refused consent to a blood draw. The consent was voluntary because the defendant understood 1) his rights and the choice presented, 2) that the officer could obtain a warrant if he refused, and 3) the consequences of a drunk driving conviction; having to make a choice between two undesirable options did not render the defendant's express consent to the blood draw involuntary. *People v Stricklin*, ___ Mich App ___; ___ NW2d ___ (2019) (2019 WL 1745975).

The defendant's consent to the officer's entry to his home was unequivocal, specific, and freely and intelligently given. Officers testified that the defendant's consent was voluntary. Their testimony was supported by the defendant's conduct: the defendant opened the door further after officers requested consent to enter and stepped backward to allow them to enter. The defendant testified that he did not consent voluntarily or freely to the officers' entry, but the trial court was free to conclude that the officers' testimony was closer to the truth. *People v Roberts*, 292 Mich App 492; 808 NW2d 290 (2011).

The defendant's consent to search his cell phone was unequivocal; he expressed his approval of the completed consent form, "Yeah, that looks okay." His consent was specific; the form identified the phone by brand name, model, and serial number. Consent was intelligently given; the defendant asked, and the officers answered, several questions about the search. And consent was freely given; the defendant had the opportunity to withhold consent when an officer asked, "Is this something you are willing to do?" *People v Whitby*, unpublished per curiam opinion of the Court of Appeals, issued December 28, 2017 (Docket No. 334737).

The defendant's consent was valid given the defendant's age, prior experience with law enforcement, level of education (high school graduate with some college), lack of any evidence of drug or alcohol intoxication, lack of evidence of violence or threats of violence by police, and the relatively short duration of the police detention. *People v Grumbley*, unpublished per curiam opinion of the Court of Appeals, issued December 21, 2006 (Docket No. 261275).

There was no was evidence that the defendant was unaware of his right to refuse consent or that he lacked sufficient intelligence to understand that he was consenting to a search especially given his previous exposure to the criminal system. *People v Crisp*, unpublished per curiam opinion of the Court of Appeals, issued April 23, 2002 (Docket No. 224307).

The defendant's wife's consent to a warrantless search of her home was not unequivocal, specific, or freely or intelligently given. She was not allowed to remain in her home or sit at the picnic table near the home. She was required to sit in a police car, she was not allowed to smoke until the issue of searching the interior of the home was resolved, and officers told her that they could obtain a search warrant if she did not consent, but she would have to remain in the police car until officers completed that process. *People v Galloway*, 259 Mich App 634; 675 NW2d 883 (2003).

> **PRACTICE POINTER:** Consent may be coerced, not voluntary, if a person is denied a basic or perceived need (such as a cigarette for a smoker) until consent is given.

The defendant's consent to wait for a dog to arrive to conduct a contraband search of his RV, if given, was not voluntary. The officer's statements to defendant made it appear that defendant would not be free to leave unless he either allowed the officer to search the RV or waited for the dog to arrive. The officer's statements indicated that defendant did not have a choice to withhold consent. *People v Hannigan*, unpublished per curiam opinion of the Court of Appeals, issued February 27, 2018 (Docket No. 339239).

Coercion

> **PRACTICE POINTER:** Consent is coerced, not voluntary, if the police give a person the impression that a search will be conducted whether consent is given or not.

Police questioning or conduct that is coercive, or the existence of a coercive atmosphere, are relevant in determining whether the consent was voluntary. *People v Klager*, 107 Mich App 812; 310 NW2d 36 (1981).

An investigatory stop is not per se coercive. Defendant's consent to search his vehicle during an investigatory stop was voluntary and not the product of coercion. The initial traffic stop was lawful because defendant was speeding. The duration of the stop was reasonable because additional suspicious circumstances warranted further investigation. The fact that defendant gave consent during the investigatory stop did not make it involuntary. *People v Williams*, 472 Mich 308; 696 NW2d 636 (2005).

Drawn service revolvers are not per se coercive and do not render consent invalid. The defendant's consent to a vehicle search during a traffic stop was voluntary and not the product of coercion even though police officers had their guns drawn throughout the stop, the defendant gave consent while spread-eagled across the front of the vehicle, and the defendant testified at an evidentiary hearing that the officers' behavior led him to believe that he would be shot if he did not consent to the search. *People v Randle*, 133 Mich App 335; 350 NW2d 253 (1984).

The mere fact that a defendant is detained at the time of consent is not per se coercive and does not, by itself, render the consent invalid. The defendant, who was detained following a lawful traffic stop until police could determine whether the vehicle he was driving was stolen, voluntarily consented to a search when police asked the defendant if he "had any objection" to them opening his trunk and he opened it for them. The presence of three officers was also not per se coercive. *People v Klager*, 107 Mich App 812; 310 NW2d 36 (1981).

The presence of several or more police officers is not per se coercive and does not render consent involuntary. The defendant voluntarily consented to a search when officers asked if they could "take a look around" his apartment and the defendant pointed out places to look. The fact that there were, ultimately, up to 10 officers in the apartment did not make the defendant's consent involuntary. *People v Reed*, 393 Mich 342; 224 NW2d 867 (1975).

The defendant's consent to search his car was voluntary and not the result of coercion when it was given after he got out of his car at the officers' request, was patted down for weapons, and asked whether there were drugs or weapons in the car. At the time of consent, the defendant was merely the subject of a *Terry* stop, which is not inherently coercive in nature. *People v Acoff*, 220 Mich App 396; 559 NW2d 103 (1996).

The defendant's consent was the result of coercion and not voluntary when officers acted antagonistically toward defendant's family. The defendant was detained over seven hours before signing a form consenting to the search of his apartment. During the detention, officers unlawfully threatened that, if he did not consent, his girlfriend would go to jail and their child would be taken into protective custody. Officers also handcuffed the defendant's girlfriend to the kitchen table by her ankle and took the child from the girlfriend's arms while attempting to induce defendant to sign the consent form. "Antagonistic actions by the police against a suspect's family taint the voluntariness of any subsequent consent." *United States v Ivy*, 165 F3d 397 (CA 6, 1998).

> **PRACTICE POINTER:** Consent may be coerced or involuntary if the police threaten action against a family member to obtain consent.

The defendant's consent to search his home was coerced and not voluntary. Police officers confronted the defendant at his residence and, while inside, informed the defendant that they had reason to believe he was storing marijuana. The defendant denied permission to search and asked the officers to leave the premises both orally and by gesturing. Instead of leaving, the officers began to question the defendant about a bulge in his pocket. The defendant ultimately opened a freezer containing marijuana. By failing to leave when requested to do so, the officers suggested that they would not accept defendant's exercise of his right to preclude them from further activity at the home. *People v Bolduc*, 263 Mich App 430; 688 NW2d 316 (2004).

Consent, if given, was coerced when a homeowner opened the door without any advance notice that three police officers with drawn guns were on her doorstep. *People v Raybon*, 125 Mich App 295; 336 NW2d 782 (1983).

The defendant's consent was coerced and not voluntary when a trooper asked for consent three times during a traffic stop and the defendant denied consent each time until the trooper stated that she did not need a warrant and advised the defendant that she could get a drug dog, at which time the defendant consented to the search. *People v Kocevar*, unpublished per curiam opinion of the Court of Appeals, issued March 16, 2017 (Docket No. 329150).

The defendant's consent to search his house, if given, was the product of implied coercion and duress and not freely given. Parole agents arrived at the defendant's home in the early morning hours, pounded loudly on the door, informed a scantily clad defendant that they had a warrant for his brother's arrest, and the defendant was shaky and nervous during the encounter. The defendant claimed that the agents barged into his home without permission. The agents claimed that the defendant consented to the search of his home. But even if the defendant had given consent, it was not voluntary under the circumstances. *People v Brewart*, unpublished per curiam opinion of the Court of Appeals, issued November 29, 2012 (Docket No. 306647).

Mere acquiescence

> **PRACTICE POINTER:** Consent is coerced, not voluntary, if the police convey to a person that resistance is futile.

Mere acquiescence to a claim of lawful authority is not voluntary consent. *People v Farrow*, 461 Mich 202; 600 NW2d 634 (1999), citing *Bumper v North Carolina*, 391 US 543; 88 S Ct 1788; 20 L Ed 2d 797 (1968).

The defendant merely acquiesced to police officers' request when, confronted by officers in an airport asking to search his bag, he responded, "You've got the badge,

I guess you can." The defendant believed that resistance was futile and that he had no choice but to comply with the search when officers showed their badges and incorrectly insisted that defendant's plane ticket was one-way. Further, the stop took place in a crowded airport concourse where the surprise of being accosted by law enforcement for no apparent reason and the pressure to cooperate to avoid a scene "make it easy for implicit threats and subtle coercion to exert tremendous pressure" to acquiesce to officers' requests. *United States v Worley*, 193 F3d 380 (CA 6, 1999).

The defendant merely acquiesced to a claim of lawful authority when he allowed officers to subject him to a preliminary breath test (PBT) without objection. Officers were aggressive, the defendant believed he would go to jail if he did not submit to the PBT, and one officer admitted that he was "pretty sure it was implied [that the defendant was] not able to leave until I finished the investigation." *People v Chowdhury*, 285 Mich App 509; 775 NW2d 845 (2009).

The defendant merely acquiesced to a claim of lawful authority, and thus his consent to search his residence was not valid when given, after police asserted that they had a search warrant and briefly showed the defendant a blank warrant. *People v Farrow*, 461 Mich 202; 600 NW2d 634 (1999).

A homeowner did not voluntarily consent to the search of the home and merely acquiesced to a claim of lawful authority when she stepped back after she opened the door and was confronted by three police officers with drawn guns, one of whom asked if they could enter the home. *People v Raybon*, 125 Mich App 295; 336 NW2d 782 (1983).

The defendant's sister's consent to search defendant's house, where she resided, was not voluntary when it was given after police had already entered the home without a warrant, had already begun to search the home, and falsely informed the sister that a search warrant was on its way. The circumstances indicated to the sister that refusal would be futile. *People v Mullaney*, 104 Mich App 787; 306 NW2d 347 (1981).

The defendant's consent was not involuntary or the product of mere acquiescence merely because he gave it under the incorrect belief that, given his probationary status, the search of his van was a "foregone conclusion." The defendant testified at the suppression hearing that the officers told him that they would get a warrant if he did not consent. The defendant's testimony demonstrated that he believed that the officers would obtain a warrant before they searched the van if he did not consent, not that they would search his van without consent. *People v Grzelak*, unpublished per curiam opinion of the Court of Appeals, issued October 20, 2015 (Docket No. 323208).

Did conduct amount to non-verbal consent?

Conduct alone can be sufficient to constitute consent under the proper circumstances. *People v Brown*, 127 Mich App 436; 339 NW2d 38 (1983).

Voluntary consent may be given in the form of words, gesture, or conduct. *Lavigne v Forshee*, 307 Mich App 530; 861 NW2d 635 (2014).

The defendant consented to the search of his home and property by his words and actions. The defendant was aware of police activity at his home and did not express objection or attempt to limit the scope of police activity. Further, the defendant exhorted police to do everything in their power to find the victim's killer. *People v Lobaito*, 133 Mich App 547; 351 NW2d 233 (1984).

The defendant unequivocally and voluntarily consented to a search of his residence when he unlocked and opened his door and stepped aside for identified police officers. The defendant testified that he attempted to step onto his porch and did not step aside for officers, but the trial court did not clearly err by crediting the officers' testimony over the defendant's. *People v Brown*, 127 Mich App 436; 339 NW2d 38 (1983).

The defendant gave sufficiently unequivocal consent to a pat down search during a prison visit when she passed conspicuous signs warning that visitors were subject to search and said nothing when a prison employee told her she would be searched "if you don't mind." The search was also voluntary because the defendant could have discontinued her visit after she saw the warning signs. *People v Whisnant*, 103 Mich App 772; 303 NW2d 887 (1981).

The defendant's wife gave non-verbal consent to search the upstairs of their apartment when she told officers that her husband had probably left but silently pointed upstairs. The officers reasonably interpreted her pointing upstairs as permission to investigate the upstairs of the apartment. *People v Stiles*, 99 Mich App 116; 297 NW2d 631 (1980).

The defendant unequivocally consented to a search of his person by his conduct during a traffic stop. According to the defendant, he gave no verbal response. But, when an officer asked for consent to search his person, the defendant raised his hands and assumed a posture that would facilitate a search. *People v Bryant*, unpublished per curiam opinion of the Court of Appeals, issued August 19, 1997 (Docket No. 194592).

Consent to search a house was given by the conduct of an individual who officers reasonably believed had the authority to do so. The individual secured a dog, opened the door, and let the identified officers in. An officer testified that the search could

not have been conducted if the dog had not been secured and that the individual secured the dog upon request. *People v Armour*, unpublished per curiam opinion of the Court of Appeals, issued July 19, 1996 (Docket No. 161081).

A mere failure to object to a proposed search does not constitute actual consent. Officers suspected that the defendant had violated an ordinance prohibiting underage drinking and administered a preliminary breath test (PBT) on defendant without asking for consent. A PBT is a search within the meaning of the Fourth Amendment, and the officers violated the amendment by conducting the test without consent or any other justification. *People v Chowdhury*, 285 Mich App 509; 775 NW2d 845 (2009).

A homeowner did not voluntarily consent by conduct when she opened the door, was confronted by three police officers with drawn guns on her doorstep, and stepped back after an officer asked if police could enter the home. *People v Raybon*, 125 Mich App 295; 336 NW2d 782 (1983).

Was the search within the scope of consent?

Consent may be limited in scope. The standard for measuring the scope of a suspect's consent is objective reasonableness: what would the typical reasonable person have understood by the exchange between the officer and the suspect. *People v Frohriep*, 247 Mich App 692; 637 NW2d 562 (2001), citing *Florida v Jimeno*, 500 US 248; 111 S Ct 1801; 114 L Ed 2d 297 (1991).

The scope of a consent search is limited by the object of that search. *People v Wilkens*, 267 Mich App 728; 705 NW2d 728 (2005).

The scope of the defendant's general consent to search his car included consent to search a paper bag on the car's floor. Officers advised the defendant that they were searching for narcotics. A reasonable person may be expected to know that narcotics are generally carried in some form of container, and the defendant did not place any explicit limitation on the scope of the search. *Florida v Jimeno*, 500 US 248; 111 S Ct 1801; 114 L Ed 2d 297 (1991).

Analysis of defendant's blood was within the scope of her consent to a blood draw, not a separate and distinct search. A typical reasonable person would understand that consent to a blood draw for alcohol testing would include seizure of a sample of blood for analysis. *People v Woodard*, 321 Mich App 377; 909 NW2d 299 (2017).

The search of a shower, where officers found a suspicious electrical device in plain view, did not exceed the scope of the defendant's oral consent to search his home for a knife or a gun because a knife or a gun could have been found in the shower. The device, located in plain view during the lawful search of the shower, was properly

admitted as evidence in defendant's trial for eavesdropping on tenants and other related offenses. *People v Wilkens*, 267 Mich App 728; 705 NW2d 728 (2005).

The search of data stored on a computer located in defendant's vehicle was within the scope of the defendant's consent to search the vehicle. Defendant's written consent allowed police to "conduct a complete search of the motor vehicle owned by me and/or under my care, custody, and control, including the interior, trunk, engine compartment, and all containers therein." The officer who presented the consent form to the defendant told him that they were searching for illegal items, including stolen property. The search of the data on the computer was within the scope of consent because (1) the scope of the consent to search for "illegal items" was very broad and a reasonable person would know that computers can be used to commit crimes; (2) a computer can store data and, thus, act as a container; and (3) the defendant did not revoke or restrict the broad consent he had given, even though he knew the police had found the computer. *People v Dagwan*, 269 Mich App 338; 711 NW2d 386 (2005).

An officer who looked through the defendant's phone and sent text messages from the phone did not exceed the scope of the defendant's consent, given when the defendant handed the phone to the officer during questioning. The defendant testified that he had given the phone to the officer voluntarily. The defendant did not limit his consent in any way, and he was present but did not object when the officer searched the phone and sent the texts. *People v Dziura*, unpublished per curiam opinion of the Court of Appeals, issued December 15, 2015 (Docket No. 323003).

The search of contact numbers on defendant's phone was within the scope of the defendant's consent to call his father on his cell phone to confirm his story. The defendant told an officer, "I don't have my father's number, but you can call my father and that's who gave me the money card." The officer had control of the defendant's phone at the time, so a reasonable person would have understood the defendant's instruction to call his father as including permission to search through the contact numbers. *People v Busby*, unpublished per curiam opinion of the Court of Appeals, issued December 27, 2012 (Docket No. 305055).

The search of data stored on a home computer was within the scope of the defendant's wife's consent for police to take the computer. An officer contacted the defendant's wife after receiving information that a member of her household may have been sexually abused by the defendant or another family member. The officer expressed interest in the computer only after the wife revealed that the defendant viewed pornography on the computer. And the officer told the wife that he wanted to take the computer for further investigation. A reasonable person could be expected to know that a computer could contain electronic images of sexually

abusive material. *People v Horan*, unpublished per curiam opinion of the Court of Appeals, issued November 30, 2010 (Docket No. 292422).

Consent to search a home for a person included the authority to move about the home. *People v Donovan*, unpublished per curiam opinion of the Court of Appeals, issued November 28, 2006 (Docket No. 263466).

An officer's use of keys to enter the defendant's apartment exceeded the scope of the defendant's consent to remove the keys from his pocket. There is a "wide chasm" between removal and use. The consent legitimated the removal of the keys, but not the use of the keys to gain entry to the apartment. *United States v Heath*, 259 F3d 522 (CA 6, 2001).

Officers exceeded the scope of the defendant's mother's consent to search her apartment, where the defendant resided, for illegal drugs when they seized the defendant's wallet, keys, and cell phone. The defendant's mother's consent did not extend to the seizure of any item found in the apartment, and the items seized fell outside the scope of her consent. *People v Mahdi*, 317 Mich App 446; 894 NW2d 732 (2016).

The search of an upstairs rear porch was not within the scope of the landlord's consent to search a vacant apartment and the attic. *People v Douglas*, 50 Mich App 372; 213 NW2d 291 (1973).

The seizure of the defendant's phone was not within the scope of her consent to look at the contents of her phone for two specific pieces of information: the phone number of a codefendant and the time of a call from the codefendant. The limited nature of the defendant's consent was demonstrated by evidence that the defendant specifically stated that she did not want police to look for anything else on the phone. *People v Bush*, unpublished per curiam opinion of the Court of Appeals, issued June 27, 2017 (Docket No. 330077).

Subsequent search

A second search of the defendant's car was within the scope of the defendant's consent. The second search was conducted the same day as the initial search, to which the defendant consented, and the defendant's written consent authorized a search "at any time." *People v Nawrocki*, 6 Mich App 46; 150 NW2d 516 (1967).

A second search of the defendant's residence two days after the defendant signed a consent form authorizing the search of his residence was not within the scope of the consent. "When consent is given to search an area, it does not mean the constitutional protection against unreasonable searches and seizures has been waived forever." The second search was valid, however, because the defendant's

wife voluntarily consented to the search. *People v Chism*, 32 Mich App 610; 189 NW2d 435 (1971).

The scope of the defendant's consent to a search of his vehicle during a traffic stop did not extend to a second warrantless search of the vehicle at an impound lot. The consent was not broad, and a reasonable person would have believed that defendant's consent extended only to a search "right then and there." The second search was valid, however, under the automobile exception. *People v Klees*, unpublished per curiam opinion of the Court of Appeals, issued June 14, 2011 (Docket No. 297310).

Was consent given by someone other than defendant?

Generally, consent must come from the person whose property is being searched or from a third party who possesses common authority over the property. "Common authority" is based on mutual use of the property by persons generally having joint access or control for most purposes. *People v Brown*, 279 Mich App 116; 755 NW2d 664 (2008).

The police do not have authority to enter a premises where one cotenant gives consent but another cotenant, who is present, objects. *Georgia v Randolph*, 547 US 103; 126 S Ct 1515; 164 L Ed 2d 208 (2006).

In situations involving temporary dwellings or dwellings occupied by more than one person, the question is who has authority to give consent to a search. Generally, this question focuses on the reasonableness of police conduct rather than on who holds ownership rights or actual authority over the premises. If searching officers reasonably believed that the consenting party had the authority to do so, the search is generally valid, even if the consenting party lacked the authority to do so. Officers do not have an obligation to make further inquiry into a third party's authority to consent unless circumstances would cause a reasonable person to question the consenting party's power or control over the premises or property. *People v Goforth*, 222 Mich App 306; 564 NW2d 526 (1997), citing *Illinois v Rodriguez*, 497 US 177; 110 S Ct 2793; 111 L Ed 2d 148 (1990).

Officers may not reasonably rely on apparent authority to consent to a search if there is ambiguity regarding the asserted authority and they do not take steps to resolve the ambiguity. *United States v Purcell*, 526 F3d 953 (CA 6, 2008).

An owner may not give consent to search the premises of a tenant unless such consent is contractually provided. *People v Taylor*, 67 Mich App 76; 240 NW2d 273 (1976), citing *Stoner v California*, 376 US 483; 84 S Ct 889; 11 L Ed 2d 856 (1964).

Even though the defendant had objected to a search of a joint residence and had not revoked his objection, it was permissible for a cotenant to consent to the search once the defendant was no longer present at the residence. The fact that the defendant's absence was caused by the police was not controlling; officers reasonably removed the defendant so that they could speak to the cotenant, an apparent victim of domestic violence, without the defendant's potentially intimidating presence. *Fernandez v California*, 571 US 292; 134 S Ct 1126; 188 L Ed 2d 25 (2014).

Officers reasonably believed that a minor sex trafficking victim had authority to consent to a warrantless search of the defendant's cell phone. The minor used the phone to speak to an officer posing as a customer; she used the phone throughout the day to arrange details of a "sex date" with the officer; she had only that phone in her possession during the date; and she knew the cell phone's passcode and provided it to officers. *United States v Gardner*, 887 F3d 780 (CA 6, 2018).

The owner of a computer who allowed the defendant to use it had authority to a consent to a search of the computer, which was in the owner's residence. Even if the defendant had common authority over the computer due to mutual use, defendant was not present to object to the search. Although an officer may not remove someone from a premises to prevent an objection, an officer is not required to locate an absent person to obtain the person's consent. *People v Brown*, 279 Mich App 116; 755 NW2d 664 (2008).

The consent of a cotenant to enter the common areas of a home was valid when given after the defendant had been arrested, removed from the premises, and placed in a police car. While police may not purposely remove a suspect to avoid his ability to object to a cotenants consent, there was no indication that police arrested the defendant and placed him in the cruiser with that intent. *People v Lapworth*, 273 Mich App 424; 730 NW2d 258 (2006).

A parent's consent to search a defendant-child's room was objectively reasonable and valid. Although the defendant did not allow others into the room and had posted a "keep out" sign on the door, the parent had sufficient common authority over and access to the room and the door was unlocked. *People v Goforth*, 222 Mich App 306; 564 NW2d 526 (1997).

The police reasonably believed that a former homeowner had the authority to consent to a search of the garage attached to the home. The former owner had asked police to make periodic "vacation checks" on the home, which was unoccupied for several months. During a check, police discovered a suspicious vehicle in the garage, which was ultimately determined to have been stolen by the defendant, who had purchased the home a few months before the search. The police reasonably believed that the former owner had authority to consent because they did not know that the

home had been sold and were still responding to the former owner's request for vacation checks. *People v Grady*, 193 Mich App 721; 484 NW2d 417 (1992).

Officers reasonably relied on the owner's consent to search a trailer when the defendant disclaimed any right to consent to the search of the trailer, even though the defendant had lived in the trailer for nine months and officers conducted the search based on information that the defendant was living in the trailer. The defendant told officers that only the owner could consent to a search, and the owner did consent. The defendant told the owner, "All you have to do is say no, you can tell them they can't." But the officers could reasonably conclude that this was unsolicited legal advice to the owner, not an objection to the search by defendant. *People v Gray*, unpublished per curiam opinion of the Court of Appeals, issued August 17, 2017 (Docket No. 331126).

Police reasonably believed that an unidentified individual had authority to consent to a search of the residence when the defendant (falsely) denied that he lived in the residence and another individual who was present indicated that he did live in the residence and consented when police asked if they could "look around." *People v Gallup*, unpublished per curiam opinion of the Court of Appeals, issued June 17, 2008 (Docket No. 276276).

An objectively reasonable officer would not have believed that the driver of a vehicle had actual or apparent authority to consent to the search the passenger/defendant's backpack. An officer stopped the vehicle in which the defendant was a passenger for expired plates, the driver consented to a search of the vehicle, and the officer searched the vehicle including the defendant's backpack. At the time of the search, the officer believed that the backpack belonged to the defendant, and the officer knew that the defendant and the driver were near strangers; the driver told the officer that she had met the defendant earlier that night and was giving him a ride to a location along her way. On these facts, a reasonable officer could not conclude that the driver had mutual use of the defendant's backpack. Further, a backpack is used for transporting personal items, which suggests individual, not common, ownership. *People v Mead*, ___ Mich ___; ___ NW2d ___ (2019) (2019 WL 1769597).

A female tenant did not have apparent authority to consent to the search of a shoebox located underneath men's clothing in the bedroom of her apartment. A reasonable person would have had substantial doubts about whether the box was subject to mutual use by the tenant, and the officers failed to cure the ambiguity regarding whether the tenant had mutual control over the shoebox by asking her to clarify the situation. *United States v Taylor*, 600 F3d 678 (CA 6, 2010).

The defendant's girlfriend's consent to search her bag did not justify the warrantless search of the defendant's luggage. The girlfriend did not have actual authority because the defendant was the sole user of his luggage. Any apparent

authority the girlfriend may have had over the luggage dissipated upon discovery of men's clothing in the luggage and was not reestablished by officers who failed to take steps to resolve the ambiguity of authority. Further, the girlfriend's intimate relationship with the defendant did not endow her with "an additional sheen of apparent authority." *United States v Purcell*, 526 F3d 953 (CA 6, 2008).

A wife's consent to search the bedroom she shared with the defendant/husband was insufficient to authorize the search where the defendant was physically present and objected to the search, even though the wife stayed in the bedroom permanently, but defendant only stayed there part time. *United States v Johnson*, 656 F3d 375 (CA 6, 2011).

A resident's consent to search his apartment did not extend to the defendant's luggage stored there. The resident did not have actual authority to consent to a search of the luggage because he did not have joint access or control over the luggage. Officers could not rely on any apparent authority; luggage is the type of container that historically commands a high degree of privacy, the expectation of privacy is not lessened when luggage is stored on the premises of a third party, the expectation of privacy is elevated when the owner is transient, and officers failed to make further inquiry into any possible mutual use of the luggage. *United States v Waller*, 426 F3d 838 (CA 6, 2005).

The defendant's sister, who was living with the defendant at the defendant's home, did not have authority to consent to a search of the defendant's bedroom. The sister could only consent to a search of the common areas of the house and to a search of her own bedroom. *People v Mullaney*, 104 Mich App 787; 306 NW2d 347 (1981).

The owner of rented premises lacked authority to consent to a search of the tenants' trailer. The prosecution argued that the consent was valid because the tenants had abandoned the trailer. The Court agreed that the tenants would lack standing to challenge the search if they had abandoned the trailer, but some of the tenants' belongings were still in the trailer, the tenants had left back rent at the owner's place of business, and the tenants told the owner that they wished to continue renting the trailer. *People v Nash*, 110 Mich App 428; 313 NW2d 307 (1981).

Property managers did not have authority to consent to a search of the garage attached to the house the defendant was renting. The managers did not have apparent authority to consent when they told the officer that the defendant had been evicted, the officer requested documentation of eviction, and the demand-for-possession form the managers presented to the officer only stated that the landlord "may take you to court to evict you" if rent was not paid. Further, a verbal agreement that the property management company had the right to enter the property to "check on problems if we have complaints" did not validate the managers consent to enter. Even if the verbal agreement was an addition to the

rental contract, the agreement did not encompass a police search, and there were no complaints. The evidence (the victim's body) was admissible, however, under the inevitable discovery doctrine. *People v Sebastian*, unpublished per curiam opinion of the Court of Appeals, issued August 11, 2011 (Docket No. 293486).

Was consent revoked?

A suspect may revoke consent at any time during a search and, once revoked, police must stop the search unless it can be justified on some other basis. Evidence obtained during the consensual portion of the search may be considered in determining whether a continued search may be justified on some other basis. *People v Powell*, 199 Mich App 492; 502 NW2d 353 (1993).

Revocation of consent does not operate retroactively to invalidate the search conducted before withdrawal of consent. A defendant could not withdraw her consent to a blood draw by withdrawing her consent in writing after the blood was taken but before it was analyzed. The withdrawal of consent was too late to invalidate the consensual seizure of her blood; the defendant surrendered her possessory interest in the blood sample after she voluntarily consented to the search and the sample was taken. Further, analysis of the blood was within the scope of the defendant's consent to the blood draw. *People v Woodard*, 321 Mich App 377; 909 NW2d 299 (2017).

The defendant could not revoke the homeowner's consent to search by forcing the door closed where there was no indication that the defendant possessed any common authority over the home. *People v Walker*, unpublished per curiam opinion of the Court of Appeals, issued March 31, 2016 (Docket No. 320559).

An occupant of a house revoked any prior consent to search the house, if given, when police entered the house and the occupant demanded that they produce a warrant before conducting a search. *People v Schwesing*, unpublished per curiam opinion of the Court of Appeals, issued October 10, 2000 (Docket No. 209543).

A co-occupant cannot revoke consent to the presence officers when they are continuing to investigate a case of potential domestic violence. Officers were called to the defendant's home due to a marital dispute, and the defendant consented to their entry. His subsequent revocation did not preclude officers from continuing their investigation. *City of Westland v Kodlowski*, 298 Mich App 647; 828 NW2d 67 (2012), *revd in part, lv den in part* 495 Mich 871 (2013).

Was consent attenuated from an unconstitutional search?

- See Exclusionary Rule – Exceptions – Attenuation, Chapter 22.

Even if consent is voluntary, evidence discovered must be suppressed if the consent is not attenuated from an unconstitutional search. Officers initial predawn "knock and talk" was not lawful because it constituted a trespass. The Court remanded to the trial court to determine if the consent was attenuated from the unconstitutional search by considering three factors: "(1) the temporal proximity of the illegal act and the alleged consent, (2) the presence of intervening circumstances, and (3) the purpose and flagrancy of the official misconduct." *People v Frederick*, 500 Mich 228; 895 NW2d 541 (2017).

The defendant's consent to search his home the day after the home burned down was sufficiently attenuated from an arson investigator's unlawful entry the night before. Defendant did not know about the previous unlawful entry, and the investigator's failure to inform defendant of the previous unlawful entry did not taint the evidence recovered after defendant's consent. *People v Essa*, 146 Mich App 315; 380 NW2d 96 (1985).

Alleged consent to a second search did not remove the "taint" of the illegal first search of the defendant's vehicle. The second search almost immediately followed the illegal first search, the defendant had vehemently objected to the first search, and the defendant was not advised of his *Miranda* rights or that he could refuse the search. Under these circumstances the defendant might have reasonably believed that any refusal after first search was futile. *United States v Haynes*, 301 F3d 669 (CA 6, 2002).

Was the search conducted pursuant to an implied consent statute?

The implied consent statute, MCL 257.625c(1), does not apply to persons who are not under arrest at the time police request a blood sample; the admissibility of the blood alcohol evidence is governed by the Fourth Amendment. *People v Borchard–Ruhland*, 460 Mich 278; 597 NW2d 1 (1999).

Motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense. *Birchfield v North Dakota*, ___ US ___; 136 S Ct 2160; 195 L Ed 2d 560 (2016).

A warrantless seizure of test results from blood samples drawn for medical purposes is allowed under MCL 257.625a(6)(e). Society is not prepared to recognize a defendant's subjective expectation of privacy in medical records as reasonable. *People v Perlos*, 436 Mich 305; 462 NW2d 310 (1990).

Right to counsel

A request for consent to search is not a critical stage of a criminal proceeding to which the right to counsel applies. A request for a defendant to sign a consent form for the search of his person, clothing, and home did not violate the defendant's Sixth Amendment right to counsel. *People v Marsack*, 231 Mich App 364; 586 NW2d 234 (1998).

WAS THE SEARCH REASONABLE?

CHAPTER 12: WARRANT EXCEPTIONS – EXIGENT CIRCUMSTANCES/ /EMERGENCY AID/ COMMUNITY CARETAKER EXCEPTIONS

CHAPTER 12: WAS THE SEARCH REASONABLE?
WARRANT EXCEPTIONS
– EXIGENT CIRCUMSTANCES/ EMERGENCY AID/ COMMUNITY CARETAKER EXCEPTIONS

Snapshot: These three exceptions to the warrant requirement involve **response to emergency or emerging situations**. The **exigent circumstances** exception requires **probable cause** because it applies only to actions pursuant to a criminal investigation. Only **reasonableness** is required for the **emergency aid and community caretaker** exceptions. The emergency aid exception may apply in the context of a criminal investigation. The **community caretaker** exception only applies when the police are **not conducting a criminal investigation**.

The circumstances in which these exceptions apply are often similar or overlapping. The exceptions all involve circumstances that are so urgent that there is no time to seek an otherwise-required warrant. There are, however, important distinctions that affect the requirements for application:

- Probable cause is required for the exigent circumstances exception to apply because it involves actions pursuant to a criminal investigation. *People v Davis*, 442 Mich 1; 497 NW2d 910 (1993).

- Only reasonableness is required for the emergency aid or community caretaker exceptions. *People v Brzezinski*, 243 Mich App 431; 622 NW2d 528 (2000).

- The emergency aid exception differs from the community-caretaking exception in that the emergency aid exception may apply to warrantless entry in the context of a criminal investigation, while the community caretaker exception only applies in situations where police are not investigating possible criminal activity. *People v Davis*, 442 Mich 1; 497 NW2d 910 (1993).

- The distinctions in Michigan law may not be precisely mirrored in federal cases (or, for that matter, in Michigan law). See, e.g., *Missouri v McNeely*, 569 US 141; 133 S Ct 1552; 185 L Ed 2d 696 (2013).

EXIGENT CIRCUMSTANCES

PRACTICE POINTERS: For the exigent circumstances exception to justify entry into a premises, the police must have probable cause to believe that evidence or a suspect of a crime is on the premises *and* probable cause to believe that the circumstances are exigent. A hunch or even a reasonable suspicion that the evidence or a suspect will be found inside is not enough.

Exigent does not mean expedient. Exigent circumstances do not justify an entry if taking the time to obtain a warrant would not create the risk of escape or destruction of evidence (unlike, for example, the automobile exception under which it is irrelevant whether the police could have obtained a warrant). So, if there were multiple officers around or near a premises and any evidence sought was not subject to immediate destruction, a warrant probably should have been obtained.

KEY QUESTIONS:

- Was there a compelling need to take immediate action rather than waiting for a warrant?
  - Were police in "hot pursuit" of a fleeing suspect or concerned that a suspect would otherwise escape?
  - Was evidence being destroyed or easily destroyed?
  - Was there an urgent need to protect officers or others?
  - Would an ongoing crime continue?
- Did police have probable cause to believe that a crime was committed *and* that the perpetrators or evidence of the crime were on the premises?
- Was the warrantless entry related to a minor offense?
- Did the search continue after the exigency passed?

Generally

Exigent circumstances are an exception to the warrant requirement for search and seizure. The exception applies when "the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." *Missouri v McNeely*, 569 US 141; 133 S Ct 1552; 185 L Ed 2d 696 (2013).

For the exigent circumstances exception to apply, officers must possess probable cause to believe that a crime was recently committed on the premises *and* probable

cause to believe that the premises contain evidence or perpetrators of the suspected crime. *People v Beuschlein*, 245 Mich App 744; 630 NW2d 921 (2001).

Exigent circumstances include the need to provide emergency assistance to an occupant of a home, "hot pursuit" of a fleeing suspect, the need to enter a burning building to put out a fire, and the need to prevent imminent destruction of evidence. *Missouri v McNeely*, 569 US 141; 133 S Ct 1552; 185 L Ed 2d 696 (2013).

The prosecution has the burden to show that a search or seizure challenged by a defendant was justified by a recognized exception to the warrant requirement, such as exigent circumstances. See *People v Galloway*, 259 Mich App 634; 675 NW2d 883 (2003).

Factors relevant to the determination of whether exigent circumstances existed at the time of the search or seizure include: (1) whether the crime was serious or involved violence; (2) whether the defendant is reasonably believed to be armed; (3) whether the defendant is reasonably believed to be on the premises; (4) whether there is a clear showing of probable cause; (5) whether it is likely that the defendant will escape if not apprehended; (6) whether the entry is forcible or peaceful; (7) whether the entry is made during the day or night; (8) the need to prevent the destruction of evidence; (9) the need to ensure the safety of the officers involved; (10) the need to ensure the safety of other citizens; and (11) the ability to secure a warrant. *People v Oliver*, 417 Mich 366; 338 NW2d 167 (1983).

Absent exigent circumstances or another exception, a warrantless entry into a suspect's home to make a routine felony arrest violates the Fourth Amendment. *People v Woodard*, 111 Mich App 528; 314 NW2d 680 (1981), citing *Payton v New York*, 445 US 573; 100 S Ct 1371; 63 L Ed 2d 639 (1980).

Was there a compelling need to take immediate action rather than waiting for a warrant?

Were police in "hot pursuit" of a fleeing suspect or concerned that a suspect would otherwise escape?

The essence of an exigency that would excuse the failure to obtain a warrant is the existence of circumstances known to the police that prevent them from taking the time to obtain a warrant because to do so would thwart the arrest. *People v Parker*, 417 Mich 556; 339 NW2d 455 (1983).

Exigent circumstances justified following the defendant into a residence to arrest him. Officers in a public alleyway observed the defendant selling crack cocaine on the back step of the house. The officers approached the defendant and advised,

"Police, stop, halt." Entering the house to arrest the defendant was justified by pursuit of a fleeing felon. *United States v Poole*, 407 F3d 767 (CA 6, 2005).

Officers were in hot pursuit of a fleeing armed robbery suspect when they entered an apartment and arrested him. The suspect was fleeing from a public place. Witnesses directed the officers to the apartment, entry occurred 10 to 15 minutes after the officers received a report that the suspect was fleeing the scene of the robbery, and the officers had reason to believe that the suspect had broken into the apartment. The warrantless entry was justified by exigent circumstances. *People v Henry (After Remand)*, 305 Mich App 127; 854 NW2d 114 (2014).

Exigent circumstances justified entry into the defendant's hotel room because the officer had probable cause to believe that a murder had just been committed and had justification to search the room to prevent the defendant's escape. *People v Snider*, 239 Mich App 393; 608 NW2d 502 (2000).

Exigent circumstances justified entry into the locked lobby of a residence hotel following a tip from a reliable informant that defendant was selling drugs in the lobby. The locked lobby was not a public place, but the police received the tip within 10 minutes of entry, and the tip involved an ongoing crime. The police could have reasonably believed that the crime would continue or that the defendant would escape in the time needed to secure a warrant. *People v Beachman*, 98 Mich App 544; 296 NW2d 305 (1980).

Exigent circumstances did not justify warrantless entry into the defendant's apartment where he was arrested. Although the defendant was believed to be armed with a dangerous weapon, was likely to escape, and a violent crime had been committed, there was over a five-hour delay between the time police were given a physical description of the defendant and his arrest, which allowed ample time to obtain a warrant, and the prosecutor offered no explanation why a warrant was not obtained. *People v Parker*, 417 Mich 556; 339 NW2d 455 (1983).

Exigent circumstances did not justify the warrantless entry of officers into the defendant's motel room. The defendant had a reasonable expectation of privacy in his motel room equal to the expectation he would have had in his home. The defendant had committed a serious crime, there was a fairly clear showing of probable cause, and the entry was peaceful. But the crime was not particularly violent; there was no reason to believe that the defendant was armed; there was no indication that the defendant would have escaped or destroyed evidence if not apprehended quickly; there was no reason to believe that the safety of officers or anyone else was in jeopardy; a sufficient number of police were present to prevent the defendant from leaving while a warrant was secured; and the entry was made at night. Exigent circumstances did not exist; the warrantless entry was unconstitutional. *People v Oliver*, 417 Mich 366; 338 NW2d 167 (1983).

Exigent circumstances did not justify warrantless entry into the defendant's apartment after police received a tip that the defendant was in his apartment and may have been involved in a larceny and rape that was under investigation. There was no indication that the defendant was armed or that he was a danger to police or others; police could have easily surrounded and secured the apartment while obtaining a warrant. *People v Love*, 156 Mich App 568; 402 NW2d 9 (1986).

Exigent circumstances did not justify entry into a house to prevent the escape of two suspects or the destruction of evidence or to protect anyone from the suspects. Nothing suggested that the suspects were in the house when the officers entered. *People v Raybon*, 125 Mich App 295; 336 NW2d 782 (1983).

Exigent circumstances did not justify entry into the defendant's house after a witness at the scene of an armed robbery saw the defendant and led them to his house. No one, including the witness, had seen the defendant enter the house. Officers knew the defendant lived at the house, but they did not know that he was in the house. The sound of running inside when officers knocked on the door did not create an exigency. At least four officers had the house secured. The officers were in no danger, and there was no testimony that officers believed that the defendant could escape or destroy valuable evidence. Exigent does not mean expedient. *People v Anthony*, 120 Mich App 207; 327 NW2d 441 (1982).

Exigent circumstances did not justify entry into an apartment where the defendant was hiding. At least five officers were present at the time of the defendant's arrest and there was only one entrance to the apartment. The officers could have kept watch over the building and prevented escape while waiting for a warrant to be issued. The officers did not know that defendant had evidence, so immediate entry was not necessary to prevent the imminent destruction of evidence. *People v Van Auker*, 111 Mich App 478; 314 NW2d 657 (1981).

Was evidence being destroyed or easily destroyed?

To justify an entry based on loss or destruction of evidence, police must show (1) probable cause that the premises contain evidence of a crime and (2) articulable specific and objective facts that reveal the necessity for immediate action. *People v Blasius*, 435 Mich 573; 459 NW2d 906 (1990).

Exigent circumstances justified the warrantless entry to prevent the destruction of evidence, even though police caused the exigency. The police caused the occupants to attempt to destroy evidence by knocking on the door. The police did not enter until they heard noises that led them to believe that evidence was being destroyed. The exigencies of the situation made the needs of law enforcement so compelling that warrantless search was objectively reasonable under the Fourth Amendment. *Kentucky v King*, 563 US 452; 131 S Ct 1849; 179 L Ed 2d 865 (2011).

Exigent circumstances justified preventing the defendant from entering his residence while police waited for a search warrant after the defendant's wife informed police that he had illegal drugs in his residence. Police had probable cause to believe that the defendant had illegal drugs in the residence and reason to fear destruction of evidence, and the restraint was limited in time (two hours) and scope. *Illinois v McArthur*, 531 US 326; 121 S Ct 946; 148 L Ed 2d 838 (2001).

Exigent circumstances justified following the defendant into a residence to arrest him. Officers in a public alleyway observed the defendant selling crack cocaine on the back step of the house. The officers approached the defendant and advised, "Police, stop, halt." Entering the house to arrest the defendant was justified by the easily disposable nature of crack cocaine. *United States v Poole*, 407 F3d 767 (CA 6, 2005).

Exigent circumstances justified entry into the defendant's hotel room because the officer had probable cause to believe that a murder had just been committed and had justification to search the room to prevent the destruction of evidence. *People v Snider*, 239 Mich App 393; 608 NW2d 502 (2000).

A "murder scene" is not an exigent circumstance. There is no general "murder scene" exception to the warrant requirement. Although police may make a warrantless entry to a premises if they reasonably believe a person is in need of immediate aid and police may make a prompt warrantless search of a homicide scene for other possible victims or a killer on the premises, the mere fact that the area is a murder scene does not justify a warrantless search absent exigent circumstances. A police search of a closed briefcase at a secured crime scene without a warrant violated the Fourth Amendment. *Flippo v W Virginia*, 528 US 11; 120 S Ct 7; 145 L Ed 2d 16 (1999).

Exigent circumstances did not justify the entry into the defendant's home after officers spotted marijuana growing outside the home while conducting a flyover. There was no reason to believe that anyone was fleeing, that there was a threat to the safety of the officers, or that evidence was being destroyed. "Notwithstanding the ease in which narcotics can be destroyed, a warrantless entry into the home of a suspected drug trafficker, effected without an objectively reasonable basis for concluding that the destruction of evidence is imminent, does not pass constitutional muster." *United States v Haddix*, 239 F3d 766 (CA 6, 2001).

Exigent circumstances did not justify the warrantless entry into the defendant's house because the police had no reason to believe that the evidence that they presumed to be in house was in danger of imminent destruction. The drug transaction on which the officers' suspicion was based occurred down the street from the house, there was no indication that third parties were inside the house, and the officers had no knowledge of the defendant's whereabouts. Uncorroborated

information that the defendant was a partner in a drug business with an individual arrested down the street did not support a belief that the defendant was home at the time of the drug transaction. *United States v Lewis*, 231 F3d 238 (CA 6, 2000).

Exigent circumstances did not justify the search of the defendant's luggage, even if exigent circumstances did justify the seizure of the luggage. When the police had custody and control over the luggage there was no exigency due to mobility. *People v Plantefaber*, 410 Mich 594; 302 NW2d 557 (1981).

> **PRACTICE POINTER:** Exigent circumstances that justify the seizure of a container (such as luggage) might not justify a search of the contents of a container. The same reasoning should apply to a cell phone or other "container" of electronic data. See *Riley v California*, 573 US 373; 134 S Ct 2473; 189 L Ed 2d 430 (2014), Search – Reasonable Expectation of Privacy, Chapter 3.

Exigent circumstances did not justify administration of a preliminary breath test (PBT) to a minor who was on foot. A Troy ordinance provided that the police may require a minor to submit to a PBT if the police have reasonable cause to believe the minor has consumed alcoholic liquor. The city argued that the ordinance addressed exigent circumstances because bodily alcohol dissipates and evidence would be lost. But the city did not produce evidence that there was not time to obtain a warrant before the evidence was lost. The ordinance was unconstitutional, and the search was illegal. *People v Chowdhury*, 285 Mich App 509; 775 NW2d 845 (2009).

Exigent circumstances did not justify warrantless entry into the defendant's apartment after police received a tip that the defendant was in his apartment and may have been involved in a larceny and rape that was under investigation. The evidence police sought (jewelry and household items) was not easily disposable. *People v Love*, 156 Mich App 568; 402 NW2d 9 (1986).

Exigent circumstances did not justify entry into an apartment, where the defendant was hiding, to prevent the destruction of evidence because the officers did not know that the defendant had evidence, so immediate entry was not necessary to prevent its imminent destruction. *People v Van Auker*, 111 Mich App 478; 314 NW2d 657 (1981).

Exigent circumstances did not justify entry into the defendant's house to preserve evidence. The police had a tip that the defendant was growing marijuana. Police officers engaged in a brief conversation with the defendant through a window before making a forced entry into the house. They did not hear any noises coming from the house that would indicate that marijuana was being destroyed, and the officers testified that the only way they knew of to destroy marijuana plants was to burn them, and they did not know how long that would take. *People v Hartigan*,

unpublished per curiam opinion of the Court of Appeals, issued April 5, 2016 (Docket No. 322625).

Exigent circumstances did not justify a warrantless entry onto the defendant's premises based on a possibility that evidence would be destroyed. After a police helicopter observed marijuana growing in the defendant's backyard, officers went onto the defendant's premises and seized marijuana plants. The defendant was not home at the time. The officers stated that they believed evidence would be destroyed if they did not enter the premises immediately because the presence of a helicopter flying low and creating noise would alert someone to police presence and lead someone to destroy the plants. The officers' suspicions of destruction were not based on any specific or objective facts. To justify an entry and seizure based on exigent circumstances, the police must show more than a mere possibility that the evidence will be destroyed. *People v Grubb*, unpublished per curiam opinion of the Court of Appeals, issued April 21, 2000 (Docket No. 213121).

Exigent circumstances did not justify entry into a home to take a blood draw from a person suspected of drunk driving. Alcohol lingers in the system for hours, and medical science provides methods for calculating earlier blood levels from later-obtained samples; there was no urgency that justified the warrantless search. *People v Kucharski*, unpublished per curiam opinion of the Court of Appeals, issued September 30, 2004 (Docket No. 246791), citing *Welsh v Wisconsin*, 466 US 740; 104 S Ct 2091; 80 L Ed 2d 732 (1984).

- But see *Mitchell v Wisconsin*, 588 US ___; 139 S Ct 2525 (2019) (warrantless blood draw permissible under exigent circumstances to prevent the dissipation of evidence if a suspected drunk driver is unconscious and unable to take a breath test).

Was there an urgent need to protect officers or others?

Exigent circumstances include the need to protect officers or others. *People v Beuschlein*, 245 Mich App 744; 630 NW2d 921 (2001).

Officers' warrantless entry into the defendant's home was justified because the officers had a reasonable basis for fearing that violence was imminent. The officers were investigating a rumor that a high school student had threatened to "shoot up" the school. It was reasonable for the officers to believe that they could enter the home without a warrant when the student's mother abruptly fled into the house in the middle of an interview. The Court decided the case based on reasonableness without identifying a particular exception, but it referred to both the exigency and the emergency need to protect persons from imminent violence. *Ryburn v Huff*, 565 US 469; 132 S Ct 987; 181 L Ed 2d 966 (2012).

Officers' warrantless entry into a hotel room was justified by the immediate need to protect the officers or others. The officers had an objectively reasonable belief that methamphetamine was being manufactured based on an informant's tip that the occupants were manufacturing meth and objects used in meth manufacturing were in plain view. The court did not create a per se rule that there is always an exigency whenever evidence of a meth laboratory is apparent. In this case, the meth lab was in a motel, so the possibility of an explosion posed a great risk to other occupants in the building. Further, many hotels and motels have central ventilation that would allow fumes to permeate the building easily. The court opined that exigency may not have justified the search if the lab "had been in the middle of a farm with no other occupied structures nearby." *United States v Atchley*, 474 F3d 840 (CA 6, 2007).

Exigent circumstances justified following the defendant into a residence to arrest him. Officers in a public alleyway observed the defendant selling crack cocaine on the back step of the house. The officers approached the defendant and advised, "Police, stop, halt." When the defendant turned to go back into the house, officers observed a gun in his waistband. Entering the house to arrest the defendant was justified by the danger presented by the weapon. *United States v Poole*, 407 F3d 767 (CA 6, 2005).

Exigent circumstances justified entry of a mobile home for a "protective search." After seeing police, a man ran from the home into the woods carrying a long object. The police officers did not know how many persons were involved, believed the long object was a gun, and reasonably believed it was unsound to remain in the open while waiting to see if someone else would exit the home. The entry into the home was cursory and no longer than necessary to dispel a reasonable suspicion of danger. *People v Cartwright*, 454 Mich 550; 563 NW2d 208 (1997), citing *Maryland v Buie*, 494 US 325; 110 S Ct 1093; 108 L Ed 2d 276 (1990).

> *Note that a protective sweep while executing a warrant, as in* Buie*, does not require probable cause. See Search – Warrant Exceptions – Protective Sweep, Chapter 15. Exigent circumstances applied to the sweep here because the officers did not have a warrant to enter the mobile home; accordingly, probable cause was required.*

Exigent circumstances justified the entry of officers to protect themselves or others. The officers responded to a 911 call reporting domestic violence. The caller indicated that there were guns and knives on the premises. Officers knocking at the door heard noises they characterized as "wrestling" and "shuffling around." The report of a domestic disturbance, the possibility of weapons inside, and the sounds of scuffling inside gave the officers probable cause to enter the home and probable cause to believe that immediate action was necessary to protect the officers or others. The entry was also justified under the emergency-aid exception. *People v Beuschlein*, 245 Mich App 744; 630 NW2d 921 (2001).

Exigent circumstances justified entry into the defendant's hotel room because the officer had probable cause to believe that a murder had just been committed and had justification to search the room to determine if defendant was wounded or to protect the safety of officers or others. *People v Snider*, 239 Mich App 393; 608 NW2d 502 (2000).

Exigent circumstances justified entry into a home where a burglar alarm was ringing and where officers discovered an open window with signs of entry from the outside. The two officers were not in a position to secure the premises and wait for a warrant without putting themselves at serious risk. *People v Williams*, 160 Mich App 656; 408 NW2d 415 (1987).

Exigent circumstances did not justify the warrantless search of the luggage of a prison-escapee who previously had been arrested for manufacturing methamphetamine. The government argued that the circumstances were exigent because the escapee may have been manufacturing methamphetamine in the hotel room where the luggage was located. While methamphetamine manufacturing is dangerous, there was no reason to believe, and the agents did not believe, that methamphetamine was cooking at the time of search. There was no need for urgent action to protect the agents or others from harm. The search was illegal. *United States v Purcell*, 526 F3d 953 (CA 6, 2008).

Exigent circumstances did not justify entry into a home to take a blood draw from a person suspected of drunk driving. Further, the suspect was not a flight risk and was not a danger to himself or others. Awareness that a person might be intoxicated does not justify a warrantless entry into a home to prevent that person from driving. *People v Kucharski*, unpublished per curiam opinion of the Court of Appeals, issued September 30, 2004 (Docket No. 246791), citing *Welsh v Wisconsin*, 466 US 740; 104 S Ct 2091; 80 L Ed 2d 732 (1984).

Would an ongoing crime continue?

Exigent circumstances justified entry into a home where a burglar alarm was ringing and where officers discovered an open window with signs of entry from the outside. The two officers were not in a position to secure the premises and wait for a warrant without running the risk that an ongoing crime might continue. *People v Williams*, 160 Mich App 656; 408 NW2d 415 (1987).

Exigent circumstances justified entry into the locked lobby of a residence hotel following a tip from a reliable informant that defendant was selling drugs in the lobby. The locked lobby was not a public place, but the police received the tip within 10 minutes of entry, and the tip involved an ongoing crime. The police could have reasonably believed that the crime would continue in the time needed to secure a warrant. *People v Beachman*, 98 Mich App 544; 296 NW2d 305 (1980).

Did police have probable cause to believe that a crime was committed and that the perpetrators or evidence of the crime were on the premises?

A police officer had probable cause to believe that crime had just been committed and that immediate entry into a hotel room was necessary to prevent the destruction of any evidence, to protect the police or others, and to prevent the defendant's escape. The officer arrived at the scene within minutes of the shooting and learned from the victim as he lay dying the defendant's identity and place of residence (the hotel room). *People v Snider*, 239 Mich App 393; 608 NW2d 502 (2000).

Warrantless entry into defendant's home to arrest him was unconstitutional. To make a lawful, warrantless entry into a home, police must have both probable cause to arrest or search and probable cause to believe that exigent circumstances exist. The state appellate court incorrectly ruled that there was no need to show exigent circumstances because police had probable cause to arrest defendant after finding cocaine on his person, not in his apartment. *Kirk v Louisiana*, 536 US 635; 122 S Ct 2458; 153 L Ed 2d 599 (2002).

A genuine issue of material existed concerning whether Lansing housing inspectors reasonably believed that exigent circumstances justified their warrantless entry of homes. Drug raids in Lansing appeared to follow a pattern. Police officers would obtain and execute a search warrant for a home, aggressively enter the home ("officers knocked in doors with rams, used flashbangs, and, according to [the homeowners], left the homes in complete disarray"), then invite inspectors into the homes. The housing inspectors would find violations and declare the home uninhabitable. The fact that police officers observed the alleged housing violations while in the homes on a valid search warrant did not justify the inspectors' warrantless entries. There was no record evidence indicating the inspectors even contemplated obtaining warrants or that they believed the homes' conditions posed an emergency. One police officer testified that Lansing police officers call for immediate follow-up inspectors in around 90% of the drug raids they conduct. Accordingly, the defendant-inspectors were not entitled to summary judgment on the Fourth Amendment counts in the case. *Gardner v Evans*, ___ F3d ___ (CA 6, 2019).

Was the warrantless entry related to a minor offense?

The exigent-circumstances exception did not justify warrantless entry to arrest the defendant and preserve effervescent evidence when the arrest and evidence related to a minor offense. Witnesses observed the defendant driving erratically, swerving off the road, and walking from his car toward his nearby home. The need to preserve evidence of the defendant's blood-alcohol level may have been exigent, but, at the time, Wisconsin treated a first offense of driving under the influence as a civil

infraction. "An important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made." *Welsh v Wisconsin*, 466 US 740; 104 S Ct 2091; 80 L Ed 2d 732 (1984).

> **PRACTICE POINTER:** A warrantless search will usually be unreasonable when the government's interest is arrest or evidence related to a minor offense.

The exigent circumstances exception did not justify warrantless entry of a dwelling based on the belief that an ongoing criminal trespass was taking place, which was the officer's only reason for entering. While there are generally no bright-line rules for the reasonableness of a search, "the investigation of certain minor offenses will never present an exigency." *United States v Washington*, 573 F3d 279 (CA 6, 2009).

Did the search continue after the exigency passed or otherwise exceed the scope of the exception?

A warrantless search based on exigent circumstances must be "strictly circumscribed by the exigencies which justify its initiation." A four-day search that included opening dresser drawers and ripping up carpets could not be rationalized in terms of the legitimate concerns that justify an emergency search. The four-day search of the residence where a police officer was killed far exceeded the limits of any initial emergency that might have justified the search. *Mincey v Arizona*, 437 US 385; 98 S Ct 2408; 57 L Ed 2d 290 (1978).

Exigent circumstances justified the warrantless entry into an apartment to free an alleged kidnap victim, but they did not justify continued search of the apartment after the victim was freed. *United States v Johnson*, 22 F3d 674 (CA 6, 1994).

The entry into a mobile home to search for suspects or weapons that could pose a danger to officers or others was cursory and no longer than necessary to dispel a reasonable suspicion of danger. *People v Cartwright*, 454 Mich 550; 563 NW2d 208 (1997).

Subsequent warrantless entry to process evidence shortly after an officer had observed the evidence in plain view during a search that was justified by exigent circumstances did not violate the Fourth Amendment. The subsequent search was not generalized; all the evidence that was examined and seized was observed by the officer on the initial entry and could have been seized by the officer on the initial entry. *People v Martin*, unpublished per curiam of the Court of Appeals, issued September 25, 2003 (Docket No. 241075).

An initial exigency does not justify a search conducted after the exigency has passed; an initial emergency did not justify an extended search of a bathroom in a

motel room. An anonymous 911 caller reported in an unexcited tone that a woman was being abducted and forced into Room Seven of a certain motel. Responding officers ordered the two men who answered the door out of Room Seven. From the open doorway, officers could see the entire room except the bathroom. One officer entered the room, opened the bathroom door, and discovered an additional male. The officer located a weapon in a bathroom wastebasket. Once the bathroom door was open and it became apparent that there was no woman in danger, the initial exigency evaporated, and the continued warrantless search of the bathroom violated the Fourth Amendment. *United States v Fisher*, 145 F Supp 2d 853 (ED Mich, 2001).

EMERGENCY AID EXCEPTION

KEY QUESTONS:

- Did officers reasonably believe that a person needed immediate aid?
- Was the officer primarily motivated by the need to render aid or assistance?
- Did the officer do more than necessary to determine whether a person needed assistance and to provide that assistance?
- Was there a need to prevent violence or restore order?

Generally

The emergency aid exception allows the police to make a warrantless entry into a dwelling in circumstances in which they reasonably believe, based on specific, articulable facts, that some person within needs immediate aid. *People v Lemons*, 299 Mich App 541; 830 NW2d 794 (2013).

Officers do not need probable cause for warrantless entry under the emergency aid exception. Rather, officers may enter a dwelling without a warrant if they have an objectively reasonable belief that it is necessary to assist a person who may be in serious need of medical aid. *People v Brzezinski*, 243 Mich App 431; 622 NW2d 528 (2000).

Officers do not need "ironclad proof of a likely serious, life-threatening" injury for the emergency aid exception to apply. The exception requires only an objectively reasonable basis for believing that a person within the house needs immediate aid. *Michigan v Fisher*, 558 US 45; 130 S Ct 546; 175 L Ed 2d 410 (2009).

The emergency aid exception differs from the community caretaker exception in that the emergency aid exception may apply to warrantless entry in the context of a criminal investigation, while the community caretaker exception only applies in situations where police are not investigating possible criminal activity. *People v Davis*, 442 Mich 1; 497 NW2d 910 (1993).

"[W]hen the police are investigating a situation in which they reasonably believe someone is in need of immediate aid, their actions should be governed by the emergency aid doctrine, regardless of whether these actions can also be classified as community caretaking activities." *People v Davis*, 442 Mich 1; 497 NW2d 910 (1993).

The reasonableness of a warrantless entry under the emergency aid exception does not depend on the seriousness the crime being investigated. *People v Lemons*, 299 Mich App 541; 830 NW2d 794 (2013).

After warrantless entry of a dwelling justified by the emergency aid exception, "police may seize any evidence that is in plain view during the course of their legitimate emergency activities." *People v Lemons*, 299 Mich App 541; 830 NW2d 794 (2013), quoting *Mincey v Arizona*, 437 US 385; 98 S Ct 2408; 57 L Ed 2d 290 (1978).

Did officers reasonably believe that a person needed immediate aid?

The "emergency doctrine" justified an officer's warrantless entry into the defendant's home after witnesses observed the defendant crash his car and then drive away holding his head. No one answered when the officer rang the doorbell. The officer saw through a window that the defendant was lying on a bed bleeding from his head. The defendant did not respond to shouting and pounding on the bedroom window. The officer reasonably believed that there was a medical emergency, and it did not matter that, by the time he entered, the officer also began to consider the defendant a suspect in the accident that occurred. *City of Troy v Ohlinger*, 438 Mich 477; 475 NW2d 54 (1991).

Officers reasonably believed that a person needed immediate aid after they responded to a report of an open door "blowing in the wind" in Michigan in November. The officers did not suspect and were not investigating a drug crime. Rather, they reasonably believed that a home invasion may have occurred (based on their experience) and that victims might be inside. The drugs that were in plain view during legitimate emergency activities were admissible against the defendant. *People v Lemons*, 299 Mich App 541; 830 NW2d 794 (2013).

The emergency aid exception justified warrantless entry into the kitchen; an officer lawfully entered the enclosed front porch and, from there, saw the defendant slumped over the kitchen table with a rifle and bullets nearby. The officer reasonably believed that the defendant might have shot himself and needed immediate aid. *People v Tierney*, 266 Mich App 687; 703 NW2d 204 (2005).

- See Search – Reasonable Expectation of Privacy, Chapter 3, and Search – Constitutionally Protected Property Interest, Chapter 4, regarding whether entry onto a front porch is a search.

Officers reasonably believed that a person might need immediate aid justifying entry into the residence when they heard sounds of a "scruffle" through an open front door. It was reasonable for the officers to believe that somebody inside needed immediate aid or protection from imminent injury. *People v Bailey*, unpublished per curiam opinion of the Court of Appeals, issued March 28, 2017 (Docket No. 330748).

Officers did not reasonably believe that someone in a motel room needed immediate aid. The officers were responding to a radio dispatch informing that a motel manager had reported hearing gunshots coming from one of two possible motel rooms. The dispatch did not suggest that anyone was injured. The officers encountered no circumstances to suggest that shots actually had been fired. The mere fact that the defendant delayed in opening the motel room door did not support a reasonable belief that a person inside the room needed immediate aid. *People v Davis*, 442 Mich 1; 497 NW2d 910 (1993).

Emergency aid exception would not have justified an officer's warrantless entry into a motel room where it was reported that two persons were the ongoing victims of elder abuse. The two elderly persons were not in any immediate life-threatening danger; rather, they were concerned that their conditions would deteriorate if they left the motel room. (But the court found that the defendant had consented to the entry.) *People v Gala*, unpublished per curiam opinion of the Court of Appeals, issued September 5, 2017 (Docket No. 334584).

Officers did not reasonably believe that someone in defendant's home might need emergency aid. The officers discovered the defendant "running around" in traffic wearing only his underwear, and the defendant told the officers he had taken too much cocaine. The officers stated that they entered defendant's residence because they were concerned that there might be additional people there in dire need of immediate medical attention. The defendant did not tell the officers that there might be other people at his residence. *People v Garcia*, unpublished per curiam opinion of the Court of Appeals, issued March 29, 2011 (Docket No. 300145).

Was the officer primarily motivated by the need to render aid or assistance?

For the emergency aid exception to apply, an officer must be motivated primarily by the perceived need to render aid or assistance. *People v Brzezinski*, 243 Mich App 431; 622 NW2d 528 (2000).

- But see *Brigham City, Utah v Stuart*, 547 US 398; 126 S Ct 1943; 164 L Ed 2d 650 (2006) (an officer's subjective motivation is irrelevant to the reasonableness of an action) (below, this chapter).

Did the officer do more than necessary to determine whether a person needed assistance and to provide that assistance?

Once warrantless entry is made under the emergency-aid exception, an officer may not do more than necessary to determine whether a person needs assistance and to provide that assistance. *People v Davis*, 442 Mich 1; 497 NW2d 910 (1993).

The emergency aid exception did not justify the search of the defendant after officers found him unconscious in the back seat of his vehicle near a suspicious fire. The exception justified the initial entry into the vehicle because officers could not wake defendant or assess his medical condition from outside. But the officers exceeded the scope of the exception when they searched defendant for identification, which was not required to assess defendant's medical condition or to render medical aid. *People v Brzezinski*, 243 Mich App 431; 622 NW2d 528 (2000).

The emergency aid exception did not justify a general exploratory search of the premises after defendant, who had been shot several times, was taken to the hospital. *People v Greene*, unpublished per curiam opinion of the Court of Appeals, issued June 15, 2001 (Docket No. 216050).

Was there a need to prevent violence or restore order?

The emergency aid exception applies not only to the need for rendering first aid to casualties; it includes preventing violence and restoring order. Officers arrived at a house where a disturbance had been reported and officers observed a smashed vehicle and broken windows; through a window, officers saw the defendant screaming and throwing objects. It would have been objectively reasonable for the officers to believe that the defendant's projectiles might have a human target (perhaps a spouse or a child), or that the defendant might hurt himself in the course of his rage. *Michigan v Fisher*, 558 US 45; 130 S Ct 546; 175 L Ed 2d 410 (2009).

The emergency aid exception justified officers' warrantless entry into the defendant/petitioner's private room in a group home to help a social worker transport the defendant to a mental health facility. The defendant had threatened to kill a social worker and the officers knocked on the defendant's door, announced that they were police officers, and informed the defendant that they were there to help. *City & Co of San Francisco, Calif v Sheehan*, ___ US ___; 135 S Ct 1765; 191 L Ed 2d 856 (2015).

Officers' warrantless entry into the defendant's home was justified because the officers had a reasonable basis for fearing that violence was imminent. The officers were investigating a rumor that a high school student had threatened to "shoot up" the school. It was reasonable for the officers to believe they could enter the home without a warrant when the student's mother abruptly fled into the house in the

middle of an interview. The Court decided the case based on reasonableness without identifying a particular exception, but it referred to both the exigency and the emergency need to protect persons from imminent violence. *Ryburn v Huff*, 565 US 469; 132 S Ct 987; 181 L Ed 2d 966 (2012).

The emergency aid exception justified a warrantless entry into a home because the officers witnessed an assault and reasonably believed that "the violence was just beginning." It did not matter whether the officers entered the home to arrest the defendants or to gather evidence against them; an officer's subjective motivation is irrelevant to the reasonableness of an action. *Brigham City, Utah v Stuart*, 547 US 398; 126 S Ct 1943; 164 L Ed 2d 650 (2006).

The emergency aid exception justified entry of officers responding to a 911 call reporting domestic violence. The caller indicated that there were guns and knives on the premises. Officers knocking at the door heard noises they characterized as "wrestling" and "shuffling around." The report of a domestic disturbance, the possibility of weapons inside, and the sounds of scuffling inside gave the officers an objectively reasonable belief that immediate action was necessary to protect the officers or others. The entry was also justified under the exigent circumstances exception. *People v Beuschlein*, 245 Mich App 744; 630 NW2d 921 (2001).

Officers reasonably believed that someone inside a residence might need protection from an imminent injury when they heard sounds of a "scruffle" through an open front door. *People v Bailey*, unpublished per curiam opinion of the Court of Appeals, issued March 28, 2017 (Docket No. 330748).

COMMUNITY CARETAKING EXCEPTION

KEY QUESTIONS:

- Did the officer reasonably believe that a person needed immediate aid?
- Was the search reasonably necessary to protect the public?
- Was the officer investigating a crime?
- Was the officer primarily motivated by the need to render aid or protect the public?
- Did the officer do more than required to render aid or protect the public?

NOTE: The community caretaker exception encompasses more than justification for warrantless entry into a dwelling or a vehicle. It also includes such functions as vehicle impoundment and inventory searches. See People v Slaughter*, 489 Mich 302; 803 NW2d 171 (2011).*

This subchapter covers only cases involving entry. For vehicle impoundment and inventory searches see Search – Warrant Exceptions – Inventory Search, Chapter 14.

Generally

In reviewing a search under the community caretaker exception, a court looks at "the *function* performed by a government agent" when the search occurs. *Taylor v City of Saginaw*, 922 F3d 328 (CA 6, 2019).

Police officers regularly perform "community caretaking functions" that are "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady v Dombrowski*, 413 US 433; 93 S Ct 2523; 37 L Ed 2d 706 (1973).

For the community caretaking exception to apply, police actions must be totally unrelated to the investigation of a crime. *People v Hill*, 299 Mich App 402; 829 NW2d 908 (2013).

Probable cause is not required for application of the community caretaking exception because the exception applies only to non-investigative activity. *People v Davis*, 442 Mich 1; 497 NW2d 910 (1993).

The community caretaker exception to the warrant requirement applies when an entering officer possesses specific and articulable facts that lead to the reasonable conclusion that a person inside a home is in immediate need of aid. *People v Hill*, 299 Mich App 402; 829 NW2d 908 (2013).

After warrantless entry of a dwelling justified by the community caretaker exception, "police may seize any evidence that is in plain view during the course of their legitimate emergency activities." *People v Lemons*, 299 Mich App 541; 830 NW2d 794 (2013), quoting *Mincey v Arizona*, 437 US 385; 98 S Ct 2408; 57 L Ed 2d 290 (1978).

The community caretaker exception applies to firefighters when they are responding to emergency situations that threaten life or property and their intrusion is reasonable. For the intrusion of a private residence to be reasonable, the firefighters must possess a good-faith belief that their actions were necessary to abate an imminent threat of fire based on specific and articulable facts. On review, it does not matter if an imminent hazard actually existed; the inquiry is whether the entry was reasonable based on the circumstances known to the firefighters at the time of entry. *People v Slaughter*, 489 Mich 302; 803 NW2d 171 (2011).

Did the entering officer reasonably believe based on articulable facts that a person needed immediate aid?

Officers reasonably believed that a person needed immediate aid. The community caretaker exception justified opening the passenger door of parked truck to see if the sleeping occupant/defendant was able to drive his intoxicated girlfriend home. The officers were trying to find the girlfriend a safe ride home. The officers did not knock on the truck's window or attempt to speak with the defendant before opening the door, but the community caretaker exception is not limited to the least intrusive means, and the opening of a vehicle door was minimally intrusive. *United States v Lewis*, 869 F3d 460 (CA 6, 2017).

Officers reasonably believed, based on specific and articulable facts, that a person needed immediate aid when they entered a home to conduct a welfare check after a neighbor called police with welfare concerns. The neighbor was concerned because she had not seen the defendant in several days and he had not used his car in several days (which was unusual). The officers found a phonebook on the defendant's front porch and several days of mail in the mailbox. The officers reasonably believed that defendant was present in the house because his car was in the driveway and lights were on in the house when police arrived around midnight. *People v Hill*, 299 Mich App 402; 829 NW2d 908 (2013).

Officer did not reasonably believe that a person in the house needed immediate aid. The officer went to the house to investigate a 911 hang-up call and found two occupants (who appeared intoxicated) and evidence of a domestic dispute. The male occupant had been removed, and the female occupant was in the front room in the officer's view. The officer's partner testified that he had no reason to believe someone else on the premises was injured. The entry was not justified by the community caretaker exception. *United States v Meixner*, 128 F Supp 2d 1070 (ED Mich, 2001).

Was the officer investigating a crime?

Officers were not investigating a crime when they opened the door of the defendant's vehicle to wake him. Rather, the officers were attempting to determine if the sleeping occupant/defendant was able to drive his intoxicated girlfriend home. The officers were trying to find the girlfriend a safe ride home, not investigating a crime. *United States v Lewis*, 869 F3d 460 (CA 6, 2017).

Officers were not "engaged in the often competitive enterprise of ferreting out crime" when they entered a home without a warrant to abate a public disturbance (excessively loud music in the middle of the night). *United States v Rohrig*, 98 F3d 1506 (CA 6, 1996).

Officers were investigating a crime when they made a warrantless entry into a dwelling. The officers were responding to a call from a neighborhood association employee concerning a house that was supposed to be vacant. The employee told the officers that a neighbor had reported seeing someone going in and out of the house and staying there without permission. The officers' purpose in entering the house was to investigate a possible trespass. Responding to a complaint of trespassers in a house, vacant or otherwise, is an investigation of a criminal matter. The community caretaker exception did not justify the entry. *People v Mayweather*, unpublished per curiam opinion of the Court of Appeals, issued April 23, 2009 (Docket No. 282849).

Officers were engaged when in a criminal investigation when an officer made a second entry into a vehicle. The first entry was justified by the community caretaking exception because the officer was not, at that point, investigating a crime. The second search was justified, however, by the plain view and automobile exceptions to the warrant requirement. *People v Davis*, unpublished per curiam opinion of the Court of Appeals, issued April 17, 2003 (Docket No. 241294).

Was the search reasonably necessary to protect the public?

Protection of the public is a community caretaking function (so long as it is "totally divorced" from criminal investigation). *Cady v Dombrowski*, 413 US 433; 93 S Ct 2523; 37 L Ed 2d 706 (1973).

The community caretaker exception justified the warrantless entry into a home to abate a public disturbance (excessively loud music). Neighbor's complained about excessively loud music coming from the home in the early morning hours. The occupants of the home did not answer the door when officers knocked, presumably due to the volume at which the music was played. The officers entered to protect the public from the harm of a continuing, noxious disturbance. "[T]he governmental interest in immediately abating an ongoing nuisance by quelling loud and disruptive noise in a residential neighborhood" was sufficiently compelling to justify the entry. *United States v Rohrig*, 98 F3d 1506 (CA 6, 1996).

Warrantlessly chalking parked car tires bears no relation to public safety. The chalking was a search for Fourth Amendment purposes because it was a common-law trespass on a constitutionally protected area (property), and it was done to obtain information (time parked). The City failed to demonstrate how the location or length of time the vehicle was parked created a hazard or impediment amounting to a public safety concern or that delaying a search would result in an injury or ongoing harm to the community. The community caretaker exception did not justify the search. *Taylor v City of Saginaw*, 922 F3d 328 (CA 6, 2019).

Was the officer primarily motivated by the need to render aid or protect the public?

A warrantless entry under the community caretaker exception must be primarily motivated by the perceived need to render aid or assistance. *People v Hill*, 299 Mich App 402; 829 NW2d 908 (2013).

Officers were motivated by the need to abate a public disturbance (excessively loud music in the middle of the night) when they entered a home without a warrant. *United States v Rohrig*, 98 F3d 1506 (CA 6, 1996).

Did the officer do more than required to render aid or protect the public?

If an officer conducts a warrantless entry under the community caretaker exception, the officer may not do more than is reasonably necessary to determine if a person is need of aid and to render that aid. *People v Hill*, 299 Mich App 402; 829 NW2d 908 (2013).

The community-caretaking exception did not justify second officer's entry into vehicle (although it did justify the first officer's entry). The owner of the vehicle had already been identified and the second officer was clearly engaged in a criminal investigation. The search was justified, however, by the plain view and automobile exceptions to the warrant requirement. *People v Davis*, unpublished per curiam opinion of the Court of Appeals, issued April 17, 2003 (Docket No. 241294).

WAS THE SEARCH REASONABLE?

CHAPTER 13: WARRANT EXCEPTIONS – SEARCH INCIDENT TO ARREST

Snapshot: A search incident to arrest is an exception to the warrant requirement. When an individual is *lawfully arrested*, officers may search the person of the arrestee and the area **within the arrestee's immediate control** for **weapons** and **destructible evidence**. The **probable cause** for the search is provided by the probable cause for the arrest.

KEY QUESTIONS:

- Was there an arrest?
- Was the arrest lawful?
  - Did the police have probable cause for arrest before the search?
- Was the search within the scope of the exception?
  - Was the area searched within the defendant's immediate control?
  - If the passenger compartment of a vehicle was searched, was it the area within defendant's immediate control or was it reasonable for the police to believe that evidence of the offense of arrest would be located there?
  - Was the search substantially contemporaneous to the arrest?

Generally

Search incident to arrest is an exception to the warrant requirement of the Fourth Amendment. It applies whenever there is probable cause to arrest. If the arrest is lawful, the search incident to that arrest is lawful. *People v Nguyen*, 305 Mich App 740; 854 NW2d 223 (2014).

The search incident to arrest exception applies even if the search is conducted before an arrest is made so long as the police have probable cause to arrest at the time of search. *People v Labelle*, 478 Mich 89; 732 NW2d 114 (2007); *People v Champion*, 452 Mich 92; 549 NW2d 849 (1996).

But the probable cause to arrest cannot be justified by the fruits of the search incident to that arrest, and justifying the search by the arrest does not satisfy the exception. *People v Champion*, 452 Mich 92; 549 NW2d 849 (1996).

The search incident to arrest exception is based on two rationales: (1) the need to disarm a suspect while taking the suspect into custody (to protect police and others), and (2) the need to preserve evidence. *Knowles v Iowa*, 525 US 113; 119 S Ct 484; 142 L Ed 2d 492 (1998).

A search incident to arrest is limited to the arrestee's person and the area within the arrestee's immediate control. An area within immediate control is the area from within which the arrestee might gain possession of a weapon or destructible evidence. *Arizona v Gant*, 556 US 332; 129 S Ct 1710; 173 L Ed 2d 485 (2009).

A search is incident to an arrest only if it is "substantially contemporaneous" with the arrest. *Vale v Louisiana*, 399 US 30; 90 S Ct 1969; 26 L Ed 2d 409 (1970).

Was there an arrest?

> **PRACTICE POINTER:** A first point of challenge to a search incident to arrest is the arrest itself. The probable cause for a search incident to arrest is provided by the probable cause for the arrest. So, if there was no probable cause for the arrest, there was no probable cause for the incidental search.

Traffic citation

The search incident to arrest exception does not apply when a police officer issues a traffic citation instead of making an arrest, even if the search was authorized by state law. A search was not justified by the need to disarm the defendant or to preserve evidence: the threat to safety while issuing a traffic citation is less than that in the case of a custodial arrest, and no further evidence of the traffic offense

was going to be found. *Knowles v Iowa*, 525 US 113; 119 S Ct 484; 142 L Ed 2d 492 (1998).

There is no reason to believe that evidence relevant to the crime of arrest would be found in the vehicle when police are addressing civil infractions or a person driving without a valid license. *People v Tavernier*, 295 Mich App 582; 815 NW2d 154 (2012).

Misdemeanor arrest

Officers' search incident to a misdemeanor arrest was within the exception, even though, as a matter of state law, the officers should have issued a summons rather than made an arrest. Warrantless arrests for crimes committed in the presence of an arresting officer are reasonable under the Constitution. A state's decision to provide more protection to suspects than is required by the Constitution does not render less-restrictive options constitutionally unreasonable. *Virginia v Moore*, 553 US 164; 128 S Ct 1598; 170 L Ed 2d 559 (2008).

Was the arrest lawful?

There must be a lawful arrest for a search incident to arrest to be lawful. *People v Houstina*, 216 Mich App 70; 549 NW2d 11 (1996).

- See Seizure – Arrest, Chapter 30.

A search of a person incident to a lawful arrest (based on probable cause) requires no additional justification. *United States v Robinson*, 414 US 218; 94 S Ct 467; 38 L Ed 2d 427 (1973).

Officers' search of a dresser drawer (containing cocaine and razors) was incident to a lawful arrest. The officers had probable cause to arrest the defendant on drug charges because they had seen him selling cocaine. The officers lawfully entered the defendant's home under the exigent circumstances exception. The dresser was within the defendant's reach at the time of his lawful arrest. It did not matter that the defendant was handcuffed at the time of the search; "[a] search incident to arrest may encompass the areas that would be within the defendant's reach, even when the defendant is restrained." *United States v Poole*, 407 F3d 767 (CA 6, 2005).

Officer's search of a pill bottle (by opening it) was incident to a lawful arrest. The officer had probable cause to arrest the defendant before the officer opened the pill bottle based on the defendant's furtive behavior after seeing the marked patrol car, the defendant's refusal to remove his hands from his sweatpants, the officer's knowledge of the defendant's past involvement in drug crimes, the finding of the pill bottle (by plain feel) in the defendant's groin area, and the officer's knowledge that

illegal drugs were frequently carried in such a manner. *People v Champion*, 452 Mich 92; 549 NW2d 849 (1996).

The search of defendant's person was not incident to a lawful arrest because police lacked probable cause to arrest the defendant based on a no-trespassing letter that prohibited trespassing in a parking lot to the annoyance or disturbance of lawful occupants. There was no evidence that the defendant was annoying or disturbing lawful occupants or that the defendant had notice of the letter, and the defendant was not in the parking lot when he was seized by police. *People v Maggit*, 319 Mich App 675; 903 NW2d 868 (2017).

The search of the defendant's person was not incident to a lawful arrest. Probable cause is not satisfied by a mere suspicion, and it is not lawful to arrest a suspect for "investigation" of a crime. *People v Davenport*, 99 Mich App 687; 299 NW2d 368 (1980), citing MCL 764.15.

Was the search within the scope of the exception?

The Fourth Amendment does not permit warrantless blood tests incident to arrest for drunk driving. A warrantless breath test incident to arrest for drunk driving is permissible. A breath test does not implicate significant privacy concerns, it leaves no biological sample in the government's possession, and it does not enhance the embarrassment inherent in any arrest. A blood test is significantly more intrusive; it's reasonableness must be considered in light of the availability of the less invasive alternative breath test. Motorists cannot be criminally punished for refusing to submit to a blood test based on legally implied consent to submit to them. *Birchfield v North Dakota*, ___ US ___; 136 S Ct 2160; 195 L Ed 2d 560 (2016).

- But see *Mitchell v Wisconsin*, 588 US ___; 139 S Ct 2525 (2019) (warrantless blood draw permissible under exigent circumstances to prevent the dissipation of evidence if a suspected drunk driver is unconscious and unable to take a breath test).

The search of digital data on the defendant's cell phone exceeded the scope of the search incident to arrest exception. Officers' seizure of the defendant's phone was justified by the exception to examine the possibility that the phone could be used as a weapon and to prevent the destruction of digital data evidence. But once the officers had secured the phone, there was no longer any risk that the defendant would be able to delete incriminating data from the phone, and the officers knew that the data on the phone could not harm them. *Riley v California*, 573 US 373; 134 S Ct 2473; 189 L Ed 2d 430 (2014).

The search of the defendant's vehicle after he was handcuffed and placed securely in the back of a patrol car exceeded the scope of the search incident to arrest exception. The permissible scope of a vehicle search incident to arrest is limited to

circumstances (1) when the arrestee is unsecured and within reaching distance of the vehicle's passenger compartment, and (2) when police reasonably believe that evidence related to the crime of arrest may be found in the vehicle. The arrestee was arrested for driving with a suspended license, so police could not have reasonably believed that evidence related to the crime of the arrest would be found in the vehicle. And once the arrestee was handcuffed and secured in the back of the patrol car, officers could not reasonably believe that the arrestee had access to the vehicle or that there was concern for officer safety. *Arizona v Gant*, 556 US 332; 129 S Ct 1710; 173 L Ed 2d 485 (2009).

> **PRACTICE POINTER:** *Gant* overruled *New York v Belton*, 453 US 454 (1981), to the extent that *Belton* held that, when an officer has made a lawful custodial arrest of an occupant of a vehicle, the officer may search the passenger compartment of the vehicle incident to arrest. *Gant* narrowed the scope of a vehicle search incident to arrest. Cases that cite or follow *Belton* to address vehicle searches incident to arrest should be revisited in light of *Gant*. See examples of cases following *Belton* below.

Officers lacked probable cause to search the vehicle of the defendant who was arrested inside a nearby apartment building, not in or near his car, and the officers had nothing more than a mere suspicion that the defendant had hidden stolen items in the car. *United States v Haynes*, 301 F3d 669 (CA 6, 2002).

Officers' search of the defendant's van exceeded the scope of a search incident to arrest because the defendant did not occupy the vehicle at the time of his arrest. The defendant had voluntarily left his vehicle and was walking away from his vehicle when he was arrested 20 to 25 feet from the vehicle. The defendant was no longer in immediate control of the interior of the van at the time of his arrest. *People v Fernengel*, 216 Mich App 420; 549 NW2d 361 (1996).

> **PRACTICE POINTER:** If a vehicle search is justified as incident to arrest, a defendant's proximity and connection to the vehicle *at the time of the defendant's arrest* is an important fact for consideration in challenging the search.

Officers' second search of the defendant was within the scope of the search incident to arrest exception. Officers had probable cause to arrest the defendant based on information from a credible and reliable informant and based on their observations. Based on this probable cause, the officers pulled the defendant over and searched his person and (with consent) his vehicle, finding nothing. Some 20 minutes later, an officer again searched the defendant's person, found cocaine on him, and arrested him. The probable cause to arrest had not dissipated during the time between the stop and the second search, so the incident-to-arrest search was lawful. It did not matter that the search was prior to the arrest because the officers still had probable cause to arrest when the second search was made. *People v Nguyen*, 305 Mich App 740; 854 NW2d 223 (2014).

The search of the passenger compartment of the defendant's vehicle was within the scope of the search incident to arrest exception under the second prong of *Gant*, even though the defendant was secured in the back of a patrol car, because the officer reasonably believed that the vehicle would contain evidence of the offense of arrest. The officer had probable cause to arrest the defendant for operating under the influence because the defendant was driving erratically, the defendant was confused and unable to perform sobriety test tasks, and the officer received information from the defendant's brother that the defendant was taking opioid painkillers following surgery. Under the totality of the circumstances and in light of the officer's common sense and training, it was reasonable for the officer to believe that passenger compartment would contain narcotics or other evidence related to offense of arrest. *People v Tavernier*, 295 Mich App 582; 815 NW2d 154 (2012).

> **PRACTICE POINTER:** If a vehicle search incident to arrest is justified under the second prong of *Gant* (reasonable belief that evidence related to the crime of arrest may be found in the vehicle), the reasonable belief must concern evidence related to the *crime of arrest*. An officer's reasonable belief that a vehicle may contain evidence of some other crime does not support a vehicle search incident to arrest.

The search of the passenger compartment of defendant's vehicle was within the scope of the search incident to arrest exception under the second prong of *Gant* because the officers reasonably believed that the vehicle would contain evidence of the offense of arrest. After he was pulled over, the defendant handed officers a half-full can of beer and exhibited signs of intoxication sufficient to establish probable cause to arrest for operating under the influence. The officers secured the defendant in the back of their patrol car and then searched the passenger compartment of his vehicle. It was reasonable for the officers to believe that the car could contain additional open containers of alcohol or other sources of intoxication, which would be relevant to the original OUI crime of arrest. *United States v Latham*, 763 Fed App'x 428 (CA 6, 2019).

Examples of cases following Belton *(revisit in light of* Gant*):*

The search of a vehicle's passenger compartment is within the scope of the search incident to arrest exception even if the officer first contacts the occupant after the occupant has parked and exited the vehicle. *Thornton v United States*, 541 US 615; 124 S Ct 2127; 158 L Ed 2d 905 (2004) (following *Belton*).

The search of the area beneath the gear shifter in defendant's vehicle was within the scope of the search incident to arrest exception. Police may search the passenger compartment of a vehicle incident to arrest, including any container that might hold an object. The area beneath the gear shifter was a "container," and it did not matter that the police had to loosen the plastic cover and remove the console to gain access

to the area. *People v Eaton*, 241 Mich App 459; 617 NW2d 363 (2000) (following *Belton*).

The search of a leather bag that the defendant was holding when an officer had probable cause to arrest him was within the scope of the search incident to arrest exception even though the defendant was handcuffed and secured and the bag was not within his immediate control at the time of the search. *People v Catanzarite*, 211 Mich App 573; 536 NW2d 570 (1995) (citing *Belton*).

The search of a jacket inside the passenger compartment of the vehicle the defendant was driving was within the scope of the search incident to arrest exception even though the defendant was in the back seat of the patrol car at the time of the search. *People v Davis*, 250 Mich App 357; 649 NW2d 94 (2002) (following *Belton*).

The search of the passenger area of a defendant's vehicle and containers in that area are within the scope of the search incident to arrest exception under the Michigan Constitution. The standard for the reasonableness of a search is the same under both the Michigan and the federal constitutions. *People v Ragland*, 149 Mich App 277; 385 NW2d 772 (1986) (following *Belton*).

Contemporaneous with arrest

The search of the passenger compartment of the defendant's vehicle (for a credit card related to a forgery charge) after the vehicle was towed to the police station was substantially contemporaneous to his arrest. Officers were unable to complete the search at the point of arrest because of the conduct of the defendant and an unruly crowd that had gathered at the point of arrest. Officers had the vehicle towed to the station (accompanied by the defendant) to abate the threat to officer safety and to prevent the destruction of the credit card by those opposing the officers' lawful activity. *People v Foster*, 17 Mich App 430; 169 NW2d 648 (1969).

The search of the trunk of the defendant's vehicle (for evidence related to an uttering and publishing charge) after he was taken into custody and incarcerated in jail was not substantially contemporaneous to his arrest. Officers searched the defendant and the passenger compartment of his vehicle at the time of his arrest but were unable to search the trunk of the vehicle because they did not have a key. After the defendant was jailed, the officers discovered a key and searched the trunk. Under these circumstances, there was no immediate need to open the trunk, and the search of the trunk required a warrant. *People v Dombrowski*, 10 Mich App 445; 159 NW2d 336 (1968).

WAS THE SEARCH REASONABLE?

CHAPTER 14: WARRANT EXCEPTIONS – INVENTORY SEARCH

Snapshot: An inventory search is an exception to the warrant requirement for search and seizure. An inventory search is lawful if it is conducted pursuant to an **established standardized procedure** intended to protect the owner's property while the vehicle remains in police custody, to protect the police against claims or disputes over lost or stolen property, or to protect the police from potential danger. **Probable cause is not required** for an inventory search because it is within the **community caretaking** or administrative caretaking police function; it is **not for criminal investigation**. An inventory search need only be **reasonable**.

The inventory search exception is a sub-category of the community caretaker exceptions. For other applications of the community caretaker exception see Exigent Circumstances, Emergency Aid, Community Caretaker Exceptions, Chapter 12.

KEY QUESTIONS:

- Was the vehicle lawfully impounded or seized?
  - Was the vehicle impounded following standardized police procedures?
  - Was the impoundment otherwise lawful?
- Was the search conducted pursuant to standardized police procedures designed to produce an inventory?
- Did the officer conducting the search follow the standardized procedures?
- Was the impoundment or search policy overbroad?
  - Did it give an officer too much discretion?
  - Did it give an officer too little discretion?
- Was the search a pretext for criminal investigation?

Generally

The inventory search of a lawfully impounded vehicle is an exception to the warrant requirement for search and seizure. *Colorado v Bertine*, 479 US 367; 107 S Ct 738; 93 L Ed 2d 739 (1987).

The inventory search serves three purposes: (1) to protect the owner's property while the vehicle remains in police custody; (2) to protect the police against claims or disputes over lost or stolen property; and (3) to protect the police from potential danger. *S Dakota v Opperman*, 428 US 364; 96 S Ct 3092; 49 L Ed 2d 1000 (1976).

The fundamental rationale for an inventory search is not only officer safety but also "routine administrative caretaking functions" that are noncriminal in nature. *S Dakota v Opperman*, 428 US 364; 96 S Ct 3092; 49 L Ed 2d 1000 (1976).

Probable cause is not required for an inventory search because it is a community caretaking or administrative caretaking function. *People v Toohey*, 438 Mich 265; 475 NW2d 16 (1991).

To be lawful, an inventory search must be conducted pursuant to standardized police procedures designed to produce an inventory, including procedures that regulate the opening of containers found during inventory searches. *Florida v Wells*, 495 US 1; 110 S Ct 1632; 109 L Ed 2d 1 (1990); *People v Poole*, 199 Mich App 261; 501 NW2d 265 (1993).

Standardized procedures for inventory searches are necessary to prevent them from becoming a pretext for criminal investigation. *People v Poole*, 199 Mich App 261; 501 NW2d 265 (1993).

A department's policy or procedure for inventory searches must be designed to produce an inventory. *Florida v Wells*, 495 US 1; 110 S Ct 1632; 109 L Ed 2d 1 (1990).

A standardized police procedure for opening containers during inventory searches may direct the opening of all containers, of none, or some, without violating the Constitution. But there must be some procedure for opening containers, or the opening violates the Constitution. *Florida v Wells*, 495 US 1; 110 S Ct 1632; 109 L Ed 2d 1 (1990).

For an inventory search to be valid, there must be proof that the police had established a reasonable inventory procedure and that the officer conducting the search followed that procedure. *S Dakota v Opperman*, 428 US 364; 96 S Ct 3092; 49 L Ed 2d 1000 (1976).

Whether a police department maintains a written policy is not determinative; officer testimony can establish the "existence and contours of the policy." *United States v Tackett*, 486 F3d 230 (CA 6, 2007).

Courts must consider the lack of an underlying motive or bad faith by the police in conducting an inventory search when determining the validity of the search. *People v Toohey*, 438 Mich 265; 475 NW2d 16 (1991).

An inventory search exception is distinct from a search incident to arrest. The search incident to arrest exception protects police and preserves evidence. The probable cause for a search incident to arrest is established by the probable cause for the arrest. An inventory search is an "incidental administrative step." Probable cause is not required for an inventory search; it only needs to be reasonable. *Illinois v Lafayette*, 462 US 640; 103 S Ct 2605; 77 L Ed 2d 65 (1983).

> **PRACTICE POINTER:** For an inventory search of an impounded vehicle to be constitutional, the police department must have an established policy for impounding vehicles *and* an established policy for the inventory search of impounded vehicles.

Was the vehicle lawfully impounded or seized?

Was the vehicle impounded pursuant to an established standardized procedure for impoundment?

The standard for determining the constitutionality of the initial impoundment of a vehicle is the same as that for determining the constitutionality of the subsequent search: was the impoundment conducted pursuant to an established set of

procedures that police must follow in deciding whether to impound. *People v Toohey*, 438 Mich 265; 475 NW2d 16 (1991).

The defendant's van was validly impounded under established departmental procedures when he was arrested for operating under the influence. Departmental procedures gave officers the discretion to choose whether to impound the van or lock it and park it. The officer exercised discretion in light of standardized criteria related to the feasibility and propriety of parking and locking rather than impounding. There was no showing that the officers chose to impound the van to investigate criminal activity. *Colorado v Bertine*, 479 US 367; 107 S Ct 738; 93 L Ed 2d 739 (1987).

The defendant's vehicle was lawfully impounded for violations of the municipal parking code. The municipal code provided that vehicles in violation of any parking ordinance may be towed from the area, and citations placed on the vehicle warned of the execution of this provision. *S Dakota v Opperman*, 428 US 364; 96 S Ct 3092; 49 L Ed 2d 1000 (1976).

The defendant's vehicle was lawfully impounded under established departmental procedures when he was arrested for operating under the influence and his passenger was too intoxicated to drive the vehicle. Departmental procedures provided that a police officer may impound a vehicle if it would otherwise be left unattended. The procedure sufficiently limited an officer's discretion whether to impound a vehicle to prevent arbitrary impoundment. It did not matter that the police could have attempted to reach the defendant's wife to take custody of the vehicle; the police are not required to use the least intrusive means to accomplish an inventory search so long as the search remains reasonable. *People v Toohey*, 438 Mich 265; 475 NW2d 16 (1991).

The defendant's vehicle was lawfully impounded from an airport parking lot under established departmental policy when the defendant was arrested. The departmental policy was that, when a driver is arrested, all vehicles not released to another driver were to be impounded. The policy was lawful and supported by considerations including the concern for vandalism or theft. *People v Krezen*, 427 Mich 681; 397 NW2d 803 (1986).

The defendant's vehicle was lawfully impounded under established departmental procedures when the defendant was arrested for driving with a suspended license and his passenger did not have a valid driver's license. The officer testified that it was department policy to impound a vehicle "when a person is arrested and there is no one there that can take care of the car." The officer had discretion whether to arrest the defendant or to issue a citation for the suspended license violation, but there was no allegation that an improper motive led to the officer's choice to arrest the defendant. *People v Poole*, 199 Mich App 261; 501 NW2d 265 (1993).

The defendant's vehicle was not lawfully impounded from a private driveway when defendant was arrested. The officer responsible for the impoundment testified that he was not concerned for his safety. The vehicle was locked and legally parked, so there was no public safety reason to impound it. And the defendant's friend, who had not been arrested, was presumably available to arrange for the vehicle to be moved if the defendant did not wish it left in the driveway. The search was a pretext for investigation, not normal police procedure. *People v Siegel*, 95 Mich App 594; 291 NW2d 134 (1980).

Was the impoundment or seizure otherwise lawful?

The warrantless seizure of the defendant's vehicle from a public place did not violate the Fourth Amendment because officers had probable cause to believe that the vehicle was subject to the state forfeiture act for prior use during a narcotics transaction. Because the vehicle was lawfully seized, the vehicle was lawfully subject to an inventory search. *Florida v White*, 526 US 559; 119 S Ct 1555; 143 L Ed 2d 748 (1999).

Impounding the defendant's vehicle was justified because officers followed established departmental procedure, even though the procedures contained some reasons for impoundment related to criminal investigation. An officer testified that the car was an "evidence vehicle impound." But on the impoundment form, the officer listed the reasons as "driver arrest" and also wrote "Other. Plate was improper. VIN does not match plate." The impoundment and subsequent inventory search were reasonable given that the car was running, unattended, had improper plates, and the perceived driver had been arrested. *People v Ashley*, unpublished per curiam opinion of the Court of Appeals, issued October 18, 2011 (Docket No. 299251).

The police lacked probable cause to arrest the defendant. Consequently, evidence discovered in a subsequent inventory search was unlawfully obtained and subject to suppression. *People v Mersino*, 419 Mich 899, 900; 352 NW2d 272 (1984).

Was the search conducted pursuant to an established standardized procedure?

The inventory search of the defendant's backpack (after he crashed his car) was conducted following an established departmental policy. Officers testified that the department had a "universally applicable" policy of inventorying all items following an accident. The department's policy was not written, but multiple officers testified at length and consistently detailing the steps required by the policy. The defendant had left the vehicle taking the backpack with him by the time the officers encountered him, but the Fourth Amendment did not require the officers to choose between giving the backpack to a stranger, leaving the backpack on the side of the

road, or taking the backpack to the station without knowledge of the backpack's contents. *United States v Tackett*, 486 F3d 230 (CA 6, 2007).

The search of the defendant's vehicle, including the search of an unlocked briefcase in the trunk, was conducted pursuant to an established standardized procedure. The departmental procedure required officers to "inventory all available areas of the motor vehicle and any containers contained within the vehicle" and to list "all personal property of value." *People v Green*, 260 Mich App 392; 677 NW2d 363 (2004), overruled in part on other grounds *People v Anstey*, 476 Mich 436 (2006).

A state trooper's inventory search that included a search of a locked suitcase found in the trunk of defendant's car was invalid because the search was not conducted pursuant to standardized police procedures. The highway patrol had no policy whatever regarding the opening of closed containers during an inventory search. Without such a policy, the search was not sufficiently regulated to satisfy the Fourth Amendment. *Florida v Wells*, 495 US 1; 110 S Ct 1632; 109 L Ed 2d 1 (1990).

An inventory search of the trunk of the defendant's impounded vehicle was invalid because there was no showing that the police agency had an established standardized procedure for conducting inventory searches. An officer's testimony about his own personal "standard" for conducting searches of impounded vehicles did not suffice. *People v Long (On Remand)*, 419 Mich 636; 359 NW2d 194 (1984).

Did the officer conducting the search follow the standardized procedures?

There was no record evidence that there was an established departmental procedure for the inventory search or, if there was, that the officer followed the departmental procedure when he conducted the search. The officer testified that it was routine to open the trunk and check for a spare tire, but he did not testify that it was departmental policy to do so or that it was departmental policy to open some or all of the containers found in the trunk. The case was remanded to determine whether the department had a standard practice that allowed for the procedure followed by the searching officer. *People v Poole*, 199 Mich App 261; 501 NW2d 265 (1993).

Was the impoundment policy or inventory search policy overbroad?

> **PRACTICE POINTER:** An impoundment policy that affords officers too much discretion is invalid because it could be applied capriciously or to "fish" for evidence of crime. But a policy that gives too little discretion (e.g., all cars must be impounded after driver's arrest) is also problematic because it could apply in situations that would otherwise be unreasonable.

Did the standardized procedure afford the officer too much discretion?

If a department does not have a standard departmental practice for impoundment and inventory searches, officers have too much discretion and vehicles might be singled out for search based on an improper (investigative) motive. *People v Long (On Remand)*, 419 Mich 636; 359 NW2d 194 (1984).

An inventory search procedure must not give the individual police officer so much latitude that inventory searches are turned into "a purposeful and general means of discovering evidence of crime." *Florida v Wells*, 495 US 1; 110 S Ct 1632; 109 L Ed 2d 1 (1990).

An officer may properly exercise discretion on whether to impound a car so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity. *Colorado v Bertine*, 479 US 367; 107 S Ct 738; 93 L Ed 2d 739 (1987).

A policy that gives an officer discretion to open a container if the officer cannot ascertain the contents by examining the exterior is permissible. Allowing the exercise of discretion based on concerns related to the purposes of an inventory search does not violate the Fourth Amendment. *Florida v Wells*, 495 US 1; 110 S Ct 1632; 109 L Ed 2d 1 (1990).

A standardized procedure that gave officers discretion to impound a vehicle if it would otherwise be left unattended was permissible. The procedure sufficiently limited an officer's discretion whether to impound a vehicle to prevent arbitrary impoundment. *People v Toohey*, 438 Mich 265; 475 NW2d 16 (1991).

A policy that left the decision whether to impound a vehicle up to the officer did not invalidate the impoundment. After a defendant-driver was arrested, the officer was arranging for a passenger to take custody of the vehicle until the officer discovered that the passenger did not have a valid driver's license. The officer impounded the vehicle based on recognized concerns of vandalism or theft if the vehicle was left on parked on a public street. *People v Castle*, 126 Mich App 203; 337 NW2d 48 (1983).

Officer's discretion whether to issue a citation to the defendant or to arrest him did not invalidate the impoundment and subsequent search of the defendant's vehicle after he was arrested. *People v Poole*, 199 Mich App 261; 501 NW2d 265 (1993).

Did the standardized procedure afford the officer too little discretion?

A departmental policy that provides that all arrests require impoundment, regardless of the surrounding factual circumstances, might, in some circumstances, be overbroad. But if the policy is unclear and the specific facts in a particular case

show that the impoundment was reasonable, the fact that the policy might be overbroad in other circumstances does not render the decision to impound a vehicle unreasonable. *People v Krezen*, 427 Mich 681; 397 NW2d 803 (1986).

Was the search a pretext for criminal investigation?

The decision to impound the defendant's truck and conduct an inventory search was not a pretext for "sanitizing" a presumptively illegal search conducted earlier. An officer's subjective intent is not relevant to the determination of the reasonableness of an inventory search. The impoundment and inventory search were objectively reasonable, which is enough to satisfy the Fourth Amendment. *United States v Kimes*, 246 F3d 800 (CA 6, 2001).

The decision to impound the defendant's car that was parked on a city street was not a pretext for criminal investigation. It was unclear whether the car was parked legally, but it was certain the car was not a traffic hazard, and the defendant asked to have the car locked and parked on the street. But no one was available to take custody of the vehicle, and the officer's conclusion that it was necessary to impound the car to protect it was reasonable and within the department's standardized inventory policy. The impoundment and search were not a mere pretext because they were justified by the inventory search exception. *People v Castle*, 126 Mich App 203; 337 NW2d 48 (1983).

The inventory search of the defendant's vehicle was a pretext for criminal investigation. Officers suspected the defendant of breaking and entering, but the defendant advised them he was the homeowner. One officer went to conduct a LEIN check because, as the other officer testified, there were "no real grounds to arrest [the defendant and his friend] and the whole thing was kind of a mix-up." The officers arrested the defendant on an outstanding warrant related to a speeding violation discovered in the LEIN check. The LEIN check verified that the car belonged to the defendant's brother, the car was locked and legally parked on a private property, and the defendant's friend was available to take custody of the vehicle. The only possible reason for the search was criminal investigation. *People v Siegel*, 95 Mich App 594; 291 NW2d 134 (1980).

> **PRACTICE POINTER:** Pretext is always difficult to prove. In the inventory search context, it likely will not be found unless there was no reason at all to impound a vehicle or there was a complete disregard for departmental policy.

WAS THE SEARCH REASONABLE?

CHAPTER 15: WARRANT EXCEPTIONS – PROTECTIVE SWEEP

Snapshot: Police officers may make a **protective sweep** without probable cause or reasonable suspicion of **the premises** where they are making an arrest. Officers must have a **reasonable belief** that the areas searched **may harbor an individual who poses a danger** to officers or others. The search must be **cursory**, **restricted** to areas where an individual might be hiding, and **not longer than necessary** to dispel the suspicion of danger.

Police officers may make a **protective sweep** of the **passenger compartment of a vehicle** during an investigatory stop if they reasonably believe that the **suspect is dangerous** and **may gain immediate control of a weapon**.

KEY QUESTIONS:

- Did the police reasonably believe that areas of the premises might harbor a dangerous individual?
  - Did the police reasonably believe another individual was present on the premises?
  - Was the search restricted to the area immediately adjoining the place of arrest?
  - Was the sweep justified by some circumstance other than arrest?
- Did the police reasonably believe that a suspect was dangerous and might gain control of a weapon during an investigative stop?

Generally

Police officers may, without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of an arrest from which an attack could be immediately launched. There must be articulable facts to warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the scene of the arrest. A protective sweep is to protect arresting officers or others. It is not a full search of the premises; it may only extend to the cursory inspection of spaces where a person may be found, and it may last no longer than necessary to dispel reasonable suspicion of danger or the completion of the arrest and departure from the premises. *Maryland v Buie*, 494 US 325; 110 S Ct 1093; 108 L Ed 2d 276 (1990).

A protective sweep of the passenger compartment of a vehicle during an investigative stop is reasonable under the Fourth Amendment if the officer reasonably believes that the suspect is dangerous and may gain immediate control of weapons. *Michigan v Long*, 463 US 1032; 103 S Ct 3469; 77 L Ed 2d 1201 (1983).

The reasonableness of a protective sweep is viewed from the perspective of the police officers. *People v Cartwright*, 454 Mich 550; 563 NW2d 208 (1997).

Whether the individual arrested and in custody is dangerous is irrelevant to the inquiry into whether the police may conduct a protective sweep in response to a reasonable suspicion that some other person inside the home poses a threat. *United States v Colbert*, 76 F3d 773 (CA 6, 1996).

> **PRACTICE POINTER:** The fact that the individual who was arrested (and is now in custody) is dangerous or might have posed a danger to officers does not justify a protective sweep of a premises. The protective sweep of a premises is justified only for persons other than the arrestee.

Contraband seen in plain view during a protective sweep may be seized. *People v Shaw*, 188 Mich App 520; 470 NW2d 90 (1991).

Did the police reasonably believe that areas of the premises might harbor a dangerous individual?

Did the police reasonably believe another individual was present on the premises?

A protective sweep was reasonable under the circumstances after an officer entered a home under exigent circumstances related to a domestic dispute call. Although the person who answered the door appeared uninjured, the officer did not know whether additional persons were present in the residence; a walk through the house was justified to confirm that no one else was in danger. *People v Beuschlein*, 245 Mich App 744; 630 NW2d 921 (2001).

Officers reasonably conducted a protective sweep of the bedroom when executing an arrest warrant on a charge of cocaine delivery in defendant's one-bedroom apartment, even if the officers did not have reason to believe that others were present, because of the dangerous nature of the narcotics business. The officers lawfully seized an electronic scale and cocaine residue in plain view in the bedroom. *People v Shaw*, 188 Mich App 520; 470 NW2d 90 (1991).

A protective sweep of an apartment was unreasonable because the defendant was arrested after leaving the apartment while walking to his car and the police had no information regarding whether anyone else was in the apartment. "'No information' cannot be an articulable basis for a sweep that requires information to justify it in the first place." *United States v Colbert*, 76 F3d 773 (CA 6, 1996).

> **PRACTICE POINTER:** The police must have some articulable facts from which to believe or infer that additional persons are on the premises to justify a protective sweep, except (generally) in cases involving illegal drug related conduct.

Was the search restricted to the area immediately adjoining the place of arrest?

A protective sweep of a mobile home was reasonable even though the defendant had had exited the home and was not immediately arrested in the home. The police officers did not know how many persons were involved in the situation, and the one person they did see was hostile, evasive, and likely armed. The entry into the home was cursory and no longer than necessary to dispel a reasonable suspicion of danger. *People v Cartwright*, 454 Mich 550; 563 NW2d 208 (1997).

Officers reasonably conducted a protective sweep of the defendant's house, including the basement. Officers knew that the defendant was a gang member, the gang had

threatened the police, other gang members who were wanted for violent crimes were still at large, and several individuals were in the house in the area where the defendant was arrested. The search of the entire house, including the basement, for dangerous persons was reasonable under these circumstances. *People v Gonzalez*, 256 Mich App 212; 663 NW2d 499 (2003).

An officer reasonably entered the defendant's hotel room for a protective search when the defendant had just shot someone in the parking lot and there was reason to believe that the defendant presented a danger to officers and others in the hotel. The intrusion of the officer's brief entry into the hotel room was outweighed by the governmental interest in ensuring that officers and others were not at risk. *People v Snider*, 239 Mich App 393; 608 NW2d 502 (2000).

A protective sweep of the defendant's residence was unreasonable because the arrest did not occur inside the residence and the area searched did not immediately adjoin the place of the arrest. An officer grabbed the defendant at the threshold of residence and pulled him outside and then arrested him outside. The officers then swept not only the room immediately adjoining the doorway, but also the kitchen and the upstairs bedroom of the residence. *United States v Archibald*, 589 F3d 289 (CA 6, 2009).

Was the sweep justified by some circumstance other than arrest?

The protective sweep exception applied to officers who were left behind to secure the premises while other officers left to obtain a search warrant. The officers saw evidence that the defendant was dealing marijuana, the defendant was also suspected of gun dealing and violent crime, he acted nervously, and sounds in the apartment led the officers to reasonably believe that others were present. *United States v Taylor*, 248 F3d 506 (CA 6, 2001).

Did the police reasonably believe that a suspect was dangerous and might gain control of a weapon during an investigative vehicle stop?

Officers acted reasonably when they searched the interior of the defendant's car for weapons after they saw a large knife in the interior, which the defendant was about to reenter. It was reasonable to take preventive measures to ensure that there were no other weapons within the defendant's grasp before allowing him to reenter the vehicle, and the officers restricted their search to those areas of the interior to which the defendant would generally have immediate control. The search of a leather bag (where marijuana was found) was justified because the bag could have concealed a weapon. *Michigan v Long*, 463 US 1032; 103 S Ct 3469; 77 L Ed 2d 1201 (1983).

An officer acted reasonably when he made a protective sweep of the passenger compartment of the defendant's vehicle for weapons because the officer knew that the vehicle had reportedly been involved in an earlier felonious assault, the defendant was likely the brother of one of the persons arrested for the earlier assault, the defendant was acting aggressively and belligerently, and the officer saw what appeared to be a weapon in plain view inside the passenger compartment. *People v Gewarges*, 176 Mich App 65; 439 NW2d 272 (1989).

WAS THE SEARCH REASONABLE?

CHAPTER 16: WARRANT EXCEPTIONS – SPECIAL NEEDS

Snapshot: The special needs exception justifies a **lowered standard for the reasonableness** for searches under the Fourth Amendment when substantial government needs make the **warrant or probable cause** requirements **impracticable**. For a search or a policy for searches to come within the special needs exception, the primary **purpose must be distinguishable** from the need for **crime control**. Examples of areas where the special needs exception applies include pervasively regulated industries, schools, and correctional systems.

> **PRACTICE POINTER:** If a search is justified by a purported special need, analyze whether the "special need" is actually a general interest in detecting criminal activity. If so, the search is not justified by the special needs exception because there is nothing special about detecting criminal activity.

The special needs exception to the Fourth Amendment's warrant requirement for a reasonable search applies when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *Griffin v Wisconsin*, 483 US 868; 107 S Ct 3164; 97 L Ed 2d 709 (1987).

Special needs generally involve situations where individual scrutiny is difficult or impossible to maintain. *Chandler v Miller*, 520 US 305; 117 S Ct 1295; 137 L Ed 2d 513 (1997).

A proffered special need must be substantial—important enough to override the individual's acknowledged privacy interest and sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion. *Chandler v Miller*, 520 US 305; 117 S Ct 1295; 137 L Ed 2d 513 (1997).

For a search to be justified under the special needs exception, its primary purpose must be distinguishable from the general interest in crime control or the conduct of a criminal investigation. *City of Los Angeles, Calif v Patel*, ___ US ___; 135 S Ct 2443; 192 L Ed 2d 435 (2015).

- Applications of the special needs exception examined in this manual are: Administrative Search, Chapter 17; Checkpoints, Chapter 18; Probation, Parole, and Incarceration, Chapter 19; and Schools, Chapter 20. This chapter examines cases considering other applications of the exception.

An ordinance allowing police officers to require underage persons to submit to a preliminary breath test (PBT) without a warrant did not fall within the special needs exception. There is nothing "special" about the need of law enforcement to detect evidence of ordinary criminal wrongdoing. A PBT is a search under the Fourth Amendment, so a warrant authorized by a neutral and detached magistrate is required conduct a PBT. The ordinance permitting warrantless PBT searches was unconstitutional on its face. *People v Chowdhury*, 285 Mich App 509; 775 NW2d 845 (2009).

The purpose of a state hospital's urine tests of pregnant patients in order to obtain evidence of cocaine use that was then reported to the police pursuant to hospital policy developed and enforced in conjunction with police was indistinguishable from a general interest in crime control, so the tests were not justified by the special needs exception. The suspicionless, warrantless searches were unreasonable under the Fourth Amendment. *Ferguson v City of Charleston*, 532 US 67; 121 S Ct 1281; 149 L Ed 2d 205 (2001).

A state statute requiring candidates for state office to submit to drug tests did not fall within the special needs exception. The statute was not enacted in response to any fear of drug use by state officials or to prevent any danger a state official might pose to the public without the statute. Special needs generally involve situations where individual scrutiny is difficult or impossible to maintain; state officials are subject to continuous and extensive scrutiny. The statute, ultimately, was symbolic, not "special" as that term applies to Fourth Amendment case law. *Chandler v Miller*, 520 US 305; 117 S Ct 1295; 137 L Ed 2d 513 (1997).

WAS THE SEARCH REASONABLE?

CHAPTER 17: WARRANT EXCEPTIONS – SPECIAL NEEDS – ADMINISTRATIVE SEARCH

Snapshot: The **administrative search** exception justifies a **lowered standard for the reasonableness** of **searches** related to **closely regulated industries** where the special needs of regulating the industry make the warrant or probable cause requirements impracticable and a prohibition on regular and flexible inspection would pose a **clear and significant risk to the public welfare**. Whether the exception applies and how it applies is determined by the pervasiveness of regulation and the **effect of the regulation on an owner's expectation of privacy**. In certain circumstances, such as building code violations, reasonableness requires an opportunity to obtain **pre-compliance review**.

PRACTICE POINTER: Lower courts, including the Michigan Supreme Court, have been liberal in designating industries as closely or pervasively regulated. But the United States Supreme Court has been stingy with the designation and purposefully so. All industries are subject to regulation. An argument may be made that an industry is merely, not pervasively, regulated under the standards announced by the Supreme Court. In challenging an administrative search, one should analyze whether there would be a significant risk to the public welfare without the use of warrantless searches.

Generally

The administrative search exception is a sub-category of the special needs exception to the Fourth Amendment's warrant requirement. See *City of Los Angeles, Calif v Patel*, ___ US ___; 135 S Ct 2443; 192 L Ed 2d 435 (2015).

The Fourth Amendment's prohibition of unreasonable searches and seizures applies to administrative inspections of private commercial property, but an exception from

the search warrant requirement exists for administrative inspections of closely regulated industries. Whether the exception applies (and how it applies) is determined by the pervasiveness and regularity of the regulation and the effect it has on an owner's expectation of privacy. *People v Beydoun*, 283 Mich App 314; 770 NW2d 54 (2009).

Michigan adopted the "pervasively regulated industry" exception to the warrant requirement in *Tallman v Dept of Nat Res*, 421 Mich 585; 365 NW2d 724 (1984), where the Court stated that the factors to be balanced in determining whether the exception applies include:

(1) the existence of express statutory authorization for search or seizure;
(2) the importance of the governmental interest at stake;
(3) the pervasiveness and longevity of industry regulation;
(4) the inclusion of reasonable limitations on searches in statutes and regulations;
(5) the government's need for flexibility in the time, scope and frequency of inspections in order to achieve reasonable levels of compliance;
(6) the degree of intrusion occasioned by a particular regulatory search; and
(7) the degree to which a businessperson may be said to have impliedly consented to warrantless searches as a condition of doing business so that the search does not infringe upon reasonable expectations of privacy.

The seven-factor balancing test is designed to be a rational approach to address the "meaningful distinction between regulatory or administrative searches and those conducted for the purpose of discovering the fruits or instrumentalities of crime." *Tallman v Dept of Nat Res*, 421 Mich 585; 365 NW2d 724 (1984).

Closely regulated industries

The designation of an industry as closely (or pervasively) regulated for purposes of administrative searches is the exception, not the rule. In over 45 years since the exception was created, the United States Supreme Court has designated only four industries as closely regulated for purposes of application of the exception: liquor sales, firearms dealing, mining, and running an automobile junkyard. Each of these industries, without regular and flexible inspection, poses a clear and significant risk to the public welfare. *City of Los Angeles, Calif v Patel*, ___ US ___; 135 S Ct 2443; 192 L Ed 2d 435 (2015).

Michigan's commercial fishing industry is pervasively regulated and subject to the administrative search exception. *Tallman v Dept of Nat Res*, 421 Mich 585; 365 NW2d 724 (1984).

The massage parlor industry is a pervasively regulated business, so an ordinance authorizing warrantless inspections of massage parlors was valid under the administrative search exception. Even though the ordinance may have provided for criminal prosecution for refusing to permit inspections, and it did not expressly require that inspections be conducted in reasonable manner or at a reasonable time, a provision of the ordinance stating that inspections could only be conducted "for the purposes of determining that the provisions of this article are fully complied with" required that the inspections were to be done reasonably. *Gora v City of Ferndale*, 456 Mich 704; 576 NW2d 141 (1998).

Tobacco sales is a pervasively regulated industry under Michigan's Tobacco Products Tax Act. A warrantless search of the defendant's business fell within the administrative search exception. The search was not particularly intrusive; the entire process of reviewing the defendant's business records and seizing 300 cartons of cigarettes took less than three hours, and the defendant was able to operate his business throughout the process. *People v Beydoun*, 283 Mich App 314; 770 NW2d 54 (2009).

Precious metals dealing is a "closely regulated industry." *Liberty Coins, LLC v Goodman*, 880 F3d 274 (CA 6, 2018).

Gun dealing is a pervasively regulated industry. When a dealer chooses to engage in it, and to accept a federal license, the dealer does so with the knowledge that the dealer's business records, firearms, and ammunition will be subject to effective inspection. The warrantless inspection of a gun dealer's storage area pursuant to a federal statute providing such inspections did not violate the Fourth Amendment. *United States v Biswell*, 406 US 311; 92 S Ct 1593; 32 L Ed 2d 87 (1972).

The automobile salvage business is a pervasively regulated industry for purposes of the administrative search exception, and the premises of an auto salvage business was lawfully searched without a warrant because, among other reasons, a statute provided for inspection of such businesses, the Legislature viewed the government interest as important (indicated by the fact that the inspection statutes for the industry had been on the record for over 60 years and were extensively detailed), and the search was not particularly intrusive. The fact that the defendant was not a licensed dealer did not shield him from warrantless inspection because the statute referred to all dealers, not licensed dealers. *People v Barnes*, 146 Mich App 37; 379 NW2d 464 (1985).

Federal Railroad Administration (FRA) regulations that required blood and urine tests of rail employees who were involved in rail accidents came within the special needs exception. The tests, especially urinalysis, raised evident privacy concerns, but these concerns were offset by the fact that the regulations reduced the intrusiveness of the collection process, and the rail employees had a reduced

expectation of privacy due to their participation in an industry that is pervasively regulated to ensure safety. The privacy concerns were outweighed by surpassing safety interests, and, for various practical reasons, testing without a showing of individualized suspicion was essential to serve the vital safety interest. *Skinner v R Labor Executives' Ass'n*, 489 US 602; 109 S Ct 1402; 103 L Ed 2d 639 (1989).

Pre-compliance review required

Hotel management is not a closely regulated industry for purposes of the administrative search exception. Accordingly, an ordinance that required hoteliers to present their registers immediately upon request at risk of criminal charges for the failure to comply was unconstitutional without an opportunity to obtain pre-compliance review before a neutral decisionmaker. *City of Los Angeles, Calif v Patel*, ___ US ___; 135 S Ct 2443; 192 L Ed 2d 435 (2015).

A city ordinance that provided for administrative searches to assure compliance with building codes designed to prevent buildings from becoming dangerous to tenants or neighbors was constitutional because it provided for adequate pre-compliance review before a neutral decisionmaker with procedural fairness guarantees for the exception to the warrant requirement for administrative searches to apply. *Benjamin v Stemple*, 915 F3d 1066 (CA 6, 2019).

A process of building inspectors following officers with search warrants into homes that had been raided, finding building violations, and then red-tagging the homes (which resulted in immediate eviction) in the absence of any emergency presented a potential violation of the petitioner's Fourth Amendment rights because a warrantless inspection for compliance with building codes requires an opportunity for a pre-compliance review. *Gardner v Evans*, 920 F3d 1038 (CA 6, 2019).

WAS THE SEARCH REASONABLE?

CHAPTER 18: WARRANT EXCEPTIONS – SPECIAL NEEDS – CHECKPOINTS

Snapshot: Consistent with general special-needs exception principles, a **checkpoint** that has the primary purpose of **detecting criminal conduct** without particularized suspicion **violates the Fourth Amendment**. A checkpoint has a purpose **unrelated to criminal investigation** of the persons stopped comes within the special needs exception and **does not** violate the Fourth Amendment.

A checkpoint with the primary purpose of detecting evidence of ordinary criminal wrongdoing violates the protection against unreasonable search and seizure. A city's checkpoints were admittedly for the primary purpose of drug interdiction. The stops at the checkpoints were not supported by individualized suspicion of criminal activity. All vehicles were stopped at the checkpoints where police officers demanded driver's licenses and registrations, peered into windows, and led drug-sniffing dogs around the vehicle. The purpose was indistinguishable from the city's general interest in crime control. The checkpoints were not justified by the city's severe drug problem or by the secondary purpose of highway safety. *City of Indianapolis v Edmond*, 531 US 32; 121 S Ct 447; 148 L Ed 2d 333 (2000).

A sobriety checkpoint scheme that authorizes the random stop of motor vehicles in the absence of particularized suspicion of wrongdoing violates the Michigan constitutional protections against unreasonable search or seizure, Const 1963, art 1, § 11. The United States Supreme Court ruled that sobriety checkpoints did not violate the Fourth Amendment. *Michigan Dept of State Police v Sitz*, 496 US 444 (1990). But the Michigan Constitution provides greater protection than the Fourth Amendment in the context vehicle seizures. *Sitz v Dept of State Police*, 443 Mich 744; 506 NW2d 209 (1993).

Checkpoint on a highway to hand out flyers as part of an investigation of a hit-and-run that had taken place on the highway a week before was not presumptively invalid. The primary purpose of the checkpoint was to ask occupants for help in investigating a crime committed by others, not to determine whether the vehicle occupants were committing a crime. The stops were brief, the public concern was

great, and the stop advanced that concern to a significant degree. The minimal interference with liberty did not rise to a Fourth Amendment violation. *Illinois v Lidster*, 540 US 419; 124 S Ct 885; 157 L Ed 2d 843 (2004).

WAS THE SEARCH REASONABLE?

CHAPTER 19: WARRANT EXCEPTIONS – SPECIAL NEEDS – PROBATION/PAROLE/PRISON

Snapshot: A search related to a probationer, parolee, or prisoner may be subject to **lower standards of reasonableness** under the **special needs exception** (or simply due to a reduced expectation of privacy or waiver). Probation, parole, and incarceration are distinct points along a "continuum of possible punishments." **Probationers** have a **diminished expectation** of privacy; the expectation is even **lower for parolees**, and **lower** almost to the vanishing point for **incarcerated individuals**. The particular **conditions of an individual's probation or parole** are a critical factor in assessing whether a search was reasonable under the totality of the circumstances.

PRACTICE POINTER: Searches of probationers and parolees without a warrant or probable cause are often justified based on a person's status as a probationer or parolee. But that status alone is generally not enough to justify a search (especially in the case of probationers). Review the particular conditions of probation or parole in a particular case to determine if a probationer or parolee is subject to or has agreed to a lowered standard for searches and, if so, for what and under what circumstances. For instance, a condition requiring warrantless searches to determine residency requirement compliance may not support a search for evidence of activity unrelated to residency. For parolees, see also Mich Admin Code, R 791.7735 (stating conditions for warrantless searches of parolees).

KEY QUESTIONS:

- Was the proffered justification for the search a probationer's or parolee's status alone?
- Was the search permitted by a condition of probation or parole?
  - Did the probation or parole condition reasonably include the search actually conducted?
- Was the search permitted by statute or regulation?
  - Did the statute or regulation permit warrantless searches without reasonable suspicion?
  - If so, did the officer conducting the search nonetheless have reasonable suspicion?

Generally

Supervision of probationers, parolees, and prisoners presents "special needs" that justify departures from the usual warrant probable cause requirements of the Fourth Amendment. *Griffin v Wisconsin*, 483 US 868; 107 S Ct 3164; 97 L Ed 2d 709 (1987).

- The lowered standard for a search based on a defendant's status as a probationer or parolee has been justified by the special needs exception or simply by the diminished expectation of privacy due to the status of the probationer or parolee or simply as a waiver of constitutional right contained in the conditions of probation or parole. See *United States v Ickes*, 922 F3d 708 (CA 6, 2019); *People v Hellenthal*, 186 Mich App 484; 465 NW2d 329 (1990).

Probationers and parolees do not enjoy the same "absolute liberty" as every citizen; they possess only "conditional liberty" that is dependent on the observance of special probation or parole restrictions. *Griffin v Wisconsin*, 483 US 868; 107 S Ct 3164; 97 L Ed 2d 709 (1987).

A probationer's (or a parolee's) home is protected by the Fourth Amendment's reasonableness requirement. But, under certain exceptions (such as the special needs exception), a search may be reasonable even though it is conducted without a warrant or probable cause. *Griffin v Wisconsin*, 483 US 868; 107 S Ct 3164; 97 L Ed 2d 709 (1987).

Probation, parole, and incarceration are points on a continuum of possible punishments for criminal offenses, and the expectation of privacy diminishes as the continuum moves toward less liberty. *Griffin v Wisconsin*, 483 US 868; 107 S Ct 3164; 97 L Ed 2d 709 (1987).

Parolees have fewer privacy expectations than probationers because parole is more akin to imprisonment than probation. *Samson v California*, 547 US 843; 126 S Ct 2193; 165 L Ed 2d 250 (2006).

Probationers

The warrantless search of a probationer's apartment that was supported by reasonable suspicion and a probation condition was reasonable under the Fourth Amendment. A probation condition is a "salient circumstance" in considering the totality of the circumstances surrounding a search. The probationer signed a probation order that included a condition requiring him to submit his person, property, residence, vehicle, and personal effects to a search at any time without a search warrant or probable cause. Just like other punishments for criminal convictions that curtail an offender's freedoms, a court granting probation may impose reasonable conditions (such as the conditions in this case) that deprive the offender of some of the freedoms enjoyed by law-abiding citizens. Although the probation conditions did not even require reasonable suspicion for a search, it was critical to the finding of reasonableness that the searching officer did have reasonable suspicion of criminal activity. *United States v Knights*, 534 US 112; 122 S Ct 587; 151 L Ed 2d 497 (2001).

The warrantless search of a probationer's home was reasonable under a state regulation that permitted a search of a probationer's home on reasonable suspicion that contraband (including any item a probationer could not possess as a condition of probation) was present. The special needs of operating a probation system justified replacement of the probable cause requirement of the Fourth Amendment and made search on reasonable suspicion reasonable under the Amendment. A warrant requirement would appreciably interfere with the goals and purposes of the probation system including public safety and deterrence of violating probation conditions. *Griffin v Wisconsin*, 483 US 868; 107 S Ct 3164; 97 L Ed 2d 709 (1987).

The search of a probationer's residence and vehicle based on reasonable suspicion was reasonable under the Fourth Amendment because of the probationer's diminished privacy interests and the government's comparatively substantial interest in monitoring his movements. *United States v Ickes*, 922 F3d 708, 712 (CA 6, 2019).

A state probationary search policy that required reasonable suspicion of a probation violation for a search was reasonable under the Fourth Amendment. But the officer who executed the search lacked reasonable suspicion to believe that the defendant had violated his probation by not living at his reported residence based on the facts that the defendant was not home when the officer visited him three times (he may have been home but not answering the door) and the defendant was unemployed and should have been home during the day (he may have been looking for work).

Even if the defendant consented to the search provision, it would be unreasonable to conclude that the scope of that consent included the search of every area, item, and document in his residence to determine signs of residency. *United States v Henry*, 429 F3d 603 (CA 6, 2005).

A probation order condition requiring a probationer to submit to warrantless searches is a valid waiver of a known constitutional protection against unreasonable searches and is proper if it is reasonably tailored to the goals and purposes of probation. *People v Hellenthal*, 186 Mich App 484; 465 NW2d 329 (1990).

The warrantless search of an apartment area where a probationer had a reasonable expectation of privacy was not justified by the special needs of probation because the probationer's conditions of probation were not contained in the record, so there was insufficient evidence for the court to conclude that the searching officers had reasonable suspicion that a probationer *subject to a search condition* was engaged in criminal activity. A provision in an unsigned probation/parole orientation guide stating that officers might make unannounced home visits during certain hours to ensure compliance with conditions did not include any language indicating that the probationer would submit to a search of his property without a warrant or probable cause. And the unsigned guide's provision that supervision would be intensified if drug use was suspected did not apply because there was no evidence that the probationer used drugs. *People v Mahdi*, 317 Mich App 446; 894 NW2d 732 (2016).

An officer violated the Fourth Amendment by remaining within the curtilage of a probationer's home for 90 minutes. The officer went to the probationer's home to administer a portable alcohol blood test and believed that the probationer was home but not answering the door. The officer, without a warrant, walked around the home five to ten times, within arm's length of the home, knocking on and peering into windows. *Brennan v Dawson*, 752 Fed Appx 276 (CA 6, 2018).

Parolees

The suspicionless search of a parolee conducted pursuant to a state statute that required all parolees to agree to be subject to a search or seizure at any time did not violate the Fourth Amendment. Parolees have fewer privacy expectations than probationers because parole is more akin to imprisonment than probation. An inmate serving out his sentence outside the custody of a department of corrections must comply with the terms and conditions of parole, which severely diminishes a parolee's privacy expectations by status alone. The state's interests in preventing parolees from committing future crimes (which they are more likely to do), reducing recidivism, and promoting positive citizenship among parolees justifies privacy intrusions that would not otherwise be tolerated under the Fourth Amendment. Requiring individualized suspicion would undermine the state's ability to effectively

supervise parolees. *Samson v California*, 547 US 843; 126 S Ct 2193; 165 L Ed 2d 250 (2006).

A Michigan parolee did not have a diminished expectation of privacy in his apartment because his parole agreement did not allow the police greater authority to search him or his residence; rather, it only allowed government agents to search him or his residence for a greater number of things. The parolee could not reasonably expect that the police could lawfully search him without a warrant or probable cause for any reason, and the state regulations governing parole supervision likewise would not support such an expectation because they only address warrantless searches for parole violations (which was not the purpose of the search here). Accordingly, the warrantless search violated the parolee's Fourth Amendment rights. *United States v Carnes*, 309 F3d 950 (CA 6, 2002).

A parole officer did not have reasonable suspicion to search a parolee's truck based on the parolee's criminal history alone. *United States v Payne*, 181 F3d 781 (CA 6, 1999).

Application of the exclusionary rule to parolees

The exclusionary rule does not apply to evidence introduced at a parole revocation hearing. The rule is not constitutionally mandated and applies only where its deterrence benefits outweigh its societal costs. The social costs of excluding reliable, probative evidence in parole revocation proceedings are particularly high because parolees are more likely to commit future crimes than the general population. And applying the exclusionary rule would add prolonged litigation to the otherwise flexible proceedings. Applying the rule in parole proceedings would have little deterrent effect on officers. The remote possibility that the subject of an officer's search is a parolee and that the evidence may be admitted at a parole revocation proceeding "surely has little, if any, effect on the officer's incentives." *Pennsylvania Bd of Prob & Parole v Scott*, 524 US 357; 118 S Ct 2014; 141 L Ed 2d 344 (1998).

Evidence obtained in violation of the Fourth Amendment introduced at a criminal trial against a defendant/parolee was subject to the exclusionary rule. A parole officer violated the defendant's Fourth Amendment rights by conducting a search without reasonable suspicion, so exclusion would deter similar future conduct by parole officers. *United States v Payne*, 181 F3d 781 (CA 6, 1999).

Prisoners

A prisoner has no reasonable expectation of privacy in the prisoner's cell under the Fourth Amendment. Any subjective expectation of privacy a prisoner might have is not one that society is willing to recognize as legitimate. The recognition of privacy rights for prisoners cannot be reconciled with the fact of incarceration and the needs

and objectives of the penal system. The Fourth Amendment protection against unreasonable searches does not fit within the confines of a prison cell. *Hudson v Palmer*, 468 US 517; 104 S Ct 3194; 82 L Ed 2d 393 (1984).

Unannounced "shakedowns" of pretrial detainees' living areas where officers required the prisoners to leave the living area while the living area was searched (including drawers, beds, and possessions) did not violate the Fourth Amendment. The constitutional principles that apply to convicted prisoners apply equally to pretrial detainees. *Bell v Wolfish*, 441 US 520; 99 S Ct 1861; 60 L Ed 2d 447 (1979).

Mail

A jail prisoner did not have a reasonable expectation of privacy in a letter to another prisoner entrusted to jail personnel for delivery. The legitimate governmental interest in institutional security and internal order and discipline makes it not only reasonable but also necessary that jail authorities have general right to open and read a prisoner's mail. The general right to scrutinize and seize mail does not extend, however, to a prisoner's personal papers, attorney-client correspondence, or personal diaries unless there is a clear showing that the papers seized contain information concerning an "imminent danger to inmate safety or prison security." *People v Williams*, 118 Mich App 117; 325 NW2d 4 (1982).

WAS THE SEARCH REASONABLE?

CHAPTER 20: WARRANT EXCEPTIONS – SPECIAL NEEDS – SCHOOLS

Snapshot: The special needs exception justifies a **lowered standard for the reasonableness** for **searches of students** at and during school. A **warrant is not required** to search a student or a student's possessions at school; rather, a school official may search a student if there are **reasonable grounds to suspect** that the search will reveal evidence of a **violation of the law or school rules**. **Random and suspicionless searches** at schools or school related events are reasonable under certain circumstances.

Generally

A lowered standard of reasonableness under the Fourth Amendment for a search of a student at school is justified by the special needs of operating a school or school system beyond the normal needs of law enforcement. *Bd of Ed of Indep Sch Dist No 92 of Pottawatomie Co v Earls*, 536 US 822; 122 S Ct 2559; 153 L Ed 2d 735 (2002).

School administrators may search a student "if the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *Safford Unified Sch Dist No 1 v Redding*, 557 US 364; 129 S Ct 2633; 174 L Ed 2d 354 (2009).

School officials do not need to obtain a warrant before searching a student or the possessions of a student who is under their authority. Students at school have a legitimate expectation of privacy, but that expectation must be balanced against a school's legitimate need to maintain an appropriate learning environment. The legitimate interest of a school justifies lowering the standards for the reasonableness of a search under the Fourth Amendment. The legality of a search at school depends on reasonableness under all the circumstances. The search of a student by a teacher or school official is "justified at its inception" if there are reasonable grounds to suspect that the search will reveal evidence that the student

has violated or is violating the law or school rules. *New Jersey v TLO*, 469 US 325; 105 S Ct 733; 83 L Ed 2d 720 (1985).

The initial search of a student's purse for cigarettes was reasonable because there were reports that the student had been seen smoking (contrary to school rules), and cigarettes in her purse would be evidence of a school rule violation. The further search of the student for marijuana was reasonable because the school official conducting the first search discovered rolling papers (often used with marijuana) in the purse. *New Jersey v TLO*, 469 US 325; 105 S Ct 733; 83 L Ed 2d 720 (1985).

A school administrator had reasonable suspicion to search the defendant's vehicle on school grounds based on an anonymous tip that the student-defendant was selling drugs at the school. The tip was detailed, internally consistent, and corroborated by the informant's description of the vehicle that was owned by the defendant. *People v Perreault*, 486 Mich 914; 781 NW2d 796 (2010) (adopting the reasoning of the Court of Appeals dissenting opinion).

A school administrator's strip-search of a student exceeded the permissible scope of a school search, even though the administrator had reasonable suspicion that the student was distributing drugs at the school. The administrator knew that the nature of drugs was of limited threat, the administrator had no reason to suspect that large amounts of drugs were being passed around, and nothing suggested that the student was hiding drugs in her underwear. *Safford Unified Sch Dist No 1 v Redding*, 557 US 364; 129 S Ct 2633; 174 L Ed 2d 354 (2009).

Random/suspicionless searches

A school district policy requiring all students who participated in competitive extracurricular activities to submit to random drug testing while participating in the activity and to agree to be tested at any time on reasonable suspicion did not violate the Fourth Amendment because it was a reasonable means of furthering the school district's important interest in preventing and deterring drug use among its students. The students affected by the policy had a limited expectation of privacy (as a result of their voluntary participation in competitive extracurricular activities), the method of urine sample collection limited the degree of intrusion, and a limitation on participation in extracurricular activities was the only consequence of a failed test. *Bd of Ed of Indep Sch Dist No 92 of Pottawatomie Co v Earls*, 536 US 822; 122 S Ct 2559; 153 L Ed 2d 735 (2002).

A school district's policy requiring random, suspicionless urinalysis testing of all students involved in interscholastic athletic programs was reasonable under the Fourth Amendment due to the special and immediate need to deter student-athletes from using drugs, and the district was not required to use the least intrusive means to address that need. *Vernonia Sch Dist 47J v Acton*, 515 US 646; 115 S Ct 2386; 132 L Ed 2d 564 (1995).

SHOULD EVIDENCE BE EXCLUDED?

CHAPTER 21: EXCLUSIONARY RULE

Snapshot: The exclusionary rule **prohibits the admission** of evidence or testimony obtained as a **direct or indirect result** of an **unlawful search or seizure**. The purpose of the rule is **to deter police misconduct**. The rule is a **"harsh remedy"** for police misconduct and is applied only as a last resort. It applies to constitutional, not statutory, violations. There are **several exceptions** to the exclusionary rule, including inevitable discovery, independent source, attenuation, and good faith.

KEY QUESTIONS

- Do the social costs of exclusion outweigh its deterrence benefit?
- Did the police violate a statute or court rule?
- Was police misconduct flagrant, deliberate, or reckless?
- Was the violation due to the conduct of an official other than a police officer?
- Was evidence obtained as an indirect result of police misconduct (fruit of the poisonous tree)?

Generally

Evidence obtained as a result of an unreasonable search is inadmissible in a criminal proceeding. *Mapp v Ohio*, 367 US 643; 81 S Ct 1684; 6 L Ed 2d 1081 (1961); *People v Cartwright*, 454 Mich 550; 563 NW2d 208 (1997).

The exclusionary rule's purpose is "to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Herring v United States*, 555 US 135; 129 S Ct 695; 172 L Ed 2d 496 (2009).

The exclusionary rule's purpose is to deter police rather than judicial misconduct. *Herring v United States*, 555 US 135; 129 S Ct 695; 172 L Ed 2d 496 (2009).

The extent to which the exclusionary rule is justified by its deterrent effect varies with the degree of law enforcement culpability. *Herring v United States*, 555 US 135; 129 S Ct 695, 697; 172 L Ed 2d 496 (2009).

The exclusionary rule applies only when its deterrence benefits outweigh its substantial social costs. *Hudson v Michigan*, 547 US 586; 126 S Ct 2159; 165 L Ed 2d 56 (2006).

Suppression of evidence due to Fourth Amendment violations is the court's last resort, not its first impulse. *Utah v Strieff*, 579 US ___; 136 S Ct 2056; 195 L Ed 2d 400 (2016).

The exclusionary rule is a "harsh remedy" designed to sanction and deter police misconduct where it has resulted in a violation of constitutional rights and should be used only as a last resort. *People v Frazier*, 478 Mich 231; 733 NW2d 713 (2007).

The exclusionary rule is not a personal constitutional right of the aggrieved party. Rather, it is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect." *United States v Leon*, 468 US 897; 104 S Ct 3405; 82 L Ed 2d 677 (1984).

The exclusionary rule is (generally) applied on a case-by-case basis. *People v Goldston*, 470 Mich 523; 682 NW2d 479 (2004).

Do the social costs of exclusion outweigh its deterrence benefit?

A grave social cost that always accrues when the exclusionary rule is applied is the risk that a dangerous criminal will be released because otherwise relevant and probative evidence was excluded. *Hudson v Michigan*, 547 US 586; 126 S Ct 2159; 165 L Ed 2d 56 (2006).

The heavy social cost of excluding otherwise admissible and highly probative evidence outweighed any minimal deterrence benefit that would result from excluding evidence that was obtained by the negligent failure to update a police database. *Herring v United States*, 555 US 135; 129 S Ct 695; 172 L Ed 2d 496 (2009).

The social costs of applying the exclusionary rule to knock and announce violations are considerable and outweigh any deterrent effect of the rule's application. In addition to the grave adverse consequences of excluding relevant evidence (risking the release of dangerous criminals), applying the exclusionary rule as a remedy for knock and announce violations would generate a constant flood of alleged failures to observe the rule and would cause police officers to refrain from timely entry after knocking and announcing, producing preventable violence against the officers in some cases, and the destruction of evidence in others. The deterrence benefits would not be considerable because ignoring knock and announce principles only prevents the destruction of evidence or avoids life-threatening resistance that are both dangers that suspend the requirement when there is reasonable suspicion that they exist. Further, many forms of police misconduct are deterred by civil-rights suits and the prospect of internal police discipline. *Hudson v Michigan*, 547 US 586; 126 S Ct 2159; 165 L Ed 2d 56 (2006).

> **PRACTICE POINTER:** It is a bright-line rule that the exclusionary rule does not apply to knock and announce violations, whether the violations are based on federal knock and announce principles or on Michigan's knock and announce statute. See *People v Stevens (After Remand)*, 460 Mich 626; 597 NW2d 53 (1999) (below, this chapter).

The social costs of excluding reliable, probative evidence in parole revocation proceedings are particularly high because parolees are more likely to commit future crimes than the general population. And applying the exclusionary rule would add prolonged litigation to the otherwise flexible proceedings. Applying the rule in parole proceedings would have little deterrent effect on officers. The remote possibility that the subject of an officer's search is a parolee and that the evidence may be admitted at a parole revocation proceeding "surely has little, if any, effect on the officer's incentives." *Pennsylvania Bd of Prob & Parole v Scott*, 524 US 357; 118 S Ct 2014; 141 L Ed 2d 344 (1998).

The deterrent value of applying the exclusionary rule was small because there was no causative link between the (alleged) misconduct and the evidentiary discovery. An officer seized evidence before the defendant consented to the search of his plane, but the seized evidence did not lead the officer to seek consent to search the plane. *United States v Clariot*, 655 F3d 550 (CA 6, 2011).

The social costs of excluding the testimony of willing witnesses outweigh any deterrent benefit. The police identified street sweepers (who picked the defendant up after a murder) through the defendant's unconstitutionally obtained confession. The street sweepers testified willingly; when witnesses testify willingly, it creates a greater likelihood that they would have been discovered by legal means and a smaller incentive to conduct an illegal search to discover them. The interest protected by the constitutional guarantee that was violated would not be served by

suppression of the evidence obtained. *People v Frazier*, 478 Mich 231; 733 NW2d 713 (2007).

> **PRACTICE POINTER:** It is nearly a bright-line rule that the testimony of a willing witness will not be subject to the exclusionary rule regardless of the nature of any misconduct that brought the witness to light.

The social costs outweighed any deterrent benefit that would result from excluding evidence discovered by officers whose entry into a residence was not justified by the community caretaker exception but who entered in a good faith effort to check on the welfare of a resident. The officers did not engage in any deliberate, reckless, or grossly negligent disregard of Fourth Amendment rights. And excluding the evidence would deter officers with some indicia of need from making good faith efforts to check on the welfare of a person after a concerned neighbor contacted police. This is not the kind of conduct the exclusionary rule was adopted to deter. Applying the rule in these circumstances would deprive citizens of helpful and beneficial police action, not deter police misconduct. *People v Hill*, 299 Mich App 402; 829 NW2d 908 (2013).

Was police misconduct flagrant, deliberate, or reckless?

The exclusionary rule's purpose is "to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Herring v United States*, 555 US 135; 129 S Ct 695; 172 L Ed 2d 496 (2009).

The extent to which the exclusionary rule is justified by its deterrent effect varies with the degree of law enforcement culpability. *Herring v United States*, 555 US 135; 129 S Ct 695, 697; 172 L Ed 2d 496 (2009).

Evidence of systemic or recurrent police misconduct favors exclusion of the evidence. *People v Maggit*, 319 Mich App 675; 903 NW2d 868 (2017).

When police conduct involves only simple, isolated negligence, the deterrence rationale for the exclusionary rule loses much of its force. *United States v Moorehead*, 912 F3d 963 (CA 6, 2019).

A recordkeeping error in a police database was not the result of significantly culpable misconduct as to merit application of the exclusionary rule. The error led to the unlawful arrest of the defendant, which in turn resulted in evidence discovered incident to arrest. The failure to update the database was negligent and not the result of systematic error or reckless disregard of constitutional rights. *Herring v United States*, 555 US 135; 129 S Ct 695; 172 L Ed 2d 496 (2009).

An officer's false statement in an affidavit for a search warrant triggers application of the exclusionary rule if the statement is made knowingly, intentionally, or with a reckless disregard for the truth and if the statement was necessary to the finding of probable cause. *Franks v Delaware*, 438 US 154; 98 S Ct 2674; 57 L Ed 2d 667 (1978).

Officers flagrantly abused Fourth Amendment protections when they forced open the door to the defendant's home, kept her lawyer from entering, displayed a false warrant, handcuffed the defendant, and searched the home for obscenity. The exclusionary rule applied to evidence discovered during the unlawful search of the defendant's home. *Mapp v Ohio*, 367 US 643; 81 S Ct 1684; 6 L Ed 2d 1081 (1961).

Active exploitation of an initial, unlawful stop to obtain evidence triggers the exclusionary rule. *People v LoCicero*, 453 Mich 496; 556 NW2d 498 (1996).

An officer's reliance on a no-trespassing letter to detain the defendant was not reasonable, and the police department's routine practice of relying on such letters suggested systemic or recurrent police misconduct. The systemic or recurrent misconduct "present[ed] a case for deterrence." *People v Maggit*, 319 Mich App 675; 903 NW2d 868 (2017).

Was the violation due to the conduct of an official other than a police officer?

Clerical errors by court employees are categorically excepted from the exclusionary rule. The defendant was arrested based on a warrant that had been quashed 17 days before, but the warrant showed as active on a database due to an error by a court clerk. Applying the exclusionary rule to errors by court clerks would not deter police misconduct. *Arizona v Evans*, 514 US 1; 115 S Ct 1185; 131 L Ed 2d 34 (1995).

The exclusionary rule did not apply because the error was made a judge, not a police officer. Suppressing the evidence obtained pursuant to the invalid warrant would not deter police misconduct. *Massachusetts v Sheppard*, 468 US 981; 104 S Ct 3424; 82 L Ed 2d 737 (1984).

The exclusionary rule did not apply to the "technical violation" of a bench-warrant court rule requiring a supporting affidavit because the error was made by the judicial officer who issued the warrant; applying the exclusionary rule would do nothing to deter police misconduct. MCR 3.606(A). *People v Hawkins*, 468 Mich 488; 668 NW2d 602 (2003).

The exclusionary rule did not apply to an error made by the Secretary of State (arguably) violating statutory confidentiality requirements. Excluding evidence

based on the Secretary of State's error would not deter police misconduct. *People v Mazzie*, 326 Mich App 279; 926 NW2d 359 (2018).

Did the police violate a statute or court rule?

The exclusionary rule does not apply to a statutory violation unless the violation is of "constitutional dimensions" or the plain language of the statute indicates a legislative intent that the rule is to be applied to the statute's violation. *People v Earls*, 477 Mich 1119; 730 NW2d 241 (2007).

The exclusionary rule did not apply to a violation of the confidentiality requirements of statutes requiring automobiles to be insured. There was no constitutional violation, and the statute did not prescribe exclusion for its violation. *People v Mazzie*, 326 Mich App 279; 926 NW2d 359 (2018).

The exclusionary rule did not apply to the violation of an investigative subpoena statute (MCL 767A.1 *et seq*.). There was no constitutional violation, and the statute did not prescribe exclusion for its violation. *People v Earls*, 477 Mich 1119; 730 NW2d 241 (2007).

The exclusionary rule did not apply to the "technical violation" of a bench-warrant court rule requiring a supporting affidavit (MCR 3.606(A)). The warrant was invalid under the court rule, but there was no constitutional violation, and the rule did not prescribe exclusion for its violation. *People v Hawkins*, 468 Mich 488; 668 NW2d 602 (2003).

The exclusionary rule did not apply to a violation of a jurisdictional statute (MCL 764.2a) when an officer had probable cause to arrest the defendant but arrested the defendant without a warrant and outside the officer's jurisdiction. The arrest was not a constitutional violation because the officer had probable cause. *People v Hamilton*, 465 Mich 526; 638 NW2d 92 (2002), overruled in part on other grounds by *Bright v Ailshie*, 465 Mich 770 (2002).

The exclusionary rule did not apply to the violation of a statute that required officers executing a warrant to give the defendant a copy of the affidavit (MCL 780.655). The warrant was not invalid, and the statute did not prescribe exclusion for its violation. The requirements of the statute are ministerial in nature and do not lead to the acquisition of evidence because the requirements come into effect only after evidence has been seized pursuant to a valid search warrant. *People v Sobczak-Obetts*, 463 Mich 687; 625 NW2d 764 (2001).

The exclusionary rule does not apply to violations of Michigan's knock and announce statute (MCL 780.656). The statute does not prescribe exclusion for its violation, and knock and announce principles do not control the execution of a valid

search warrant; they only delay entry for a brief period. "The exclusionary rule is not meant to put the prosecution in a worse position than if the police officers' improper conduct had not occurred, but, rather, it is to prevent the prosecutor from being in a better position because of that conduct." *People v Stevens (After Remand)*, 460 Mich 626; 597 NW2d 53 (1999).

- See also *Hudson v Michigan*, 547 US 586; 126 S Ct 2159; 165 L Ed 2d 56 (2006) (the exclusionary rule does not apply to violations of the federal knock and announce rule).

The exclusionary rule did not apply to a violation of a jurisdictional statute (MCL 764.2a) when an undercover officer bought narcotics outside his jurisdiction. The purpose of the jurisdictional statute is to protect the rights and autonomy of local governments, not the rights of criminal defendants. *People v Clark*, 181 Mich App 577; 450 NW2d 75 (1989).

Was evidence obtained as an indirect result of police misconduct (fruit of the poisonous tree)?

Under the fruit of the poisonous tree doctrine, the exclusionary rule applies not only to the primary evidence obtained as a direct result of an unlawful search or seizure, it also applies to evidence that is discovered later and is derivative of the unlawful police conduct. *Wong Sun v United States*, 371 US 471; 83 S Ct 407; 9 L Ed 2d 441 (1963).

The fruit of the poisonous tree doctrine is a subset of the exclusionary rule. See *People v Stevens*, 460 Mich 626; 597 NW2d 53 (1999).

The doctrine applies to evidence and testimony that are the results of an illegal search. *People v Stevens*, 460 Mich 626; 597 NW2d 53 (1999).

Evidence is not fruit of the poisonous tree simply because it would not have come to light but for unlawful police conduct. The key question is whether, given a primary illegality, the evidence was obtained by exploitation of that illegality. *Wong Sun v United States*, 371 US 471; 83 S Ct 407; 9 L Ed 2d 441 (1963).

> **PRACTICE POINTER:** Police officers can exploit an illegality to indirectly obtain evidence by, among other ways, making an investigatory stop for a fishing expedition when they knew they lacked reasonable suspicion (*LoCicero*), by subjecting an invalidly impounded vehicle to an inventory search (*Mersino*), by purposely prolonging an invalid detention (*Bolduc*), or by using unlawfully obtained evidence to gather additional evidence (*Mahdi*).

Evidence discovered in the defendant's car after the defendant was unlawfully arrested was the tainted fruit of the unlawful arrest. The officers actively exploited the initial, unlawful investigatory stop. The evidence was inadmissible under the exclusionary rule. *People v LoCicero*, 453 Mich 496; 556 NW2d 498 (1996).

Evidence discovered in an inventory search that was conducted pursuant to an unlawful arrest was the fruit of the unlawful arrest. The evidence was inadmissible under the exclusionary rule. *People v Mersino*, 419 Mich 899; 352 NW2d 272 (1984).

The defendant's inculpatory statements and evidence found in his home were the fruits of his unlawful detention during a prolonged knock and talk encounter. The statements and evidence were inadmissible under the exclusionary rule. *People v Bolduc*, 688 NW2d 316 (2004).

Text messages on the defendant's cell phone were the fruit of the illegal seizure of the phone. An officer searched the messages and even engaged in several text message conversations on the phone. The text messages were obtained by exploiting the illegal seizure. They were inadmissible under the exclusionary rule. *People v Mahdi*, 317 Mich App 446; 894 NW2d 732 (2016).

Evidence seized from the defendant was the fruit of his unlawful arrest and should have been dismissed. *People v Barrera*, unpublished per curiam opinion of the Court of Appeals, issued January 8, 2019 (Docket No. 338762).

SHOULD EVIDENCE BE EXCLUDED?

CHAPTER 22: EXCLUSIONARY RULE –ATTENUATION

Snapshot: The **attenuation** exception to the exclusionary rule applies when unlawful police conduct is **remote from the discovery** of the evidence. Three factors guide application of the exception: 1) **temporal proximity**; 2) **intervening circumstances**; and 3) **flagrant police misconduct**.

KEY QUESTIONS

- Did the discovery of the evidence closely follow the unlawful police conduct?
- Did an intervening circumstance dissipate the taint of the unlawful police conduct?
- Was police misconduct flagrant?
- Was the causal connection between the unlawful police conduct and the discovery of the evidence remote?
- Did the police exploit their initial misconduct for the purposes of discovering evidence?

Generally

"Under the attenuation exception to the exclusionary rule, exclusion is improper when the connection between the [official] illegality and the discovery of the challenged evidence has become so attenuated as to dissipate the taint." *People v Frazier*, 478 Mich 231; 733 NW2d 713 (2007).

Whether the attenuation exception applies is guided by consideration of three factors: (1) the temporal proximity between the unconstitutional conduct and the discovery of evidence; (2) the presence of intervening circumstances; and (3) particularly significant, the purpose and flagrancy of the official misconduct. *Utah v Strieff*, 579 US ___; 136 S Ct 2056; 195 L Ed 2d 400 (2016).

The attenuation doctrine evaluates the causal link between the government's unlawful conduct and the discovery of evidence, which often has nothing to do with a defendant's actions, and thus, the attenuation doctrine's application is not limited to independent acts by the defendant. *Utah v Strieff*, 579 US ___; 136 S Ct 2056; 195 L Ed 2d 400 (2016).

Attenuation is favored when the causal connection is remote or when the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained. *People v Frazier*, 478 Mich 231; 733 NW2d 713 (2007).

If voluntary consent to search is not attenuated from an unconstitutional search, the evidence discovered must be suppressed. *People v Frederick*, 500 Mich 228; 895 NW2d 541 (2017).

Did the discovery of the evidence closely follow the unlawful police conduct?

The temporal proximity factor does not favor attenuation unless "substantial time" elapsed between the time of the unlawful police conduct and the time when the evidence was obtained. *Utah v Strieff*, 579 US ___; 136 S Ct 2056; 195 L Ed 2d 400 (2016).

The temporal proximity factor favored exclusion of the drugs found on the defendant during an unlawful investigatory stop (but the other factors outweighed this factor and the attenuation exception applied). *Utah v Strieff*, 579 US ___; 136 S Ct 2056; 195 L Ed 2d 400 (2016).

The two-month lapse of time between the defendant's unlawful seizure and his voluntary, Mirandized confession greatly favored application of the attenuation exception to the confession. *United States v Gross,* 662 F3d 393 (CA 6, 2011).

Alleged consent to a second search did not remove the "taint" of the illegal first search of the defendant's vehicle. The second search almost immediately followed the illegal first search, the defendant had vehemently objected to the first search, the defendant was not advised of his *Miranda* rights or that he could refuse the search. Under these circumstances the defendant might have reasonably believed that any refusal after the first search was futile. *United States v Haynes*, 301 F3d 669 (CA 6, 2002).

Did an intervening circumstance dissipate the taint of the unlawful police conduct?

Relevant intervening circumstances are not limited to the defendant's independent acts. The attenuation doctrine therefore applied in this case, where the intervening circumstance was the discovery of a valid, pre-existing, and untainted arrest warrant. *Utah v Strieff*, 579 US ___; 136 S Ct 2056; 195 L Ed 2d 400 (2016).

The discovery of an arrest warrant after the unlawful stop but before the evidence was discovered was an intervening factor sufficient to dissipate the taint of the unlawful police conduct. An officer made an unconstitutional investigatory stop of the defendant, learned during the stop that there was a warrant for the defendant's arrest, arrested the defendant, and searched him (discovering drugs). The attenuation exception applied. *Utah v Strieff*, 579 US ___; 136 S Ct 2056; 195 L Ed 2d 400 (2016).

The discovery of an arrest warrant after the unlawful arrest but before the evidence was discovered was an intervening factor sufficient to dissipate the taint of the unlawful police conduct. An officer unlawfully arrested the defendant for trespassing, discovered that there was a warrant for the defendant's arrest, arrested the defendant on the warrant, called a tow truck for the impoundment of the defendant's vehicle, and cocaine was discovered during the inventory search. The discovery of the warrant was an intervening circumstance between the unlawful arrest and the discovery of the cocaine because the warrant was discovered before the search. *People v Reese*, 281 Mich App 290; 761 NW2d 405 (2008).

The discovery of an arrest warrant after an unlawful traffic stop was a factor in the attenuation analysis, but, under the circumstances, it was not dispositive. After the unlawful seizure, the officer discovered a warrant for the defendant's arrest, arrested him, and a gun was discovered on the defendant after the arrest. The warrant was not dispositive because the officer had no particularized and objective basis for suspecting the defendant of criminal activity at the time of the stop and no reasonable grounds to suspect that there might be an outstanding warrant for the defendant during the duration of the seizure. There was no rationale for the continued detention of the defendant while the officer ran a warrant check. The

attenuation exception did not apply to the discovery of the gun. *United States v Gross*, 662 F3d 393 (CA 6, 2011).

The discovery of an arrest warrant after the defendant was searched and the evidence was seized was not an intervening circumstance for purposes of the attenuation exception. An officer made an unconstitutional investigatory stop of the defendant, searched him (discovering contraband), and then discovered that there was a valid warrant for the defendant's arrest. The discovery of the warrant was not an intervening factor because the officer searched the defendant before he learned of the warrant and the officer testified the warrant had no effect on his actions; rather, the case involved "an after-the-fact discovery of a valid warrant and an attempt to apply that warrant as a post-hoc panacea for unlawful actions that were wholly unrelated to that warrant." *People v Maggit*, 319 Mich App 675; 903 NW2d 868 (2017).

> **PRACTICE POINTER:** If attenuation based on a pre-existing arrest warrant is relied on in an attempt to avoid the exclusionary rule, the timing of the discovery of the pre-existing warrant is a crucial factor. If the warrant was discovered before or during the unlawful search or seizure, it can support attenuation. But if the warrant was discovered after a person was already searched or evidence seized, it will not support attenuation and the evidence obtained by the unlawful search or seizure should be excluded.

Was police misconduct flagrant?

The flagrancy factor favors exclusion only when the police misconduct is most in need of deterrence. *Utah v Strieff*, 579 US ___; 136 S Ct 2056; 195 L Ed 2d 400 (2016).

Evidence of systemic or recurrent police misconduct favors exclusion of the evidence. *People v Maggit*, 319 Mich App 675; 903 NW2d 868 (2017).

The officer's conduct during an unlawful investigatory stop was negligent, not flagrant, and once an arrest warrant was discovered, the officer had a duty to arrest the defendant. There was no evidence of systemic of recurrent police misconduct. *Utah v Strieff*, 579 US ___; 136 S Ct 2056; 195 L Ed 2d 400 (2016).

There was no evidence of police misconduct when officers wrongfully arrested the defendant for trespassing (and later discovered cocaine in his vehicle). The officers made it clear to the defendant that he was free to leave and asked him to leave twice before they arrested him for trespassing. *People v Reese*, 281 Mich App 290; 761 NW2d 405 (2008).

An officer's reliance on a no-trespassing letter to detain the defendant was not reasonable, and the police department's routine practice of relying on such letters suggested systemic or recurrent police misconduct. *People v Maggit*, 319 Mich App 675; 903 NW2d 868 (2017).

Was the causal connection between the unlawful police conduct and the discovery of the evidence remote?

The exclusionary rule does not apply to unlawful police conduct that results from isolated negligence attenuated from the search. The record-keeping error that led to the mistaken arrest of the defendant was not "reckless or deliberate." An error that arises from nonrecurring and attenuated negligence is far removed from the core concerns that led to the adoption of the exclusionary rule. The abuses that gave rise to the exclusionary rule involved intentional conduct that was patently unconstitutional. Exclusion under these circumstances was not worth the cost to the criminal justice system. *Herring v United States*, 555 US 135; 129 S Ct 695; 172 L Ed 2d 496 (2009).

The causal connection between the defendant's confession (arguably obtained in violation of the right to counsel) and the testimony of street sweepers who picked the defendant up after a murder (and whom defendant referred to in his confession) was sufficiently remote for the attenuation exception to apply. The street sweepers testified willingly; when witnesses testify willingly, it creates a greater likelihood that they would have been discovered by legal means and a smaller incentive to conduct an illegal search to discover them. The interest protected by the constitutional guarantee that was violated would not be served by suppression of the evidence obtained. *People v Frazier*, 478 Mich 231; 733 NW2d 713 (2007).

The causal connection between the unlawful seizure of the defendant's cell phone and the names and text messages discovered was not remote or significantly attenuated so as to dissipate the taint; the discovery of the names and text messages flowed directly from the unlawful seizure. *People v Zabavski*, unpublished per curiam opinion of the Court of Appeals, issued April 23, 2019 (Docket No. 338317).

Did the police exploit their initial misconduct for the purposes of discovering evidence?

Officers exploited their initial misconduct when they conducted an investigatory stop of the defendant's vehicle without reasonable suspicion. The officers made the stop because they "believed there was a possible drug transaction happening." The officers discovered an open container of alcohol and, later, drugs. The attenuation exception did not apply to the discovery of the alcohol that was the direct result of active, not passive, police exploitation of the initial stop. *People v LoCicero*, 453 Mich 496; 556 NW2d 498 (1996).

SHOULD EVIDENCE BE EXCLUDED?

CHAPTER 23: EXCLUSIONARY RULE –GOOD FAITH

Snapshot: Under this exception to the exclusionary rule, **evidence** obtained pursuant to an **invalid search warrant will not be excluded** if the executing officer had a **good-faith belief** that the warrant was **valid**. The exception has also been applied to warrantless searches.

KEY QUESTIONS:

- Was the officer's reliance on the invalid warrant objectively reasonable?
- Was the warrant invalid due to a jurisdictional defect?
- Was the warrant invalid due to an oversight or unrelated negligence?
- Did the officer reasonably rely on a statute or precedent?
- Was the exception applied to a warrantless search?
- Did the issuing magistrate abandon his neutral and detached role?
- Did the officer executing the invalid warrant also supply the affidavit for the warrant?

Generally

The good faith exception to the exclusionary rule provides that evidence that was obtained in violation of the Fourth Amendment may nonetheless be introduced if the evidence is "obtained in the reasonable, good-faith belief that the search or seizure was in accord with the Fourth Amendment." *United States v Leon*, 468 US 897; 104 S Ct 3405; 82 L Ed 2d 677 (1984).

The good faith exception to the probable cause requirement for a valid warrant is meant to curb the effects of the exclusionary rule because the rule is "designed to deter police misconduct rather than to punish the errors of judges and magistrates." *United States v Leon*, 468 US 897; 104 S Ct 3405; 82 L Ed 2d 677 (1984).

The good faith exception generally, but not exclusively, applies to invalid search warrants. In deciding whether evidence obtained under an invalid warrant is subject to the good faith exception, a court must ask "whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's" authorization. If not, the exception applies. *United States v Moorehead*, 912 F3d 963 (CA 6, 2019).

The test for application of the good faith exception is objective reasonableness. The test is not what the executing officer believed or could have believed; it is whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization. *United States v Laughton*, 409 F3d 744 (CA 6, 2005).

"[R]easonable inferences that are not sufficient to sustain probable cause in the first place may suffice to save the ensuing search as objectively reasonable." *United States v White*, 874 F3d 490 (CA 6, 2017).

There are at least four situations where an officer's reliance on an invalid warrant could not be considered objectively reasonable (so the exception would not apply): (1) when the warrant is issued on the basis of a supporting affidavit that the affiant knows (or is reckless in not knowing) contains false information; (2) when the issuing magistrate abandons his neutral and detached role and serves as a rubber stamp for police activities; (3) when the affidavit is so lacking in indicia of probable cause that a belief in its existence is objectively unreasonable; and, (4) when the warrant is so facially deficient that it cannot reasonably be presumed to be valid. *United States v Leon*, 468 US 897; 104 S Ct 3405; 82 L Ed 2d 677 (1984); *United States v Moorehead*, 912 F3d 963 (CA 6, 2019).

The "four corners" of the supporting affidavit are the exclusive consideration when determining whether an objectively reasonable officer would have recognized that the affidavit was so lacking in indicia of probable cause that a belief that probable

cause existed was objectively unreasonable. Consideration of what was known to the affiant officer, but not included in the affidavit, is not permitted. *United States v Laughton*, 409 F3d 744 (CA 6, 2005).

- But see *United States v Frazier*, 423 F3d 526 (CA 6, 2005) (a court reviewing an officer's good faith may look beyond the four corners of the affidavit to information that was *known to the officer and revealed to the magistrate*).

A warrant must indicate why evidence of illegal activity will be found in a particular place; there must be "a nexus between the place to be searched and the evidence sought." *United States v Gardiner*, 463 F3d 445 (CA 6, 2006).

"[A] search may not stand on a general warrant. A search warrant must particularly describe the place to be searched and the persons or things to be seized." *People v Hellstrom*, 264 Mich App 187; 690 NW2d 293 (2004).

The good faith exception applies to claims made under both the federal and Michigan constitutions. *People v Goldston*, 470 Mich 523; 682 NW2d 479 (2004).

A magistrate's probable cause determination is entitled to great deference on review. *People v Keller*, 479 Mich 467; 739 NW2d 505 (2007).

Was the officer's reliance on the invalid warrant objectively reasonable?

Officers' reliance on a search warrant for the defendant's emails was objectively reasonable, even though the supporting affidavit may have failed to demonstrate probable cause that the defendant had violated government sanctions on Iran. The affidavit was not so skimpy or conclusory that anyone looking at the warrant would necessarily have known that it failed to demonstrate probable cause. The sanctions on Iran are broad in scope, probable cause is a lenient standard of proof, and the good faith exception permits an affidavit to show much less than the one in this case did. *United States v Asgari*, 918 F3d 509 (CA 6, 2019).

Officers' reliance on a warrant to search defendant's home for drugs was objectively reasonable even though the supporting affidavit did not tie defendant's drug-related activity to his home. In the affidavit, the officer stated that, in his experience, drug dealers often keep evidence of their criminal activity at their homes. The affidavit was not so lacking in indicia of probable cause that belief in its existence was unreasonable. The warrant was deficient, but the good faith exception applied. *United States v Ardd*, 911 F3d 348 (CA 6, 2018).

Officers relied in good faith on an affidavit to search the defendant's home even though the affidavit merely tied defendant's drug-related activity to his place of business. *United States v McCoy*, 905 F3d 409 (CA 6, 2018).

Officers' reliance on the warrant was objectively reasonable even though the supporting affidavit did not specify the date when defendant was found to be illegally soliciting contributions for 9/11 victims (at a location other than his home) and did not state that the location to be searched was defendant's residence. Review of the affidavit and warrant could lead to no other conclusion than that the listed address was defendant's residence. The warrant was deficient, but the good faith exception applied. *People v Goldston*, 470 Mich 523; 682 NW2d 479 (2004).

Officers' reliance on a warrant authorizing a blood draw was objectively reasonable even if the supporting affidavit included false information. The accurate information in the affidavit was sufficient to support a finding of probable cause, so the good faith exception would apply even if the warrant was deficient. *People v Czuprynski*, 325 Mich App 449; 926 NW2d 282 (2018).

Officers' reliance on a search warrant was objectively reasonable even though the supporting affidavit did not tie the defendant to the location to be searched. The location was defendant's father's house, but the affidavit did not state that the homeowner was defendant's father. Police executing the warrant knew that the homeowner was defendant's father; the affidavit's failure to state that the homeowner was defendant's father was a minor, "good-faith oversight," not the product of police misconduct. Application of the exclusionary rule to these circumstances would not deter unlawful police searches; the good faith exception applied. *People v Osantowski*, 274 Mich App 593; 736 NW2d 289 (2007), rev'd in part on other grounds 481 Mich 103 (2008).

Officers' reliance on a warrant authorizing a search of the defendant's computer for pornographic images depicting children was objectively reasonable even though the supporting affidavit did not allege that the defendant had videotaped or taken pictures of the complainants. The affidavit alleged that two complainants had reported criminal sexual conduct at the defendant's residence, and the specific items authorized for seizure (computers, DVDs, cameras) were all related to devices capable of recording or storing pornography. The warrant was deficient, but the good faith exception applied. *People v Hellstrom*, 264 Mich App 187; 690 NW2d 293 (2004).

Officers' reliance on a warrant was objectively reasonable, even though the warrant did not include the signing magistrate's name or bar number, a court seal, the confidential informant's "code number," or any dates of alleged transactions between the defendant and the informant. The warrant indicated that it was based on the attached affidavit and that it was entered by the 50th District Court magistrate, the magistrate signed the warrant, and the warrant described the place to be searched and the items to be seized with sufficient particularity. Even if the warrant was structurally deficient, the good faith exception applied. *People v*

Roston, unpublished per curiam opinion of the Court of Appeals, issued December 13, 2016 (Docket No. 328726).

Officers unreasonably relied on a warrant to search the defendant's home that was supported by a "bare bones" affidavit. The affidavit merely alleged that the defendant was arrested at his home with drugs in his pocket. It did not allege that defendant was involved in drug dealing activity, that the hallmarks of drug dealing had been observed at his home, that the officers' experience suggested that the quantity of drugs found on defendant's person suggested a quantity for resale, or any other facts tying the defendant or his home to illegal drug activity. The affidavit was so lacking in indicia of probable cause that the belief that probable cause existed was objectively unreasonable; the good faith exception did not apply. *United States v McPhearson*, 469 F3d 518 (CA 6, 2006).

Officers unreasonably relied on a warrant to search the defendant's home in relation to drug dealing activity that was supported by an affidavit that failed to connect the home to the drug activity. The defendant was not a known drug dealer, the defendant had not been under investigation prior to arrest, and the police waited three weeks after his arrest to seek the warrant. The affidavit was so lacking in indicia of probable cause as "to render official belief in its existence entirely unreasonable." The good faith exception did not apply. *United States v Brown*, 828 F3d 375 (CA 6, 2016).

> **PRACTICE POINTER:** Whether a warrant for one location can reasonably be relied on to search another location will depend on the circumstances of the case. For example, in *Brown*, the warrant did not authorize a "satellite" search because the defendant was not a known drug dealer. But in *Ardd* (above) officers reasonably relied on a warrant for one location to also search the defendant's home because he was a known drug dealer.

Officers unreasonably relied on a warrant to search the defendant's home in relation to drug dealing activity that was supported by an affidavit that failed to connect the home to the drug activity. The affidavit did not state where the informant made drug purchases, did not state whether the informant had purchased drugs from the defendant, and did not state where the defendant's residence was. The affidavit was utterly lacking in the indicia of probable cause; the good faith exception did not apply. *United States v Laughton*, 409 F3d 744 (CA 6, 2005).

Officers unreasonably relied on a warrant to search the defendant's home. The supporting affidavit completely lacked the indicia of probable cause. It did not state the date on which the officers observed the defendant apparently retrieving drugs from his home to sell to an informant or the date on which the drugs were allegedly sold to the informant. Nothing in the affidavit indicated that the sale of drugs out of

the home was an ongoing offense. The good faith exception did not apply. *United States v Hython*, 443 F3d 480 (CA 6, 2006).

Was the warrant invalid due to a jurisdictional defect?

Officers' reliance on a search warrant was objectively reasonable even though the warrant was void ab initio due to a jurisdictional defect. The warrant was authorized by a magistrate judge in the Eastern District of Virginia, but the warrant was executed outside of the issuing magistrate's jurisdictional territory in Tennessee. The warrant's authorization to search a computer "wherever located" was illegal at the time, but subsequent changes in the law legalized such warrants. Accordingly, application of the exclusionary rule would not deter future unlawful police searches; the good faith exception applied. *United States v Moorehead*, 912 F3d 963 (CA 6, 2019).

Officers' reliance on a search warrant was objectively reasonable even though the warrant was void ab initio due to a jurisdictional defect. A state court judge in Franklin County, Tennessee, issued a warrant for a property located in Coffee County, Tennessee. Under Tennessee law, judges do not have jurisdiction to authorize a search in a different county. But the exclusionary rule did not apply because the officer sought the warrant in Franklin County based on the defendant's mistaken statement on his sex offender registration that his residence was in Franklin County. Nothing in the record indicated that the police had an improper motive in seeking the warrant in Franklin County, and suppression would not deter unlawful police searches; the good faith exception applied. *United States v Master*, 614 F3d 236 (CA 6, 2010).

Was the warrant invalid due to an oversight or unrelated negligence?

An officer reasonably believed that there was an outstanding warrant for the defendant's arrest, even though the warrant had been recalled five months earlier. A police database incorrectly showed that the warrant was active due to a negligent bookkeeping error by another police employee. When an unlawful search is the result of isolated police negligence attenuated from the arrest, and the error is not "reckless or deliberate," the good faith exception applies. *Herring v United States*, 555 US 135; 129 S Ct 695; 172 L Ed 2d 496 (2009).

An officer reasonably believed that there was an outstanding warrant for the defendant's arrest, even though the warrant had been quashed 17 days prior to the arrest. A court database incorrectly showed the warrant as outstanding due to a clerical error by a court employee. Application of the exclusionary rule to these circumstances would not deter unlawful police searches; the good faith exception applied. *Arizona v Evans*, 514 US 1; 115 S Ct 1185; 131 L Ed 2d 34 (1995).

PRACTICE POINTER: Generally, the exclusionary rule will not apply to a warrant that is deficient due to negligence or mistake.

Did the officer reasonably rely on a statute or precedent?

The good faith exception applies to evidence obtained by police acting in objectively reasonable reliance on a statute authorizing warrantless administrative searches, even if the statute is subsequently found to violate the Fourth Amendment. The good faith exception would not apply, however, if the legislative body that passed the statute had wholly abandoned its responsibility to enact constitutional legislation or if the statute's provisions are such that a reasonable officer should have known that the statute was unconstitutional. *Illinois v Krull*, 480 US 340; 107 S Ct 1160; 94 L Ed 2d 364 (1987).

Officers reasonably relied on the Stored Communications Act (SCA) to warrantlessly search the defendant's email. To the extent that the SCA allowed warrantless email searches, it was unconstitutional. But the evidence the officers obtained in the search was not subject to exclusion under the good faith exception. *United States v Warshak*, 631 F3d 266 (CA 6, 2010).

An officer reasonably relied on the long-standing rule in *New York v Belton*, 453 US 454 (1981), that he could conduct a search of the defendant's vehicle incident to arrest, even if there was no possibility the defendant could gain access to the vehicle. The search was illegal under *Arizona v Grant*, 566 US 332 (2009), but the officer did not intentionally violate the defendant's rights, and excluding the evidence would not remove the incentive to engage in unreasonable searches. The good faith exception applied. *People v Short*, 289 Mich App 538; 797 NW2d 665 (2010).

Officers reasonably relied on the then-existing precedent of *New York v Belton*, 453 US 454 (1981), to search defendant's car incident to the arrest of a passenger even though the search did not comply with the retroactive rule of *Arizona v Gant*, 566 US 332 (2009). The good faith exception applied. *People v Mungo*, 295 Mich App 537; 813 NW2d 796 (2012), citing *Davis v United States*, 564 US 229; 131 S Ct 2419; 180 L Ed 2d 285 (2011).

Was the exception applied to a warrantless search?

Evidence obtained as the result of the warrantless placement of GPS tracking device placed on defendant's vehicle was admissible under the good faith exception even though the Supreme Court subsequently held that placement of a GPS tracking device constituted a "search" for purposes of the Fourth Amendment. The officers' reliance on then-binding precedent that warrantless GPS tracking was

lawful at the time of the search was objectively reasonable. *United States v Powell*, 847 F3d 760 (CA 6, 2017).

Officers reasonably believed that the community caretaker exception applied to the warrantless entry into defendant's home, even if the exception did not apply. Officers made a welfare check on the defendant after defendant's neighbor called police with concerns about defendant's well-being. The neighbor stated that she had not seen or heard from the defendant for several days, which was unusual, and that defendant's vehicle had not moved in several days, which also was unusual. Officers observed mail in the defendant's mailbox that was at least several days old. Even if these circumstances were not enough to satisfy the community caretaker exception, the officers entered the defendant's home "in a good faith effort to check on the welfare of a citizen." *People v Hill*, 299 Mich App 402; 829 NW2d 908 (2013).

Even if the officers' warrantless entry into the defendant's residence fell short under the emergency aid exception to the warrant requirement, the evidence the officers discovered in the residence was not subject to exclusion because the officers acted with a good faith belief that people could be inside and were in need of immediate aid. *People v Lemons*, 299 Mich App 541; 830 NW2d 794 (2013).

An officer reasonably relied on the emergency aid exception for a warrantless entry into defendant's home, even if the exception did not apply. The officer had observed what appeared to be a car crash near the defendant's home involving one of the residents of defendant's home. After arranging for a person in the car to be sent to the hospital for a wound on her hand, the officer approached the defendant's home and observed blood on the door handle, on a sunroom window, and on a ladder leading up to the window. Through a window, the officer could see blood on the wall and broken glass on the floor. The officer entered the defendant's home in a good faith effort to determine if emergency aid was needed, even if it was not. *People v Kevonian*, unpublished per curiam opinion of the Court of Appeals, issued October 17, 2017 (Docket No. 337733).

Did the issuing magistrate abandon his neutral and detached role?

Abandoning the judicial role requires more than reaching a different legal conclusion from that of an appellate court; an appellate court's determination that an affidavit in support of a search warrant was insufficient does not, in itself, provide adequate support for the conclusion that a magistrate wholly abandoned his judicial role. *People v Keller*, 479 Mich 467; 739 NW2d 505 (2007).

Did the officer executing the invalid warrant also supply the affidavit for the warrant?

Application of the good faith exception is not precluded merely because the officer executing the invalid warrant also supplied the affidavit supporting the warrant. An officer's affidavit was not so lacking in the indicia of probable cause as to render the officer's subsequent official belief in its existence unreasonable. The affidavit provided the magistrate with more than adequate grounds to conclude that there was a fair probability that contraband would be found at the defendant's residence. The officer executed the warrant with a good faith belief that it was valid. *People v Adams*, 485 Mich 1039; 776 NW2d 908 (2010).

SHOULD EVIDENCE BE EXCLUDED?

CHAPTER 24: EXCLUSIONARY RULE– EXCEPTIONS –INEVITABLE/INDEPENDENT DISCOVERY

Snapshot: **Inevitable discovery** is an exception to the exclusionary rule that applies when constitutionally tainted evidence ***would have been obtained*** inevitably by lawful means. The **independent source** exception applies when evidence was ***actually obtained*** by lawful means independent of the tainted means.

PRACTICE POINTERS: The inevitable discovery exception to the exclusionary rule and the independent source exception are closely related. But the two exceptions are distinguishable: the inevitable discovery exception is based on a hypothetical method of lawful discovery of the evidence (by which the evidence has not actually been obtained); the independent source exception applies when the evidence is actually obtained by a lawful independent method.

The independent source exception is closely related to the "fruit of the poisonous tree" doctrine. If the evidence is lawfully discovered independent

from its unlawful discovery, the source of the evidence is the lawful discovery, not the "poisonous tree."

KEY QUESTIONS:

- Would the evidence have been discovered inevitably by lawful means?
- Would application of the exception provide an incentive for police misconduct or significantly weaken constitutional protections?
    - Did police have probable cause to secure a warrant but fail to do so?
- Was the evidence discovered by legal means that were wholly independent of the unlawful police conduct?

Generally

Inevitable discovery

Inevitable discovery is an exception to the exclusionary rule. Under this exception, unconstitutionally obtained evidence is not excluded if the evidence "ultimately or inevitably would have been discovered by lawful means." *Nix v Williams*, 467 US 431; 104 S Ct 2501; 81 L Ed 2d 377 (1984).

The preponderance of the evidence standard applies to an inevitable discovery determination. *Nix v Williams*, 467 US 431; 104 S Ct 2501; 81 L Ed 2d 377 (1984).

Inevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment and does not require a departure from the usual burden of proof at suppression hearings. *Nix v Williams*, 467 US 431; 104 S Ct 2501; 81 L Ed 2d 377 (1984).

Three basic concerns arise in an inevitable discovery analysis: 1) whether the legal means are truly independent; 2) whether both the use of the legal means and the discovery by that means are truly inevitable; and 3) whether the application of the inevitable discovery exception either provides an incentive for police misconduct or significantly weakens constitutional protection. *People v Brzezinski*, 243 Mich App 431; 622 NW2d 528 (2000).

The inevitable discovery exception cannot be used to circumvent the warrant requirement. The exception does not apply when the only argument for its application is that the police *could have* secured a warrant (but did not). *People v Hyde*, 285 Mich App 428; 775 NW2d 833 (2009); *United States v Quinney*, 583 F3d 891 (CA 6, 2009).

Under Sixth Circuit precedent, application of the inevitable discovery exception does not require a showing that the police were actively pursuing an alternative line

of investigation at the time of the unconstitutional seizure. *United States v Kennedy*, 61 F3d 494 (CA 6, 1995). Other circuits disagree. See, e.g., *United States v Cherry*, 759 F2d 1196 (CA 5, 1985) (prosecution must show that the police were actively pursuing an alternate line of investigation prior to the misconduct).

> **PRACTICE POINTER:** Whether active pursuit of an alternate line of investigation is required for application of the inevitable discovery exception to the exclusionary rule appears to be an open question in Michigan. In *People v Cartwright*, unpublished per curiam opinion of the Court of Appeals, May 21, 1996 (Docket No. 183631) a panel of the Court of Appeals stated that active pursuit was required and, since the police were not actively pursuing an alternate line of investigation, the exception did not apply and the evidence was subject to exclusion. The Michigan Supreme Court reversed, holding that the initial discovery of the evidence was not unlawful under the exigent circumstances exception to the warrant requirement. 454 Mich 550 (1997). Given this conclusion, the Court did not reach the issue of inevitable discovery.

Independent source

If the government learned of the evidence from an independent source, the exclusionary rule does not apply. *Wong Sun v United States*, 371 US 471; 83 S Ct 407; 9 L Ed 2d 441 (1963).

Evidence is admissible if the government shows it was discovered through sources "wholly independent of any constitutional violation." *Nix v Williams*, 467 US 431; 104 S Ct 2501; 81 L Ed 2d 377 (1984).

When there are two searches – an earlier illegal search and a later valid warrant search – evidence from the later search is from an independent source if the warrant application contains probable cause apart from the tainted information discovered during the first search. *United States v Jenkins*, 396 F3d 751 (CA 6, 2005).

Evidence does not need to be suppressed if the illegal search did not prompt the officers to seek a warrant and the magistrate was not affected by evidence from the illegal search to issue the warrant. See *People v Smith*, 191 Mich App 644; 478 NW2d 741 (1991).

If a search warrant is based partially on tainted evidence and partially on evidence from an independent source, evidence obtained pursuant to the warrant is admissible if the lawfully obtained evidence supports probable cause and would have supported the warrant without the tainted evidence. *People v Melotik*, 221 Mich App 190; 561 NW2d 453 (1997).

"The interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse,* position that they would have been in if no police error or misconduct had occurred." *Nix v Williams*, 467 US 431; 104 S Ct 2501; 81 L Ed 2d 377 (1984).

The admission of evidence under the independent source exception is not limited to evidence that was not discovered during the initial, unlawful entry. Evidence is admissible under the exception if it is later rediscovered during a valid search. *Murray v United States*, 487 US 533; 108 S Ct 2529; 101 L Ed 2d 472 (1988).

Would the evidence have been discovered inevitably by lawful means?

The inevitable discovery rule applied because a systematic search involving 200 volunteers was already underway searching for the victim's body in the area at the time the defendant directed the police to the location of the body during an interrogation conducted in violation of the defendant's right to counsel. *Nix v Williams*, 467 US 431; 104 S Ct 2501; 81 L Ed 2d 377 (1984).

The inevitable discovery exception applied to a pipe bomb (even it if it was discovered through a violation of the defendant's *Miranda* rights). Officers were searching the defendant's house for evidence of a methamphetamine lab pursuant to a valid warrant. The pipe bomb was "in a visually prominent area," sitting on a kitchen cabinet where decorative objects were displayed, and "conspicuously" covered with a towel. The warrant specified the search of "all equipment, chemicals, liquids, [and] powders used in the manufacture or production of narcotics." The officers would have examined the unusual object to see if it contained contraband and would have been justified in doing so. *United States v Hodge*, 714 F3d 380 (CA 6, 2013).

The inevitable discovery exception applied because an unlawfully searched vehicle inevitably would have been subjected to an inventory search. Veterans Administration officers violated the Fourth Amendment when they searched the defendant's truck in a V.A. hospital parking lot. But the V.A. had an established policy that called for the removal of vehicles that did not belong to patients or visitors parked on V.A. property. The policy also prescribed an inventory search before the vehicle's removal. And the V.A.'s policy was constitutional under the community caretaker exception to the warrant requirement. *United States v Kimes*, 246 F3d 800 (CA 6, 2001).

The inevitable discovery exception applied to the warrantless search of a mislabeled suitcase left unclaimed at an airport; if the government had not performed the illegal search, airline personnel would have opened the suitcase in an effort to locate its owner pursuant to airline policy. The fact that the police were not actively

pursuing an alternate, legal line of investigation to discover the contents of the suitcase was irrelevant to the inevitable discovery determination. *United States v Kennedy*, 61 F3d 494 (CA 6, 1995).

The evidence would have been discovered inevitably under a search warrant and was not subject to the exclusionary rule because the police were executing the valid warrant when they violated the knock and announce statute; if the officers had not violated the statute, the evidence would have been discovered under the warrant. *People v Stevens (After Remand)*, 460 Mich 626; 597 NW2d 53 (1999).

The evidence would have been discovered inevitably under a search warrant, and the exclusionary rule did not apply (even if the officers violated the knock and announce rule). The knock and announce principles do not control the execution of a valid search warrant; they only delay entry for a brief period. *People v Vasquez (After Remand)*, 461 Mich 235; 602 NW2d 376 (1999).

- See *Hudson v Michigan*, 547 US 586; 126 S Ct 2159; 165 L Ed 2d 56 (2006) (the exclusionary rule does not apply to violations of the knock and announce rule). Exclusionary Rule, Chapter 21; Warrant, Chapter 8.

- See also *People v Sobczak-Obetts*, 463 Mich 687; 625 NW2d 764 (2001) (exclusionary rule did not apply when officers had a valid search warrant but failed to comply with the statutory requirement to provide a copy of the search warrant). Exclusionary Rule, Chapter 21.

The prosecution did not show that evidence discovered on the defendant's unlawfully seized cell phone would have been discovered inevitably. The officer testified that, if she had seized the phone, she would have obtained a warrant for it. But the prosecutor did not present copies of subpoenaed records to allow the trial court to determine that there was an independent means of obtaining the information on the phone and that police would have inevitably discovered that information. Regarding whether she would have discovered text messages from the phone placed in evidence, the officer testified, "I don't know how much text messages, but yes, I would have gotten the call logs and the text logs." *People v Zabavski*, unpublished per curiam opinion of the Court of Appeals, issued April 23, 2019 (Docket No. 338317).

The inevitable discovery exception did not apply to drugs that were discovered only because of the defendant's illegal detention. Defendant's status as a parolee did not support inevitable discovery; the arresting officers did not know that the defendant was a parolee with warrants for his arrest until after the officers transported him to jail; the officers had no reason to believe that the defendant had violated his parole when they detained him. *People v Barrera*, unpublished per curiam opinion of the Court of Appeals, issued January 8, 2019 (Docket No. 338762).

The methadone that an officer discovered in the defendant's car during an unlawfully prolonged traffic stop would not have been discovered inevitably. The prosecution argued that the defendant's car would have been subject to search because the defendant told the officer that she had medical marijuana in the passenger compartment of her vehicle in violation of statute. But the defendant told the officer this after the stop should have lawfully terminated. If the officer had not prolonged the stop, she would not have known about the marijuana. *People v. Kocevar*, unpublished per curiam opinion of the Court of Appeals, issued March 16, 2017 (Docket No. 329150).

Would application of the exception provide an incentive for police misconduct or significantly weaken constitutional protections?

Applying the exception to a violation of the knock and announce rule when officers were executing a valid search warrant would not incentive police misconduct. There are many disincentives for violating the knock and announce rule, including departmental discipline and civil action. *People v Stevens (After Remand)*, 460 Mich 626; 597 NW2d 53 (1999).

Applying the exception based on an officer's testimony that, absent the improper seizure of the defendant's cell phone, she would have simply obtained records from a telephone provider without any prior proof of what those records could establish, would incentive police misconduct and weaken Fourth Amendment protections. (But the error was harmless). *People v Zabavski*, unpublished per curiam opinion of the Court of Appeals, issued April 23, 2019 (Docket No. 338317).

Applying the exception to include evidence discovered after a traffic stop had been unlawfully prolonged would incentivize unlawfully prolonged traffic stops for the purpose of ferreting out unrelated crime. *People v. Kocevar*, unpublished per curiam opinion of the Court of Appeals, issued March 16, 2017 (Docket No. 329150).

Did police have probable cause to secure a warrant but fail to do so?

> **PRACTICE POINTER:** If the police had probable cause to obtain a warrant but did not do so, the fact that they could have obtained a warrant will not support application of the inevitable discovery doctrine. If it were otherwise, the warrant requirement would be wholly subverted.

The exception did not apply to the warrantless seizure of a printer. Even though the officers had probable cause to secure a warrant for the seizure, they did not do so. The exception cannot be used to circumvent the warrant requirement. *United States v Quinney*, 583 F3d 891 (CA 6, 2009).

The exception did not apply to the warrantless entry and search of the defendant's residence (after a helicopter flyover revealed marijuana growing in the backyard). It was irrelevant that the police could have secured a warrant for the search; they did not attempt to secure a warrant and no exception to the warrant requirement applied to the entry. To hold otherwise in these circumstances was untenable because it would obviate the warrant requirement. *United States v Haddix*, 239 F3d 766 (CA 6, 2001).

The exception did not apply to the defendant's wallet, keys, and cell phone seized during a warrantless search simply because the officers had probable cause for a warrant and could have secured one (but did not). There was no indication that the officers would inevitably discover the items; even if the officers could have secured a warrant, they were not in process of doing so. Applying the exception under these circumstances would incentivize police misconduct and significantly weaken Fourth Amendment protections because it would permit warrantless seizure whenever there is probable cause. *People v Mahdi*, 317 Mich App 446; 894 NW2d 732 (2016).

The exception did not apply to defendant's warrantless blood draw simply because an officer could have obtained a warrant (but did not). A blood draw could have been obtained by independent legal means (by securing a warrant), and it was inevitable because the officer would have secured a warrant had his realized his error in failing to secure one. But the damage to Fourth Amendment protections and the incentive for police misconduct that would arise if the exception applied in these circumstances outweighed the other *Brzezinski* factors. *People v Hyde*, 285 Mich App 428; 775 NW2d 833 (2009).

The exception did not apply to the warrantless search of the defendant's house. The prosecution argued that had the officers decided to wait until one of the them arrived with the search warrant the evidence would have been legally discovered. But the record was unclear as to whether the evidence was discovered before or after the officer prepared the search warrant and affidavit and unclear as to whether the evidence was discovered before or after the officer returned to the house with the warrant. *People v Hartigan*, unpublished per curiam opinion of the Court of Appeals, issued April 5, 2016 (Docket No. 322625).

Was the evidence discovered by lawful means that were wholly independent of the unlawful police conduct?

The independent source exception applied when officers unlawfully entered a warehouse, observed bales of marijuana, and obtained a search warrant based on information wholly independent of their observations during the illegal entry (including information obtained from surveillance, informants, and coconspirators). Because the affidavit was not supported by any information gathered during the unlawful entry, that information did not affect the magistrate's decision to issue the warrant. *Murray v United States*, 487 US 533; 108 S Ct 2529; 101 L Ed 2d 472 (1988).

The independent source exception applied when officers unlawfully entered the defendant's apartment, observed drugs, and "secured the apartment from within" (rather than from the perimeter) while waiting for a search warrant. The warrant was issued based on an affidavit that stated facts completely independent from observations made during the unlawful entry (including information obtained during weeks of surveillance and from an informant). The illegal entry into the defendant's apartment did not contribute in any way to the discovery of the evidence seized under the warrant; the seizure would have occurred even if the officers never entered the defendant's apartment. *Segura v United States*, 468 US 796; 104 S Ct 3380; 82 L Ed 2d 599 (1984).

The illegal entry by police officers into the defendant's apartment did not require suppression of evidence subsequently discovered at the apartment pursuant to a search warrant that had been obtained based on information wholly unconnected with the initial entry. Officers illegally entered the defendant's apartment (but did not seize evidence) after a neighbor reported that he had been assaulted and robbed there by the defendant. The affidavit under which the warrant was subsequently obtained was based on the victim's account of the robbery, including the victim's description of what evidence would be found in the apartment. The evidence was the product of the validly obtained search warrant, not the initial unlawful entry. *People v Smith*, 191 Mich App 644; 478 NW2d 741 (1991).

An illegal blood draw did not require suppression of the evidence from a subsequent blood draw pursuant to a search warrant that was supported by an affidavit that did not include any reference to the initial, unlawful blood-test results. Rather, the affidavit recited statements from people with firsthand knowledge of the defendant's insobriety prior to and immediately preceding an accident involving the defendant. The case was decided under the inevitable discovery exception, but it is more properly classified as an independent source case. *People v Kroll*, 179 Mich App 423; 446 NW2d 317 (1989).

The independent source exception applied to the unlawful search of the defendant's gas station by Treasury agents. A witness from the civil audit section of the Treasury Department testified that he had assigned a civil audit to the defendant's business based on information received during the audit of a gasoline distributor and that he was unaware of the unlawful search at the time he assigned the audit. *People v Harajli*, 148 Mich App 189; 384 NW2d 126 (1986).

The independent source exception did not apply to discovery of narcotics based on information obtained from a person who was illegally arrested, and the narcotics would not have been discovered but for the illegally obtained information. *Wong Sun v United States*, 371 US 471; 83 S Ct 407; 9 L Ed 2d 441 (1963).

WAS THERE A SEIZURE?

CHAPTER 25: SEIZURE

CHAPTER 25: WAS THERE A SEIZURE?

Snapshot: The **seizure of a person** occurs if the police terminate or **restrain a person's freedom** of movement by means of **physical force** or a **show of authority** intentionally applied. The coercive effect of a police encounter is measured by whether a **reasonable person would feel free to leave**, to ignore an officer's questions, or to terminate the encounter. A person is **not seized** by a show of authority of the person **does not submit** to the show of authority.

The seizure of **property** occurs when there is a **meaningful interference** with an individual's interest in the property.

PRACTICE POINTER: There are distinct tiers of police-citizen encounters, each with its own level-of-suspicion requirement.

Consensual encounter: a police officer may ask non-coercive questions of a person in a public setting without any level of suspicion. See Consensual Encounters (Knock and Talk), Chapter 26.

Investigatory stop: a police officer may make a brief investigatory stop of a person or a vehicle if the officer has reasonable suspicion that a person has committed or is about to commit a crime. See Seizure – Investigatory Stop, Chapter 27; Seizure – Investigatory Stop – Vehicle, Chapter 28.

Traffic stop: an officer may stop a vehicle with probable cause of a traffic violation for the time required to resolve the violation. See Seizure – Traffic Stop, Chapter 29.

Arrest: an arrest or complete detention of an individual requires probable cause. See Seizure – Arrest, Chapter 30.

KEY QUESTIONS

- Did the police use force or coercion to detain the defendant?
  - Or was it a consensual police-citizen encounter?
- Was the defendant in or near a vehicle when the police approached?
  - Did the police conduct a traffic stop?
  - Did the police block the vehicles mobility?
- Did the police pursue the defendant?
  - Did the defendant submit to a show of police authority?
- Did the police meaningfully interfere with an individual's interest in property?

Generally

A person is seized by the police when "an officer, by means of physical force or show of authority, terminates or restrains [the person's] freedom of movement, through means intentionally applied." *Brendlin v California*, 551 US 249; 127 S Ct 2400; 168 L Ed 2d 132 (2007).

The coercive effect of a police encounter is measured by asking whether a reasonable person would feel free to decline the officer's requests or otherwise terminate the encounter. *Brendlin v California*, 551 US 249; 127 S Ct 2400; 168 L Ed 2d 132 (2007).

A person is seized when police words or conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter. *People v Anthony*, ___ Mich App ___; ___ NW2d ___ (2019) (2019 WL 290026).

A court must determine whether there has been a seizure "in view of all of the circumstances surrounding the incident." *United States v Mendenhall*, 446 US 544; 100 S Ct 1870; 64 L Ed 2d 497 (1980).

Whether a reasonable person would feel free to leave a police encounter "will vary, not only with the particular police conduct, but also with the setting in which the conduct occurs." *Michigan v Chesternut*, 486 US 567; 108 S Ct 1975; 100 L Ed 2d 565 (1988).

The test for determining whether there was a seizure is "necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a

whole, rather than to focus on particular details of that conduct in isolation." *Michigan v Chesternut*, 486 US 567; 108 S Ct 1975; 100 L Ed 2d 565 (1988).

The test for the existence of a "show of authority" is "an objective one: not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person." *California v Hodari D*, 499 US 621; 111 S Ct 1547; 113 L Ed 2d 690 (1991).

An officer's words alone can be enough to make a reasonable person feel that he or she would not be free to leave. *United States v Richardson*, 385 F3d 625 (CA 6, 2004).

There is no seizure when a police officer merely approaches individuals on the street or in other public places and asks questions if they are willing to listen. *United States v Drayton*, 536 US 194; 122 S Ct 2105; 153 L Ed 2d 242 (2002).

The fact that a police officer identifies himself or herself as such, without more, does not convert an encounter into a seizure. *Florida v Royer*, 460 US 491; 103 S Ct 1319; 75 L Ed 2d 229 (1983).

Interrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure. *INS v Delgado*, 466 US 210; 104 S Ct 1758; 80 L Ed 2d 247 (1984).

The mere pursuit of a person does not constitute a seizure; rather, the application of physical force or the suspect's submission to an officer's show of authority is required for a seizure to have occurred. *California v Hodari D*, 499 US 621; 111 S Ct 1547; 113 L Ed 2d 690 (1991).

An application of physical force sufficient to effect a seizure may be extremely slight. *California v Hodari D*, 499 US 621; 111 S Ct 1547; 113 L Ed 2d 690 (1991).

A show of authority to which the subject does not yield is not a seizure. *California v Hodari D*, 499 US 621; 111 S Ct 1547; 113 L Ed 2d 690 (1991).

Did the police use force or coercion to detain the defendant?

> **PRACTICE POINTER:** Facts relevant to determining whether a person was seized include drawn weapons, commands (subtle or otherwise), blocked exits (sometimes), questioning (sometimes), and heavy police presence.

The defendant was seized the moment he opened the front door of his apartment. Several officers positioned themselves at the front door (the only exit from the apartment) with their guns drawn, knocked forcibly on the door, announced they

were police, and, when the defendant opened the door, ordered him to come outside (which he did). A reasonable person would not have believed that he or she was free to leave or end the encounter. *United States v Saari*, 272 F3d 804 (CA 6, 2001).

A police officer may not seize an unarmed, nondangerous suspect by shooting him dead. *Tennessee v Garner*, 471 US 1; 105 S Ct 1694; 85 L Ed 2d 1 (1985).

The defendant was seized when an officer placed his hand on the defendant's back. *People v Jenkins*, 472 Mich 26; 691 NW2d 759 (2005).

A person was seized when officers persisted in questioning him after he asked them to leave his residence. The officers' conduct was inherently coercive because they were making an indirect "offer of force" by not leaving until getting the information they wanted. *People v Bolduc*, 263 Mich App 430; 688 NW2d 316 (2004).

The defendant was seized when up to 12 police officers came to the bar where the defendant worked while he was standing outside and two of the officers followed the defendant when he walked back into the bar and then asked the defendant if he was armed. The officers were there to check the club's business license, but it was reasonable for the defendant to believe that they were especially interested in him, particularly because two of them followed him into the bar when he attempted to walk away. Because the officers followed him after he walked away, their conduct conveyed to the defendant that he was not free to decline their requests or terminate the encounter. The heavy police presence, together with the officer's statement that he needed to know whether the defendant was armed for his safety, was a show of authority to which any reasonable citizen would feel compelled to submit. *People v Bashi*, unpublished per curiam opinion of the Court of Appeals, issued October 13, 2009 (Docket No. 286239).

The defendants were not seized on a bus when plainclothes officers boarded the bus and began questioning passengers. The officers gave the passengers no reason to believe that they were required to answer the officers' questions. When an officer approached the defendants, he did not brandish a weapon or make any intimidating movements. He left the aisle free so that the defendants could exit. He spoke to passengers one by one and in a polite, quiet voice. Nothing the officer said would suggest to a reasonable person that he or she was not free to terminate the encounter or that the passengers were required to answer his questions. The officer's display of his badge and the presence of a holstered gun did not contribute to the coerciveness of the encounter. Likewise, the position of one officer at the front of the bus was not coercive because the officer did nothing to intimidate the passengers and said nothing to suggest that passengers could not exit. *United States v Drayton*, 536 US 194; 122 S Ct 2105; 153 L Ed 2d 242 (2002).

The defendant was not seized when an officer approached him in an airport, showed him his badge, and asked him to answer some questions. Rather, this was a consensual encounter that did not implicate any Fourth Amendment interest. *Florida v Rodriguez*, 469 US 1; 105 S Ct 308; 83 L Ed 2d 165 (1984).

The entire workforce in a factory was not seized when immigration agents wearing badges moved systematically through the factory questioning individual workers while other agents were stationed at each exit. The freedom to move about is ordinarily restricted when people are at work. The agents were stationed at exits only to ensure that each worker was questioned. "If mere questioning does not constitute a seizure when it occurs inside the factory, it is no more a seizure when it occurs at the exits." *INS v Delgado*, 466 US 210; 104 S Ct 1758; 80 L Ed 2d 247 (1984).

Officers did not seize the defendant when they simply approached him, showed their badges, and questioned the defendant. Defendant was walking along railroad tracks when the officers approached him, and he continued walking throughout this initial encounter. *People v Dembinski*, 62 Mich App 583; 233 NW2d 662 (1975).

The police did not seize the defendant when they approached him as he was standing in his front yard, identified themselves, told the defendant that they had information that he had drugs on his property, and asked if they could look around. The police are not prohibited from going to a residence and engaging in a conversation with a person there. There was no indication that the defendant was not free to end the encounter; testimony at a hearing indicated that the defendant did not feel threatened or coerced during this initial encounter. *People v Frohriep*, 247 Mich App 692; 637 NW2d 562 (2001).

Officers did not seize the defendant when they approached him at an airport and asked to see his airplane ticket. The officers did not display their weapons, touch the defendant, or use threatening language. The officers' failure to inform the defendant that he was free to decline to cooperate did not provide the defendant with any objective reason to believe that he was not free to end the conversation and proceed on his way. *People v Sasson*, 178 Mich App 257; 443 NW2d 394 (1989).

Was the defendant in or near a vehicle when the police approached?

When police make a traffic stop, a passenger in the car, like the driver, is seized for Fourth Amendment purposes. A reasonable person riding in a car subjected to a traffic stop would not feel free to terminate the encounter. *Brendlin v California*, 551 US 249; 127 S Ct 2400; 168 L Ed 2d 132 (2007).

Under the Fourth Amendment, stopping a vehicle and detaining the occupants amounts to a seizure. *People v Simmons*, 316 Mich App 322; 894 NW2d 86 (2016).

An officer seized the defendant when he pulled up directly behind the vehicle that the defendant was in, blocking the vehicle's movement, and turned the cruiser's spotlight into the car. A reasonable person in the defendant's place would not have felt free to leave. *United States v Gross*, 662 F3d 393 (CA 6, 2011).

An officer seized the driver of a vehicle when, at the end of a traffic stop, the officer asked the driver to remain standing at the rear of the vehicle. The officer's demeanor was not intimidating, and he did not use coercive language; rather, the officer said, "Okay, just hang out right here for me, okay?" Regardless of the officer's demeanor, his words alone were enough to make a reasonable person in the defendant's position feel that he or she would not be able to walk away or ignore the officer's command. The passengers in the vehicle were likewise seized at that point because they were as unable to leave as the driver. *United States v Richardson*, 385 F3d 625 (CA 6, 2004).

Officers seized the defendant when they ordered him out of his parked car. *People v Freeman*, 413 Mich 492; 320 NW2d 878 (1982).

The defendant was seized because the police stopped the car he was riding in. *People v Mazzie*, 326 Mich App 279; ___ NW2d ___ (2018).

Officers' commands to stay in a vehicle constituted a seizure of the defendant under the Fourth Amendment because a reasonable person in the defendant's situation would have believed that she was not free to leave. *People v Corr*, 287 Mich App 499; 788 NW2d 860 (2010).

A passenger who jumped out of a car that was blocked by police vehicles and ran was not seized until he complied with an officer's order to stop. The driver and the other passenger were seized when the car was blocked due to their passive acquiescence. *United States v Jones*, 562 F3d 768 (CA 6, 2009).

The defendant was not seized until officers ordered him out of his vehicle that was parked in a car wash bay. The defendant was not seized when police officers parked their unmarked Explorer at an angle in front of the defendant's vehicle because there was enough room for the defendant to steer around the police Explorer. The defendant was not seized when officers activated blue police lights once and immediately turned them off because the officers did so to identify themselves as officers and an encounter does not become compulsory merely because an officer reveals his or her identity as an officer. And the defendant was not seized when the officers approached his vehicle from both sides; the officers did not draw their weapons, the conversation that ensued with the defendant was polite and friendly in tone, and the conversation was a consensual civilian-police encounter. *United States v Carr*, 674 F3d 570 (CA 6, 2012).

The defendant was not seized until officers approached his truck and ordered him out. The defendant was not seized when officers pulled up to his parked truck and engaged in consensual conversation with the defendant but did not block his path of egress. Pulling up to the defendant's truck was not a traffic stop (which would constitute a seizure) because the truck was parked. *People v Anthony*, ___ Mich App ___; ___ NW2d ___ (2019) (2019 WL 290026).

Did the police pursue the defendant?

> **PRACTICE POINTER:** The common concern in pursuit situations is whether the defendant was seized by the police at the time the defendant disposed of some evidence while fleeing. If the defendant was not seized at the time the evidence was disposed of, then the evidence is not the fruit of a seizure and seizing the evidence (which the defendant abandoned by discarding) presents no Fourth Amendment concerns.

The mere pursuit of a person does not constitute a seizure; rather, the application of physical force or the suspect's submission to an officer's show of authority is required for a seizure to have occurred. *California v Hodari D*, 499 US 621; 111 S Ct 1547; 113 L Ed 2d 690 (1991).

An officer's pursuit of the defendant was a show of authority, but the defendant did not submit to it and kept running. The defendant was not seized until the officer tackled him. The cocaine that the defendant abandoned while running was not the fruit of an unlawful seizure. *California v Hodari D*, 499 US 621; 111 S Ct 1547; 113 L Ed 2d 690 (1991).

Police officers did not seize the defendant when they sped up and drove alongside him as he ran on foot after spotting the officers' vehicle in a high crime area. The police did not activate a siren or flashers or command the defendant to halt or display weapons or operate their car in an aggressive manner. The officers' conduct would not have communicated to the reasonable person they were attempting to capture or otherwise intrude upon the defendant's freedom of movement. While following a person on foot with a cruiser might be somewhat intimidating, it did not amount to a seizure under the Fourth Amendment. The pack of pills that the defendant discarded as he ran was not the fruit of an unlawful seizure. *Michigan v Chesternut*, 486 US 567; 108 S Ct 1975; 100 L Ed 2d 565 (1988).

The defendant was not seized when officers approached him from several directions in a parking lot, and, after he paused briefly, the defendant ran from the officers. The brief pause was not a submission to the officers' authority, especially given that the defendant did not speak to the officers and did not heed their commands. He was not seized until officers in pursuit tackled him. *United States v Jeter*, 721 F3d 746 (CA 6, 2013).

A passenger who jumped out of a car that was blocked by police vehicles and ran was not seized until he complied with an officer's order to stop. Even though an occupant in a vehicle stopped by the police is generally deemed seized by virtue of the stopping of the vehicle, an occupant is not thereby seized if he or she does not submit to the show of authority. *United States v Jones*, 562 F3d 768 (CA 6, 2009).

The officers' initial encounter with the defendant, when they asked for identification, was consensual. When the defendant saw that an officer was running a LEIN check during the consensual encounter, the defendant began to walk away, the officer orally discouraged him from leaving, and, finally, the officer put his hand on the defendant's back and told him to wait for the results of the check. The defendant was seized when the officer physically hindered the defendant's departure (by placing his hand on the defendant's back) and instructed him to stay in the officer's presence. *People v Jenkins*, 472 Mich 26; 691 NW2d 759 (2005).

The defendant was not seized while officers chased him, and the bag he discarded while fleeing (containing cocaine) was the not the fruit of an unlawful seizure. *People v Mamon*, 435 Mich 1; 457 NW2d 623 (1990).

When the defendant fled from police officers, he was not seized until one officer caught him and physically restrained him. The pursuit was a show of authority, but the defendant did not submit to it until he was physically restrained. Consequently, the plastic bag containing cocaine that the defendant discarded while fleeing the officers was abandoned and not the fruit of an unlawful seizure. *People v Lewis*, 199 Mich App 556; 502 NW2d 363 (1993).

The defendant was seized when up to 12 police officers came to the bar where the defendant worked while he was standing outside, and two of the officers followed the defendant when he walked back into the bar and then asked the defendant if he was armed. The officers were there to check the club's business license, but it was reasonable for the defendant to believe that they were especially interested in him, particularly because two of them followed him into the bar when he attempted to walk away. Because the officers followed him after he walked away, their conduct conveyed to the defendant that he was not free to decline their requests or terminate the encounter. The heavy police presence, together with an officer's statement that he needed to know whether the defendant was armed for his safety, was a show of authority to which any reasonable citizen would feel compelled to submit. *People v Bashi*, unpublished per curiam opinion of the Court of Appeals, issued October 13, 2009 (Docket No. 286239).

Did the police meaningfully interfere with an individual's interest in property?

A Fourth Amendment seizure of property occurs when there is some meaningful interference with an individual's possessory interests in that property. *United States v Jones*, 565 US 400; 132 S Ct 945; 181 L Ed 2d 911 (2012).

The definition of the seizure of property mirrors that of the seizure of a person in that there is a seizure when there is interference however slight. *United States v Jacobsen*, 466 US 109; 104 S Ct 1652; 80 L Ed 2d 85 (1984).

Viewing property without touching it is not a seizure. *Arizona v Hicks*, 480 US 321; 107 S Ct 1149; 94 L Ed 2d 347 (1987).

Placing a GPS device on a vehicle did not amount to seizure of the vehicle because the device did not interfere in any way with the operation of the vehicle. *United States v Jones*, 565 US 400; 132 S Ct 945; 181 L Ed 2d 911 (2012).

"The concept of a 'seizure' of property is not much discussed in our cases." *United States v Jacobsen*, 466 US 109; 104 S Ct 1652; 80 L Ed 2d 85 (1984).

- Fourth Amendment issues involving property are generally addressed under search principles. For more on property, see the Search chapters in this manual.

WAS THERE A SEIZURE?

CHAPTER 26: SEIZURE – CONSENUAL ENCOUNTERS (KNOCK AND TALK)

Snapshot: Police officers **may approach** a home **via the front path**, **knock promptly**, **briefly wait** for someone to answer, and **then** (if not invited to linger) **leave**. A knock and talk is **not a search or a governmental intrusion** because officers are doing no more than anyone else (such as Girl Scouts or trick-or-treaters) might do under the **implied consent to approach** a home.

KEY QUESTIONS:

- Did officers do more than anyone else might do under the implied consent to approach a home?
- Was the knock and talk ordinary police-citizen contact?
- Did officers "linger" or prolong the encounter after being asked to leave?
- Did officers conduct the knock and talk in the middle of the night?
- Was the knock and talk for a purpose other than obtaining consent to enter and search?
- Did the person who responded feel free to end the encounter?
- Did officers identify themselves as officers?

Generally

A knock and talk, when performed within its proper scope, is not a search or a governmental intrusion because its contours are defined by what *anyone* may do. *Kentucky v King*, 563 US 452; 131 S Ct 1849; 179 L Ed 2d 865 (2011); *People v Frederick*, 500 Mich 228; 895 NW2d 541 (2017).

The scope of a knock and talk is determined by the "implied license" that is granted to "solicitors, hawkers, and peddlers of all kinds." Accordingly, a police officer has an implied license to "approach the door [of a home] by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *Florida v Jardines*, 569 US 1; 133 S Ct 1409; 185 L Ed 2d 495 (2013).

If officers go beyond what any private citizen might do, the officers are trespassing. *People v Frederick*, 500 Mich 228; 895 NW2d 541 (2017).

An officer's purpose of gathering information in the course of and proper scope of a knock and talk does not cause it to violate the Fourth Amendment. But information-gathering becomes a search when it is combined with a trespass on Fourth-Amendment-protected property. *Florida v Jardines*, 569 US 1; 133 S Ct 1409; 185 L Ed 2d 495 (2013); *People v Frederick*, 500 Mich 228; 895 NW2d 541 (2017).

A knock and talk to obtain consent to search a home is not a search or seizure under the Fourth Amendment. It is no different than an officer initiating ordinary citizen contact. The scope of a knock and talk is exceeded, however, if a person does not feel free to end the encounter or coerced to acquiesce to the search. *People v Frohriep*, 247 Mich App 692; 637 NW2d 562 (2001).

The scope of the implied license to approach a house and knock is time-sensitive and does not include knocking in "the middle of the night"; Girl Scouts or other visitors do not have an implied license to knock on a private door in the middle of the night or the predawn hours, so police officers likewise do not. *People v Frederick*, 500 Mich 228; 895 NW2d 541 (2017).

Did officers do more than anyone else might do under the implied consent to approach a home?

> **PRACTICE POINTER:** Bringing a trained scent-detecting dog to the front door, knocking in the middle of the night, or searching the yard before knocking on the front door are not what any member of the public might do and are not within knock and talk principles. If a Girl Scout wouldn't do it, an officer cannot do it and justify it as a knock and talk.

Officers exceeded the scope of a knock and talk when they brought a drug dog to the front door of the defendant's home. Officers approached a house by the front walk with a drug dog that eventually alerted to the smell of contraband by sitting at the front door of the home. The Court ruled that there is no "customary invitation" or implied license to introduce a trained police dog to explore the area around the home to search for evidence of a crime. The Court applied the property-rights framework for assessing governmental intrusion and determined that bringing the dog onto the property was a trespass on a constitutionally protected area made for the purpose of obtaining information; this was a warrantless search and thus a constitutional violation. *Florida v Jardines*, 569 US 1; 133 S Ct 1409; 185 L Ed 2d 495 (2013).

Officers exceeded the scope of a knock and talk when they knocked on one defendant's door at 4:00 a.m. and the other defendant's door at 5:30 a.m. The Court reasoned, "Just as there is no implied license to bring a drug-sniffing dog to someone's front porch, there is generally no implied license to knock at someone's door in the middle of the night." The knocks were trespasses. The officers were searching for marijuana butter when they approached the homes and knocked on the doors, so they trespassed to obtain information. This was a warrantless search under the property-rights analysis and thus a constitutional violation. *People v Frederick*, 500 Mich 228; 895 NW2d 541 (2017).

> *NOTE: The Michigan Supreme Court granted oral argument on the application on March 29, 2019, in* People v Towne *(Docket No. 157210, see 924 NW2d 250) on issues including "whether the police exceeded the proper scope of a knock and talk when they approached and secured the defendant's home at night while attempting to execute an arrest warrant for the defendant's son, who lived elsewhere," citing* Frederick.

Officers exceeded the scope of a knock and talk when they searched the defendant's backyard, then knocked on the door. The officers did not first approach the front door of the home or proceed along a path that the public could be expected to travel in visiting the defendant's home. *People v Galloway*, 259 Mich App 634; 675 NW2d 883 (2003).

Was the knock and talk ordinary police-citizen contact?

Officers did not exceed the scope of a knock and talk procedure when they approached the defendant in his yard, identified themselves as police officers, explained that they had information he had drugs on his property and asked permission to look around. The encounter was no different than any other police-initiated contact with a private citizen. Accordingly, the encounter was not a search or a seizure for Fourth Amendment purposes. *People v Frohriep*, 247 Mich App 692; 637 NW2d 562 (2001).

Helicopter surveillance and movement by law enforcement officers on the ground directly into the backyard of a private home do not constitute ordinary citizen contact. The case did not fit within the knock and talk framework; rather, it amounted to an investigatory entry of the back area of defendant's home that failed Fourth Amendment safeguards. *People v Galloway*, 259 Mich App 634; 675 NW2d 883 (2003).

Officers exceeded the scope of a knock and talk when officers were searching the curtilage of the home at the same that other officers approached and knocked on the front door. While the knocking officers may have been seeking consent to search the home, the other two officers were investigating, which is not ordinary citizen contact. *People v Wiktor*, unpublished per curiam opinion of the Court of Appeals, issued December 29, 2016 (Docket No. 333517).

Did officers "linger" or prolong the encounter after being asked to leave?

Officers exceeded the scope of a knock and talk procedure when they failed to promptly leave the defendant's house after being asked to do so. The officers approached the front door of the defendant's residence, and the defendant let them in. The officers informed the defendant that they had information that marijuana was being stored at his address and asked permission to search. The defendant denied permission to search and asked the officers to leave, but the officers conducted a search anyway. The officers conduct exceeded a knock and talk, and the search violated the defendant's Fourth Amendment protections. *People v Bolduc*, 263 Mich App 430; 688 NW2d 316 (2004).

Was the knock and talk for a purpose other than obtaining consent to enter and search?

A knock and talk cannot be used as a "springboard" to a plain view exception to the warrant requirement; it is intended as a springboard to obtaining consent for a search. Police entry into defendant's back yard was an investigatory entry that failed Fourth Amendment safeguards, not a knock and talk. *People v Galloway*, 259 Mich App 634; 675 NW2d 883 (2003).

> **PRACTICE POINTER:** The purpose of a knock and talk is to obtain consent to search. A knock and talk is not justified if it is used for some other purpose, such as finding items in plain (or open) view.

Did the person who responded feel free to end the encounter?

There was no indication that the defendant felt coerced or otherwise unfree to end the encounter with the police in his yard. Although it was uncertain what level of consent the defendant gave during the encounter, the officers stopped their search

when the defendant said something to the effect of, "Wait, wait, just a minute." *People v Frohriep*, 247 Mich App 692; 637 NW2d 562 (2001).

The defendant did not feel free to end the encounter during a knock and talk. The officers' continued questioning of the defendant after he asked them to leave was inherently coercive. By failing to leave when asked to do so, the officers suggested they were in control of the situation and would not accept the defendant's exercise of his right to preclude them from further activity in his home. *People v Bolduc*, 263 Mich App 430; 688 NW2d 316 (2004).

Did officers identify themselves as officers?

A Court of Appeals panel ruled that a knock and talk and subsequent search did not violate the Fourth Amendment even though officers did not initially identify themselves. The detectives conducting the knock and talk were not in uniform, and their weapons were not initially displayed. One of the detectives wore a shirt embroidered with the logo of a window and door company. When the defendant asked who was at the door, one of the officers identified himself only as "Paul." When the defendant opened the door, the detective asked him, "Can I come in and talk to you a minute?" The defendant responded affirmatively, and the officers entered the vestibule of the residence. At this point the detectives identified themselves as police officers investigating possible methamphetamine production at the residence. The panel observed that, under *Frohriep*, proper a knock and announce requires officers to identify themselves as such. But, the panel reasoned, *Frohriep* did not specifically indicate at what point when initiating contact with a citizen that police must identify themselves. The encounter was a proper knock and talk and, accordingly, constitutional concerns were not implicated. *People v Gallup*, unpublished per curiam opinion of the Court of Appeals, issued June 17, 2008 (Docket No. 276276).

WAS THERE A SEIZURE?

CHAPTER 27: SEIZURE – INVESTIGATORY (*Terry*) STOP

Snapshot: An officer may make an **investigatory stop** of an individual if the officer has **reasonable suspicion** that the individual is involved in **criminal activity**. The stop is proper **only so long as necessary** to confirm or dispel the investigating officer's suspicions **unless** new information creates **new suspicion**. An officer's reasonableness in making or continuing an investigatory stop is reviewed under the totality of the circumstances.

An officer may **frisk** a detainee for weapons during a *Terry* stop if the officer **reasonably believes** the detainee is **armed**. A **frisk for contraband is not allowed**, but if an officer feels an object that the officer immediately has probable cause to believe is contraband, the officer may seize the contraband.

KEY QUESTIONS

- Did the officer have reasonable suspicion of criminal activity at the time of the stop?
  - Was reasonable suspicion based on a tip?
- Did officers exceed the scope of the stop?
  - Did the stop last longer than necessary to dispel or confirm suspicion?
  - Did officers use excessive force in effecting the stop?
- Was the detainee a student?
- Did officers conduct a frisk?
  - Did officers have reasonable suspicion to believe that the detainee was armed?
  - Did the frisk go beyond what was necessary to discover weapons?
  - Did the weapons frisk give an officer probable cause to believe that an item was contraband by "plain feel"?

Generally

The Fourth Amendment applies to all seizures of a person, including brief detentions short of traditional arrest. *United States v Brignoni–Ponce*, 422 US 873; 95 S Ct 2574; 45 L Ed 2d 607 (1975).

A police officer may make a brief investigatory stop (a seizure) of an individual if the officer has reasonable suspicion, based on articulable and particularized facts, that the individual has been, is, or is about to be involved in criminal activity. See *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

A reasonable suspicion is satisfied by a likelihood of criminal activity less than probable cause and falls considerably short of satisfying a preponderance of the evidence standard. If an officer possesses a particularized and objective basis for suspecting a particular person based on specific and articulable facts, he may conduct a *Terry* stop. *King v United States*, 917 F3d 409 (CA 6, 2019).

To establish reasonable suspicion, an officer must be able to articulate more than an "inchoate and unparticularized suspicion or hunch" of criminal activity. *Illinois v Wardlow*, 528 US 119; 120 S Ct 673; 145 L Ed 2d 570 (2000).

The totality of the circumstances must be considered in determining whether an officer had reasonable suspicion for a legal *Terry* stop. *United States v Sokolow*, 490 US 1; 109 S Ct 1581; 104 L Ed 2d 1 (1989).

The determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior. *Illinois v Wardlow*, 528 US 119; 120 S Ct 673; 145 L Ed 2d 570 (2000).

The scope of a *Terry* stop must be carefully tailored to its underlying justification. *Florida v Royer*, 460 US 491; 103 S Ct 1319; 75 L Ed 2d 229 (1983).

A valid investigatory stop must be justified at its inception and must be reasonably related in scope to the circumstances that justified police interference with a person's security. *People v Champion*, 452 Mich 92; 549 NW2d 849 (1996).

A *Terry* stop must be temporary and last no longer than necessary to effectuate the purpose of the stop. *Florida v Royer*, 460 US 491; 103 S Ct 1319; 75 L Ed 2d 229 (1983).

A detention during a Terry stop cannot continue for an excessive period of time or resemble a traditional arrest. *Hiibel v Sixth Judicial Dist Court of Nevada, Humboldt Co*, 542 US 177; 124 S Ct 2451; 159 L Ed 2d 292 (2004).

The investigatory methods employed during a *Terry* stop should be the "least intrusive means reasonably available to verify or dispel the officer's suspicion" in a short period of time. *Florida v Royer*, 460 US 491; 103 S Ct 1319; 75 L Ed 2d 229 (1983).

Terry stops are not limited to investigating ongoing crimes. A *Terry* stop may be made to investigate a suspicion that a person was involved in or is wanted in connection with a completed felony. *United States v Hensley*, 469 US 221; 105 S Ct 675; 83 L Ed 2d 604 (1985).

"A refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure." *Florida v Bostick*, 501 US 429; 111 S Ct 2382; 115 L Ed 2d 389 (1991).

An officer may pat-down (or frisk) an individual during a *Terry* stop if the officer reasonably believes or suspects that the defendant is armed; a reasonable belief that an individual has contraband is not sufficient to support a frisk during a *Terry* stop. *Ybarra v Illinois*, 444 US 85; 100 S Ct 338; 62 L Ed 2d 238 (1979).

Non-threatening contraband discovered by "plain feel" during a *Terry* protective weapons frisk is admissible as long as the frisk does not exceed its stated purpose. *Minnesota v Dickerson*, 508 US 366; 113 S Ct 2130; 124 L Ed 2d 334 (1993).

Did the officer have reasonable suspicion of criminal activity at the time of the stop?

> **PRACTICE POINTER:** Factors that can support reasonable suspicion include presence in a high crime area, evasive or furtive behavior, suspect descriptions, an informant's tip, and unprovoked flight. If flight is provoked (by a threat of physical harm, for instance), it may be excluded as a factor.

> Many factors, such as those listed here, will not support reasonable suspicion alone, but may support it together under the totality of the circumstances. Because review is under the totality of the circumstances, reasonable suspicion is determined on a case by case basis, and the same set of factors may or may not support reasonable suspicion depending on the circumstances.

An officer had reasonable suspicion for an investigatory *Terry* stop of the defendant in an area known for heavy narcotics trafficking when the defendant looked in the direction of officers and fled. An individual's presence in a high crime area is not enough alone to support a reasonable, particularized suspicion, but it may be a relevant fact in a *Terry* analysis. Likewise, flight alone is generally not enough to support an investigatory stop, but nervous, evasive behavior is a pertinent factor in determining reasonable suspicion: flight "is not necessarily indicative of wrongdoing, but it is certainly suggestive of such." Together, the defendant's unprovoked flight at the sight of officers in a high crime area established the officer's reasonable suspicion to stop and frisk the defendant. *Illinois v Wardlow*, 528 US 119; 120 S Ct 673; 145 L Ed 2d 570 (2000).

Officers had reasonable suspicion (based on a police profile) that the defendant was a drug courier when they stopped him for investigation as he was leaving an airport. The defendant appeared very nervous and was looking all around the waiting area. Further, the defendant purchased his $2,100 airplane tickets with cash from a large roll of $20 bills, used an alias for his ticket purchase, and arranged for a round trip flight from Hawaii to Miami – a 20-hour flight – with only a 48-hour stay in Miami in July. None of these factors alone was enough to raise a reasonable suspicion, but together they were. The fact that these factors were reflected in a police "courier profile" did not make the stop unreasonable. *United States v Sokolow*, 490 US 1; 109 S Ct 1581; 104 L Ed 2d 1 (1989).

Officers had reasonable suspicion for a *Terry* stop based on a "wanted flyer" issued by another police department. If a flyer has been issued based on articulable facts establishing a reasonable suspicion that a wanted person has committed an offense, then officers may reasonably rely on the flyer to make an investigatory stop to check identification, to pose questions to the person, or to detain the person briefly while attempting to obtain further information. *United States v Hensley*, 469 US 221; 105 S Ct 675; 83 L Ed 2d 604 (1985).

Officers had reasonable suspicion for an investigatory *Terry* stop when the defendant fled in response to law enforcement presence. The encounter was in a high crime area, and the defendant grabbed the right front pocket of his shorts as he fled, giving officers a belief that he possibly had contraband. And the defendant's flight was unprovoked. While there are situations in which flight is provoked (for instance putting a defendant in fear of physical harm) and thus cannot justify a

Terry stop, that was not the case here; the officers used a tactic designed to prevent flight when they approached the defendant. *United States v Jeter*, 721 F3d 746 (CA 6, 2013).

Police officers had reasonable suspicion to initiate a *Terry* stop of a suspect sitting in the passenger seat of a parked car in a city-owned parking lot at 1:15 am; the lot had recent high-crime history, the bar next to the lot regularly conducted pat-downs of its patrons, a city ordinance made it a crime for someone to be in parking lot without having business at adjacent establishments, and officers watched the suspect for a minute and a half and observed that he appeared to be going nowhere. *United States v Young*, 707 F3d 598 (CA 6, 2012).

Officer had reasonable suspicion to make an investigatory stop. The defendant was in a high-crime area when the officer engaged him in conversation. When the officer initiated a LEIN check, the defendant immediately began to act nervously, the defendant attempted to walk away from the officer (who still had the defendant's identification card), and although the defendant did not live in the area, various people invited him into their homes. Presence in a high-crime area, nervous or evasive behavior, and unprovoked flight are all pertinent factors in determining reasonable suspicion. And an experienced officer could infer that bystanders were inviting the defendant into their homes because they had reason to know that the defendant desired to avoid further police scrutiny. *People v Jenkins*, 472 Mich 26; 691 NW2d 759 (2005).

Officers did not have reasonable suspicion that the defendant/plaintiff was the person the officers suspected in a home invasion. The physical description of the suspect lacked any defining characteristics and a picture that showed the suspect's face was seven years old. The defendant was stopped while walking in the afternoon in a neighborhood where the suspect was known to buy soft drinks in the afternoon, but the defendant did not buy a soft drink. Together, these factors could not have provided a particularized and objective basis for suspecting the defendant because they could describe any number of people walking in the neighborhood where the defendant was walking. *King v United States*, 917 F3d 409 (CA 6, 2019).

Plain-clothes officers did not have reasonable suspicion based on particularized facts for an investigatory stop of the defendant who was present on the street late at night in a high-crime neighborhood after he had just left a building where police had made a number of arrests for narcotics and weapons offenses, attempted to conceal a small paper bag, and fled from undercover officers in an unmarked car. These factors only created a generalized suspicion, not a particularized one. *People v Shabaz*, 424 Mich 42; 378 NW2d 451 (1985).

Officer lacked reasonable suspicion to detain the defendant on a bus where the only facts the officer could state to support the detention were that the defendant was

seated sideways in his seat and was watching people enter the bus. These actions were consistent with innocent travel and any degree of suspicion that might attach to them was too minimal to support an investigatory detention. *People v Bloxson*, 205 Mich App 236; 517 NW2d 563 (1994).

Officers lacked reasonable suspicion to stop the defendant merely because they observed a bulge in his pocket. The defendant was walking at a normal pace toward a gas station door. The bulge in his pocket could have been a cell phone, a wallet, or store purchases rather than a gun. *United States v Davis*, 554 Fed Appx 485 (CA 6, 2014).

Was reasonable suspicion based on a tip?

An anonymous tip that the defendant was at a gas station waving a gun provided reasonable suspicion for the officers to briefly detain defendant. The tipster indicated that he had personally observed an individual waving an "Uzi-type" gun at a specific location approximately a mile away and had just left that location. The tipster also described the make, model, and color of the suspect's vehicle. The descriptive information was detailed, and the police corroborated it in less than five minutes. *People v Horton*, 283 Mich App 105; 767 NW2d 672 (2009).

Officer had reasonable suspicion to justify an investigatory stop based on information received from a confidential informant. The informant had provided accurate information in at least three successful drug-buy operations. Officers went to the location where the informant told them the defendant would be and observed the defendant and the informant go behind a building for a short period of time, reappear, and go their separate ways. *People v Dunbar*, 264 Mich App 240; 690 NW2d 476 (2004), overruled in part on other grounds by *People v Jackson*, 483 Mich 271 (2009).

An anonymous tip that the defendant had a gun did not establish reasonable suspicion for a *Terry* investigatory stop. Police received an anonymous tip that a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a concealed firearm. Police officers went to the bus stop, saw defendant (who matched the description), frisked him, and seized a gun from his pocket. Apart from the tip, the officers had no reason to suspect any illegal conduct. The tip lacked sufficient indicia of reliability; it was a "bare report" from an unaccountable informant who gave no explanation of how he knew about the gun. The fact that officers ultimately discovered a gun on the defendant did not make the stop reasonable; the reasonableness of official suspicion is measured by what the officers knew at the time of the stop. Further, there is no "firearm exception" modifying the *Terry* analysis. *Florida v JL*, 529 US 266; 120 S Ct 1375; 146 L Ed 2d 254 (2000).

Did officers exceed the scope of the stop?

An officer's request for identification was reasonably related to the justified *Terry* stop. The officer was responding to a report of an assault taking place in a vehicle. The officer encountered the defendant standing outside a vehicle that met the description in the report and repeatedly asked the defendant for identification (while the defendant repeatedly refused). The Court reasoned that obtaining a suspect's name during a *Terry* stop serves important governmental interests, including police officer's need to know whom they are dealing with in domestic violence disputes. But, after finding that the defendant's arrest during the *Terry* stop for violating a state "stop and identify" statute was constitutional, the Court opined that the "an officer may not arrest a suspect for failure to identify himself if the request for identification is not reasonably related to the circumstances justifying the stop." *Hiibel v Sixth Judicial Dist Court of Nevada, Humboldt Co*, 542 US 177; 124 S Ct 2451; 159 L Ed 2d 292 (2004).

> **PRACTICE POINTER:** Suspicion based on a failure to provide identification might not be reasonable if the governmental interests identified *Hiibel* are not implicated. (For example, the *Hiibel* Court emphasized that the officer was investigating a domestic assault report where information about the nature of relationships is of great importance.) Further, *Hiibel* does not provide probable cause for arrest when a person refuses to provide identification in Michigan because Michigan does not have a statute comparable to Nevada's "stop and identify" law. See *People v Barrera*, unpublished per curiam opinion of the Court of Appeals, issued January 8, 2019 (Docket No. 338762).

The defendant's 16-hour detention did not unreasonably prolong the stop or otherwise exceed the scope of the stop where the defendant refused less intrusive means to resolve suspicion. Border patrol officers had reasonable suspicion that the defendant was smuggling drugs in her alimentary canal. During the 16-hour delay in getting a court order for a rectal examination, the officers offered the defendant the options of taking an x-ray or making a monitored bowel movement, both of which the defendant refused. The detention was not unreasonably long, in part, because it took place at the border. The officers held the defendant only as long as necessary for bodily processes to dispel their suspicion that they would introduce a harmful agent into this country. *United States v Montoya de Hernandez*, 473 US 531; 105 S Ct 3304; 87 L Ed 2d 381 (1985).

A warrant check on the defendant who was stopped for suspicion of a trespass did not exceed the permissible scope of a *Terry* stop, even though the warrant check was unrelated to the crime suspected. A warrant check may help clear a person's name or may give the officers important information about the suspect. *United States v Young*, 707 F3d 598 (CA 6, 2012).

Transporting a suspect to a police station and detaining the suspect there for purposes of obtaining fingerprints exceeds the scope of a *Terry* stop. Although a *Terry* stop may include a brief detention in the field for the purpose of fingerprinting based only on reasonable suspicion, "the involuntary removal of a suspect from his home to a police station and his detention there for investigatory purposes, whether for interrogation or fingerprinting, absent probable cause or judicial authorization" violates the Fourth Amendment.

> **PRACTICE POINTER:** Transporting a person from the point of the initial detention will almost always transform an investigative stop into an arrest (for which probable cause is required). See also *United States v Heath*, 259 F3d 522 (CA 6, 2001), Seizure – Investigatory Stop – Vehicle, Chapter 28.

Detaining a suspect in a small police room in an airport, retaining his ticket and driver's license, and indicating that he was in no way free to leave exceeded the scope of a *Terry* stop. Officers had reasonable suspicion for the initial *Terry* stop of a person in an airport whom they suspected was transporting drugs, but their investigation went beyond that allowed by mere suspicion; police officers may not seek to verify their suspicions by means that approach the conditions of arrest, as happened here. A seizure or detention on less than probable cause must be temporary and last no longer than necessary to effectuate the purpose of the stop. Likewise, the investigatory methods employed should be the "least intrusive means reasonably available to verify or dispel the officer's suspicion" in a short period of time. *Florida v Royer*, 460 US 491; 103 S Ct 1319; 75 L Ed 2d 229 (1983).

The 90-minute detention of a suspect's luggage at an airport exceeded the scope of a *Terry* stop on length alone and made the stop unreasonable. The detention was not brief or minimally intrusive and, thus, not justifiable on reasonable suspicion. Further, the officers did not diligently pursue their investigation through the stop and did not use the least intrusive means to investigate their suspicions; the officers knew the time of the suspect's arrival at the airport and could have provided for more efficient (and less intrusive) means to investigate. At any rate, on the length of the detention alone, it "went beyond the narrow authority possessed by police to detain briefly luggage reasonably suspected to contain narcotics." *United States v Place*, 462 US 696; 103 S Ct 2637; 77 L Ed 2d 110 (1983).

The detention of the defendant was an arrest, not an investigatory stop based on reasonable suspicion. On encountering the defendant, an officer told defendant, "[Y]ou have to stop. You are under arrest." The officer did not detain the defendant to merely conduct an investigatory stop. *People v Maggit*, 319 Mich App 675; 903 NW2d 868 (2017).

Officers did not use the least intrusive means of detention when they held the defendant for three hours in an unventilated police car in 90-degree heat. Officers

could have rolled down the windows or used the car's ventilation system to minimize the defendant's discomfort. The detention was a violation of the Fourth Amendment prohibition on unreasonable searches and seizures. *Burchett v Kiefer*, 310 F3d 937 (CA 6, 2002).

Was the detainee a student?

- See Search – Warrant Exceptions – Special Needs – Schools, Chapter 20.

A school official (such as a principal) is a state officer during school hours for Fourth Amendment purposes. *New Jersey v TLO*, 469 US 325; 105 S Ct 733; 83 L Ed 2d 720 (1985).

School administrators may search a student "if the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *Safford Unified Sch Dist No 1 v Redding*, 557 US 364; 129 S Ct 2633; 174 L Ed 2d 354 (2009).

A school administrator had reasonable suspicion to search the defendant's vehicle on school grounds based on an anonymous tip that the student-defendant was selling drugs at the school. The tip was detailed, internally consistent, and corroborated by the informant's description of the vehicle that was owned by the defendant. *People v Perreault*, 486 Mich 914; 781 NW2d 796 (2010) (adopting the reasoning of the Court of Appeals dissenting opinion).

A school administrator had reasonable suspicion that a student was distributing drugs at school, but the strip-search of the student exceeded the permissible scope of the search. The administrator knew that the nature of drugs was of limited threat, the administrator had no reason to suspect that large amounts of drugs were being passed around, and nothing suggested that the student was hiding drugs in her underwear. *Safford Unified Sch Dist No 1 v Redding*, 557 US 364; 129 S Ct 2633; 174 L Ed 2d 354 (2009).

Did officers conduct a frisk?

An officer may frisk an individual during an investigative stop if the officer reasonably believes or suspects that the defendant is armed; a reasonable belief that an individual has contraband is not sufficient to support a frisk during a *Terry* stop. *Ybarra v Illinois*, 444 US 85; 100 S Ct 338; 62 L Ed 2d 238 (1979).

Whether a frisk is constitutional is determined by the totality of the circumstances in a given case. *People v Custer*, 465 Mich 319; 630 NW2d 870 (2001).

The officer must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous. *King v United States*, 917 F3d 409 (CA 6, 2019).

Terry does not require the officer to "be absolutely certain that the individual is armed; the issue is whether a reasonably prudent [person] in the circumstances would be warranted in the belief that [the person's] safety or that of others was in danger." *United States v Wilson*, 506 F3d 488 (CA 6, 2007).

If a protective pat-down goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry*. *Minnesota v Dickerson*, 508 US 366; 113 S Ct 2130; 124 L Ed 2d 334 (1993).

Did officers have reasonable suspicion to believe that the detainee was armed?

An officer's frisk of the defendant who was detained on reasonable suspicion while sitting in a car in a parking lot next to a bar that regularly conducted patron pat-downs was reasonable. Because the bar conducted pat-downs, a person in possession of a gun was more likely to remain outside in the parking lot. *United States v Young*, 707 F3d 598 (CA 6, 2012).

The pat-down search of the defendant was justified by the officer's reasonable belief that the defendant might be armed. The pat-down took place while officers were investigating what appeared to be a drug deal. The officer testified that, because of his twenty-three years of experience and training as an officer, he knew that weapons are often involved when drugs are involved. The officer's subjective belief that he might also find drugs was not material to the reasonable suspicion inquiry. *People v Custer*, 465 Mich 319; 630 NW2d 870 (2001).

An officer's pat-down search of the defendant was reasonable; the defendant was known by police to have previous drugs and weapons charges, and he refused to remove his hands from inside the front of his sweatpants. *People v Champion*, 452 Mich 92; 549 NW2d 849 (1996).

Officers reasonably believed that the defendant was armed and dangerous. The defendant's appearance was very similar to that of prisoner who had escaped from jail. The escapee had overcome a guard in making his escape. The officer had information that the escapee was armed. The limited pat-down search was justified under *Terry*. *People v Bandy*, 105 Mich App 240; 306 NW2d 465 (1981).

An officer did not possess reasonable suspicion to frisk the defendant. The defendant was driving a vehicle that had been linked to drug trafficking, but there was no other connection between the defendant and any criminal activity. The officer who made the stop was acting on a report from a detective who "didn't know

who was in the vehicle, didn't know anything about any weapons but basically the group was involved in meth." The officer did not have reasonable suspicion that the defendant was armed or dangerous. *United States v Noble*, 762 F3d 509 (CA 6, 2014).

An officer had no reason to believe that the defendant was armed or dangerous when he frisked the defendant. The defendant had been a passenger in a vehicle that was stopped because the occupants were not wearing seatbelts, a minor infraction that did not suggest anyone in the vehicle was potentially armed. One of the occupants admitted that he had a prior weapons conviction, and the defendant appeared nervous, but these facts were not enough to justify a pat-down search to protect officers from an armed and dangerous suspect. The frisk exceeded the scope of *Terry* and was invalid. *United States v Wilson*, 506 F3d 488 (CA 6, 2007).

An officer did not have the reasonable suspicion necessary to conduct a frisk during an investigatory stop when he took a paper towel from the defendant's pocket. A frisk is only permissible to search a suspect for dangerous weapons. The officer testified that he did not expect to remove anything dangerous from the defendant's pocket. The frisk was not justified by *Terry* and was illegal. *People v LaGrange*, 40 Mich App 342; 198 NW2d 736 (1972).

Did the frisk go beyond what was necessary to discover weapons?

A protective pat-down went beyond what was necessary to determine if the defendant was armed when an officer removed the defendant's wallet from his pocket. The officer felt an object that felt like a wallet, the object looked like a wallet, it was in a location where a wallet would be expected to be, and there was no suspicion that the object was anything other than a wallet. The search exceeded the scope of *Terry* and was invalid. *King v United States*, 917 F3d 409 (CA 6, 2019).

An officer's seizure of the defendant's pager during a *Terry* stop and frisk was unlawful. An officer may frisk a suspect for weapons and seize nonthreatening contraband that is immediately apparent by plain feel. But there was no evidence that the officer mistook the pager for a weapon and a pager is not contraband. *United States v Garcia*, 496 F3d 495 (CA 6, 2007).

An officer exceeded the scope of a *Terry* frisk when he not only patted-down but also searched the defendant and later testified that he was not fearful for his safety during the stop of the defendant. *People v Davenport*, 99 Mich App 687; 299 NW2d 368 (1980).

Did the weapons frisk give an officer probable cause to believe that an item was contraband by "plain feel"?

Non-threatening contraband discovered by "plain feel" during a *Terry* protective weapons frisk is admissible as long as the frisk does not exceed its stated purpose. *Minnesota v Dickerson*, 508 US 366; 113 S Ct 2130; 124 L Ed 2d 334 (1993).

"If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context." *Minnesota v Dickerson*, 508 US 366; 113 S Ct 2130; 124 L Ed 2d 334 (1993).

- See Search – Plain View/Open View, Chapter 7.

The plain feel (or plain touch) doctrine allows the warrantless seizure of an object felt during a legitimate frisk for weapons when the identity of the object is immediately apparent and the officer has probable cause to believe that the object is contraband. *People v Champion*, 452 Mich 92; 549 NW2d 849 (1996).

Whether an officer had probable cause to believe that an object was contraband is determined under the totality of the circumstances. *People v Champion*, 452 Mich 92; 549 NW2d 849 (1996).

Probable cause does not require that an officer *knows* that certain items are contraband. Rather, probable cause is satisfied if the facts available to the officer would warrant a man of reasonable caution in the belief that certain items may be contraband. Probable cause does not require a showing that the belief is correct or more likely true than false. *People v Custer*, 465 Mich 319; 630 NW2d 870 (2001).

Officer had probable cause to believe that the 2- by 3-inch object he felt in the defendant's pocket was a card of blotter acid because he had already discovered marijuana and a large amount of money, he knew that blotter acid was often contained on sheets of carboard, and he knew that cards of blotter acid were typically capable of fitting a pants pocket like that he felt on the defendant. It did not matter that the officer anticipated finding drugs during the frisk; the proper focus in analyzing a frisk is on the officer's actions, not the officer's thoughts. It was also irrelevant that the object turned out to be photographs, not blotter acid. Probable cause does not require that an officer's belief turned out to be correct. *People v Custer*, 465 Mich 319; 630 NW2d 870 (2001).

An officer immediately recognized that the item he felt in the defendant's groin area was a pill bottle; he did not further manipulate or grope the object in order to

determine its incriminating character. The officer had probable cause to believe that the pill bottle contained contraband because, among several other factors, the officer knew that illegal drugs were frequently carried in such a manner. The seizure of the pill bottle was lawful under the plain feel doctrine. If the pill bottle had been in the defendant's jacket pocket, then the result might have been different. *People v Champion*, 452 Mich 92; 549 NW2d 849 (1996).

> **PRACTICE POINTER:** A pill bottle in a jacket pocket or other ordinary place in which to carry it will probably not have an immediately discernable contraband character.

Officer did not immediately recognize that a small lump in the defendant's jacket was contraband (crack cocaine). Rather, the officer had to conduct a further search by "squeezing, sliding and otherwise manipulating the contents of the defendant's pocket," which the officer already knew did not contain a weapon. The officer overstepped the bounds of the "strictly circumscribed" *Terry* search for weapons. The further search of the defendant's pocket was constitutionally invalid. *Minnesota v Dickerson*, 508 US 366; 113 S Ct 2130; 124 L Ed 2d 334 (1993).

> **PRACTICE POINTER:** If any manipulation is required to determine whether an item is contraband during a frisk, the seizure of the item is not justified by the plain feel doctrine.

The identity of a lumpy item in the defendant's jacket was not immediately apparent. Rather, the officer did not know what the item was until he removed it from the defendant's pocket. On this basis alone, the seizure did not come within the plain feel exception. Further, the officer lacked probable cause to believe the item was contraband. The area where the officer stopped the defendant was not a high crime area, the defendant did not attempt to flee, there was no evidence of drug activity or a prior drug conviction, and the item was not stored in the defendant's person in an unusual place. The search of the brown bag in the defendant's pocket was unconstitutional. *People v Massey*, 220 Mich App 56; 558 NW2d 253 (1996).

The tactile examination of a bus passenger's carry-on luggage to determine its contents was similar to a *Terry* protective weapons frisk because, even though the bag was not part of the defendant's person, travelers are particularly concerned about their carry-on luggage and they generally use to for personal items they prefer to have close to hand. The exploratory manipulation of the defendant's bag violated the Fourth Amendment. *Bond v United States*, 529 US 334; 120 S Ct 1462; 146 L Ed 2d 365 (2000).

WAS THERE A SEIZURE?

CHAPTER 28: SEIZURE – INVESTIGATORY (*Terry*) STOP - VEHICLE

Snapshot: An officer may make an **investigatory stop of a vehicle** if the officer has **reasonable suspicion** that one of the **occupants** is involved in **criminal activity**. The stop is a seizure for Fourth Amendment purposes, but **probable cause is not required** because a proper investigatory stop is brief and limited in scope; it does not amount to an arrest. The stop is proper **only so long as necessary to confirm or dispel** the investigating officer's **suspicions** unless new information creates new suspicion. An officer's reasonableness in making or continuing an investigatory stop is reviewed under the totality of the circumstances.

A police officer may stop a vehicle if the officer possesses either **probable cause** of a civil infraction or **reasonable suspicion** of criminal activity. *United States v Noble*, 762 F3d 509 (CA 6, 2014).

- This chapter addresses an investigatory (*Terry*) vehicle stop based on reasonable suspicion of criminal activity.

- "Traffic stops" (requiring probable cause of a civil infraction) are addressed in Chapter 29.

PRACTICE POINTER: The principles that apply to the two types of vehicle stops (investigatory and traffic) are closely related, and the distinction between the two is not precisely followed in case law. When a case involves a vehicle stop, both forms of seizure should be considered.

KEY QUESTIONS

- Did the officer have reasonable suspicion of criminal activity at the time of the stop?
    - Was reasonable suspicion based on a tip?
    - Was reasonable suspicion based on stale information?
    - Was reasonable suspicion based on a mistake of law?
- Did officers exceed the scope of the stop?
    - Did the detention last longer than necessary to dispel or confirm suspicion?
    - Did officers use excessive force in effecting the stop?
    - Were the investigatory techniques applied reasonably related to the purpose for the stop?

Generally

The Fourth Amendment applies to all seizures of a person, including brief detentions short of traditional arrest. *United States v Brignoni–Ponce*, 422 US 873; 95 S Ct 2574; 45 L Ed 2d 607 (1975).

PRACTICE POINTER: A vehicle may be subjected to a brief investigatory stop under *Terry*. The same principles that apply to the *Terry* stop of an individual apply to investigatory vehicle stops. See Investigatory (*Terry*) Stop, Chapter 27.

An officer may make a brief investigatory stop (a seizure) of a vehicle and its occupants if the officer has reasonable suspicion, based on articulable and particularized facts, of criminal activity. *People v Oliver*, 464 Mich 184; 627 NW2d 297 (2001); *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

The reasonableness of an officer's suspicion is determined case by case based on the totality of the circumstances. *People v LoCicero*, 453 Mich 496; 556 NW2d 498 (1996).

In determining reasonableness, the court must consider whether the facts known to the officer at the time of the stop would warrant an officer of reasonable precaution to suspect criminal activity. *People v Steele*, 292 Mich App 308; 806 NW2d 753 (2011).

In determining whether the totality of the circumstances provide reasonable suspicion to support an investigatory stop, the circumstances must be viewed as understood and interpreted by law enforcement officers, not legal scholars. *People v Oliver*, 464 Mich 184; 627 NW2d 297 (2001).

Under the totality of the circumstances, an officer may make inferences based on cumulative information and due weight must be given to the investigating officer's specialized training and familiarity with local customs. It is error for a reviewing court to examine the factors that the officer relied on in isolation or to disregard factors that, in isolation, were susceptible to innocent explanation. *United States v Arvizu*, 534 US 266; 122 S Ct 744; 151 L Ed 2d 740 (2002).

The officer must, however, be able to articulate something more than an inchoate and unparticularized suspicion or hunch. *United States v Gross*, 662 F3d 393 (CA 6, 2011).

The reasonableness of a *Terry* seizure depends on whether it was justified at its inception and whether it was reasonably related in scope to the circumstances that justified the interference in the first place. *People v Williams*, 472 Mich 308; 696 NW2d 636 (2005).

An investigatory stop of a vehicle and subsequent inquiry must be reasonably related in scope to the justification for their initiation. *United States v Noble*, 762 F3d 509 (CA 6, 2014).

The ongoing legality of the detention after the initial stop must be reasonable and depends on "the evolving circumstances with which the officer is faced." *People v Dillon*, 296 Mich App 506; 822 NW2d 611 (2012).

The permissible length of an investigatory stop is determined by reference to the purposes of the stop, the time reasonably needed to effectuate those purposes, the diligence of the officers involved, and the investigatory means at their disposal. *United States v Sharpe*, 470 US 675; 105 S Ct 1568; 84 L Ed 2d 605 (1985).

Reasonable suspicion for an investigatory stop need not rule out the possibility of innocent conduct. *Navarette v California*, 572 US 393; 134 S Ct 1683; 188 L Ed 2d 680 (2014).

Did the officer have reasonable suspicion of criminal activity at the time of the stop?

An officer had reasonable suspicion, based on the defendant's route among other reasons, for an investigatory stop of the defendant's minivan. The defendant was traveling on a little-used backroad that was known to be used by smugglers to avoid a checkpoint on the main road. The stop took place at a time when officers would regularly be leaving the backroads at the end of their shifts. The minivan turned away from a recreational area, diminishing the likelihood that the defendant and the other occupants were out for a picnic. And children in the minivan waved mechanically at the officer's vehicle for a full four to five minutes. *United States v Arvizu*, 534 US 266; 122 S Ct 744; 151 L Ed 2d 740 (2002).

Officers had reasonable suspicion to stop the defendant in his truck as he arrived at his residence based on prior drug transactions that had been traced to the defendant and information that a transaction was set to occur that day. *United States v Mooneyham*, 473 F3d 280 (CA 6, 2007).

An officer had reasonable suspicion of ongoing criminal activity sufficient to warrant an investigatory stop of the defendant because the officer had seen the defendant at a suspected drug location, the officer knew the defendant had a prior drug trafficking conviction, a reliable source told the officer that the defendant was currently involved in drug trafficking, and the defendant used counter-surveillance techniques (circling the area and looking around a parking lot before entering a building). *United States v Heath*, 259 F3d 522 (CA 6, 2001).

An investigatory stop was based on reasonable suspicion that the car's occupants had committed a bank robbery. The officer believed, based on his experience, that the perpetrators of the robbery would have a getaway car. The robbery report stated that it was committed by two black males; the car was occupied by two black males and at least three occupants (presumably including the getaway driver). The car was leaving an apartment complex in the only direction the officer had not ruled out as an escape route. Further, each of the car's occupants declined to look at the officer's marked vehicle, which the officer found "unusual" in his experience. *People v Oliver*, 464 Mich 184; 627 NW2d 297 (2001).

Officers had reasonable suspicion for an investigatory stop of a vehicle in which the defendants were riding because the defendants had been observed stopping for four minutes at a house that two weeks earlier had been raided for selling cocaine, the house continued to operate as drug house as reported by a reliable informant, and 30 minutes earlier the house was the site of controlled buy. Officers are permitted to consider modes or patterns of operation of certain kinds of lawbreakers and draw inferences that may elude the untrained person. *People v Nelson*, 443 Mich 626; 505 NW2d 266 (1993).

Officers had reasonable suspicion for an investigatory stop of the defendant's red SUV because the officers had just apprehended an accomplice at a motel who had cocaine in her car in amounts that matched the amounts a buyer had ordered from the defendant, officers saw the accomplice leave defendant's house immediately before she drove to the motel with the drugs, and officers had reason to believe the defendant was in a red SUV. *People v Collins*, 298 Mich App 458; 828 NW2d 392 (2012).

An officer had reasonable suspicion to make an investigatory stop of the defendant in his vehicle because the officer had reliable information that the defendant had purchased a combination of methamphetamine precursors from one store. This information, together with the arresting officer's training and experience regarding manufacture of methamphetamine, formed a solid basis for reasonable suspicion of criminal activity. *People v Steele*, 292 Mich App 308; 806 NW2d 753 (2011).

An officer had reasonable suspicion for an investigatory stop of the defendant's vehicle because a computer check of the vehicle's license plate number revealed that the registered owner of the vehicle had two outstanding warrants. The officer did not observe any traffic violations or other suspicious activity, but a police officer may properly run a computer check of a license plate number in plain view even if no traffic violation is observed and there is no other information to suggest that a crime has been or is being committed. *People v Jones*, 260 Mich App 424; 678 NW2d 627 (2004).

An officer's investigatory stop of the defendant as he drove away from a car wash was based on reasonable suspicion of criminal activity. The officer observed a man using the change machine at a carwash after midnight. When the officer drove into the parking lot, the man entered a vehicle driven by the defendant, and the defendant drove off abruptly, leaving several dollars' worth of quarters in the change tray of the money changer. The defendant's car returned a few moments later, as if to check if the officer had left. After the officer stopped defendant's vehicle, he learned from another officer that the car wash owner had complained of theft from the changers. *People v Yeoman*, 218 Mich App 406; 554 NW2d 577 (1996).

Officer lacked reasonable suspicion for an investigatory stop of the defendant's car. Officers observed two vehicles leave a hotel parking lot and drive together to a movie theater parking lot, where a passenger in defendant's car got into the passenger seat of the other car, conversed with the driver of the other car for a few minutes, then got back into defendant's car, and the two vehicles drove away. The officer's "hunch" that a drug transaction was taking place was not enough to support an investigatory stop. *People v LoCicero*, 453 Mich 496; 556 NW2d 498 (1996).

Was reasonable suspicion based on a tip?

Officer had reasonable suspicion of drunk driving for an investigatory stop of the defendant's vehicle based on a 911 call tipping off officers that a pickup truck had just run the caller off the road. The tip was sufficiently reliable for purposes of reasonable suspicion because the caller described the truck's make, model, and license plate number. Officers located the truck 18 minutes after the 911 call, suggesting that the caller reported the incident soon after she was run off the road. The officers effecting the stop did not have to take time to observe the defendant's vehicle for signs of drunk driving because the tip was sufficient to support the stop. *Navarette v California*, 572 US 393; 134 S Ct 1683; 188 L Ed 2d 680 (2014).

An anonymous tip that the defendant was involved in drug trafficking was sufficiently reliable to give officers reasonable suspicion for an investigatory stop. The tip was reliable because, in part, the informant correctly predicted the defendant's future conduct, which demonstrated a "special familiarity" with the defendant's affairs, which in turn supported a reasonable belief that the caller had access to reliable information regarding the defendant's illegal activity. *Alabama v White*, 496 US 325; 110 S Ct 2412; 110 L Ed 2d 301 (1990).

An anonymous tip that the defendant was presently transporting drugs provided a sufficiently particularized suspicion of criminal activity to support the investigatory stop of the defendant's vehicle. The informant gave a sufficiently detailed description of the defendant's pickup and correctly predicted a street that the defendant would be driving on. The fact that the tip did not include the point of the defendant's departure did not make the tip unreliable. *People v Faucett*, 442 Mich 153; 499 NW2d 764 (1993).

An officer had reasonable suspicion for an investigatory stop of the defendant's vehicle based on a face-to-face tip from a driver who pointed to the defendant's vehicle directly in front of her vehicle and mouthed, "Almost hit me," as she was driving by the officer. The tip was clearly based on first-hand and nearly contemporaneous information. And the fact that the driver likely knew she could be identified by the officer and subjected to further police questioning also indicated that the tip was reliable. *People v Barbarich*, 291 Mich App 468; 807 NW2d 56 (2011).

A silent 911 hang-up call did not support reasonable suspicion for an investigatory stop of the defendant's vehicle merely because he was driving in the neighborhood from which the call originated. The call, which was analogous to an anonymous tip, lacked reliability. The 911 hang-up call did not provide a description of the defendant or his car and thus did not identify any determinate person. There was no follow-up call by a dispatcher or other information to support the stop. Further, there are many explanations for a 911 call, including dialing by mistake or making

a prank call. The information from the call was indeterminate, not specific, and, without corroboration or suspicious activity, the call was insufficient to justify the stop. *United States v Cohen*, 481 F3d 896 (CA 6, 2007).

Officers did not have reasonable suspicion to seize a vehicle and its occupants, including defendant, based on an anonymous tip that provided no more than a hunch that defendant would be in the car with his girlfriend and no more identification of the defendant other than that he was black. The officers lacked specific articulable facts tending to show that the person stopped was the person wanted in connection with a criminal investigation. *United States v Hudson*, 405 F3d 425 (CA 6, 2005).

Was reasonable suspicion based on stale information?

Information was not too stale to support an officer's reasonable suspicion for the investigatory stop of the defendant's vehicle, even though the stop was based on information the officer received three weeks before the stop that the defendant did not have a valid driver's license. There was no evidence that would have suggested to the officer that the defendant's ongoing offense had ceased during the period between the license check and the traffic stop. *United States v Sandridge*, 385 F3d 1032 (CA 6, 2004).

Information was not too stale to support an officer's reasonable suspicion for the investigatory stop of a vehicle in which the defendant was a passenger based on a LEIN check that revealed that the vehicle was uninsured, even though insurance information on LEIN is updated only twice a month and the information could have been as old as 16 days. The information was not too stale to support reasonable suspicion because driving without insurance is an "on-going infraction," so staleness is less of a concern than it would be for a crime that had already occurred. *People v Mazzie*, 326 Mich App 279; 926 NW2d 359 (2018).

Information was not tool stale to support an officer's reasonable suspicion for the investigatory stop of the defendant's vehicle, even though the stop was based on information the officer had obtained a week earlier that the defendant was driving with a suspended license. *People v Ward*, 73 Mich App 555; 252 NW2d 514 (1977).

> **PRACTICE POINTER:** Information supporting probable cause will probably not be considered stale if the information relates to an ongoing violation, such as driving without insurance or on a suspended license.

Was reasonable suspicion based on a mistake of law?

Officer had reasonable suspicion for an investigatory equipment stop, even though the stop was based on a mistake of law. The officer stopped the defendant's vehicle

because one of its brake lights was out, but the state statutes required only a single working brake light. The mistake of law was reasonable because other state statutes arguably required both lights to be operational. *Heien v North Carolina*, 574 US ___; 135 S Ct 530; 190 L Ed 2d 475 (2014).

- But see *People v Maggit*, 319 Mich App 675; 903 NW2d 868 (2017) (distinguishing *Heien* because the ordinance at issue was clear and unambiguous and officer's reliance on the ordinance to arrest the defendant was objectively unreasonable). Seizure – Arrest, Chapter 30.

An officer's stop of the defendant's vehicle because one of two tail lamps was inoperative was reasonable, even though the state statute required only one operative tail lamp. Another section of the statute arguably required all tail lamps to be operative. The stop was also lawful under MCL 257.683(2) ("police officer on reasonable grounds shown may stop a motor vehicle and inspect the motor vehicle"). *People v Williams*, 236 Mich App 610; 601 NW2d 138 (1999).

Did officers exceed the scope of the stop?

An officer may conduct a protective search of the passenger compartment of a car for weapons during an investigatory stop if the officer has reasonable suspicion based on specific and articulable facts that the suspect is dangerous and might gain immediate control of weapons. The scope of the protective search is limited to those areas where a weapon might be placed or hidden. The protective search of the passenger compartment of defendant's car was reasonable because the hour was late, the area was rural, the defendant appeared to be intoxicated, officers observed a large knife in the interior of the car, and the search was restricted to areas over which the defendant would generally have immediate control. *Michigan v Long*, 463 US 1032; 103 S Ct 3469; 77 L Ed 2d 1201 (1983).

The extension of a valid investigatory stop of the defendant's car was justified because the investigating officer saw an object being thrown out the front passenger window after the car was stopped and saw a syringe in the vicinity of where the object was thrown. *People v Dillon*, 296 Mich App 506; 822 NW2d 611 (2012).

Officers exceeded the scope of an investigatory stop when they continued the defendant's detention and transported him to an apartment building for further investigation after the initial search of the defendant and his vehicle did not reveal anything suspicious. Absent probable cause, which was lacking here, an investigatory stop must be confined to the site of the initial inquiry. *United States v Heath*, 259 F3d 522 (CA 6, 2001).

> **PRACTICE POINTER:** Transporting a person from the point of the initial detention will almost always transform an investigative stop into an arrest

(for which probable cause is required). See also *Hayes v Florida*, 470 US 811 (1985), Seizure – Investigatory (*Terry*) Stop, Chapter 27.

Did the detention last longer than necessary to dispel or confirm suspicion?

An investigatory stop can "mature" into an arrest if it occurs over an unreasonable period of time. *United States v Heath*, 259 F3d 522 (CA 6, 2001).

An investigatory stop may be unreasonable based on the length of the duration alone. *United States v Place*, 462 US 696; 103 S Ct 2637; 77 L Ed 2d 110 (1983).

The 20-minute detention of the defendant for an investigatory stop was reasonable because the officers diligently pursued the investigation during the stop and the delay resulted mainly from the defendant's evasive actions. There was no delay that was unnecessary to the investigation. *United States v Sharpe*, 470 US 675; 105 S Ct 1568; 84 L Ed 2d 605 (1985).

Officers' detention of the defendants for "a good ten minutes" (and probably longer) without reasonable suspicion went "well beyond the scope" of an investigatory stop. The officers observed the defendants running and then getting into a parked car in the early morning hours. The area was not a high crime area, and the officers did not have information of criminal activity in the area or any objective information connecting the defendants with a crime. Following that investigation, the officers received a radio report that a silent alarm had activated at a jewelry store down the street from where the defendants had been running. Even if the initial stop was valid (which was questionable), the continued detention was not. The practice of detaining a suspected criminal while looking for a crime is disapproved. *People v Bryant*, 135 Mich App 206; 353 NW2d 480 (1984).

PRACTICE POINTER: Discovering information connecting a person to a crime after unlawfully detaining the person does not sanitize the initial, unlawful detention.

Did officers use excessive force in effecting the stop?

The degree of force used by officers during an investigatory detention must be "reasonably related in scope to the situation at hand" and not "so intrusive as to constitute an arrest." *United States v Hardnett*, 804 F2d 353 (CA 6, 1986).

Approaching the defendant's vehicle with weapons drawn, frisking the defendant, and handcuffing him was not excessive force that would convert an investigatory stop into arrest because the defendant was suspected of carrying drugs and the investigating officers were entitled rely on their experience and training to conclude

that weapons are frequently used in drug transactions. The degree of force utilized was reasonable. *United States v Heath*, 259 F3d 522 (CA 6, 2001).

Were the investigatory techniques applied reasonably related to the purpose for the stop?

A dog sniff was reasonably related to the purpose of the investigatory stop. Officers reasonably suspected the occupants of the vehicle of drug trafficking, and the dog sniff was for detection of drugs. *United States v Garcia*, 496 F3d 495 (CA 6, 2007).

WAS THERE A SEIZURE?

CHAPTER 29: SEIZURE – TRAFFIC STOP

Snapshot: An officer may stop a vehicle if the officer has **probable cause** to believe that a **traffic or equipment violation** has occurred. The authority for a traffic ends when the purpose of the stop has been completed – usually when the officer issues a ticket or the vehicle is allowed to drive away. A traffic stop may be **extended** beyond its purpose only if an officer develops a **reasonable suspicion** of criminal activity.

A police officer may stop a vehicle if the officer possesses either **probable cause** of a civil infraction or **reasonable suspicion** of criminal activity. *United States v Noble*, 762 F3d 509 (CA 6, 2014).

- This chapter address "traffic stops" (requiring probable cause to believe a civil infraction has occurred) a civil infraction) an.

- Investigatory (*Terry*) vehicle stop based on reasonable suspicion of criminal activity are addressed in Chapter 28.

PRACTICE POINTER: The principles that apply to the two types of vehicle stops (investigatory and traffic) are closely related, and the distinction between the two is not precisely followed in case law. When a case involves a vehicle stop, both forms of seizure should be considered.

KEY QUESTIONS:

- Did the officers have probable cause to believe that the driver violated a traffic law?
- Did officers have reasonable suspicion to prolong the stop beyond the time necessary to address the suspected traffic violation?
- Did officers otherwise exceed the scope of a traffic stop?

Generally

"Stopping an automobile and detaining its occupants constitutes a 'seizure' within the meaning of the Fourth Amendment, even if the purpose of the stop is limited and the resulting detention is brief." *People v Williams*, 472 Mich 308; 696 NW2d 636 (2005). See also *Brendlin v California*, 551 US 249; 127 S Ct 2400; 168 L Ed 2d 132 (2007).

Probable cause to believe that a traffic or equipment violation has occurred justifies a stop of a vehicle. See *People v Davis*, 250 Mich App 357; 649 NW2d 94 (2002).

When there is probable cause to believe that a driver has violated a traffic law, it is constitutional to briefly detain the driver for purposes of addressing the violation. *Whren v United States*, 517 US 806; 116 S Ct 1769; 135 L Ed 2d 89 (1996).

Upon stopping a vehicle, a police officer may, as a matter of routine, detain the driver for a period sufficient to enable the officer to run a Law Enforcement Information Network (LEIN) check on the driver and the vehicle. *People v Williams*, 472 Mach 308; 696 NW2d 636 (2005).

An officer may ask reasonable questions during a valid traffic stop without violating the Fourth Amendment. In addition to asking for the necessary identification and paperwork, an officer may ask questions relating to the reason for the stop, including questions about the driver's destination and travel plans. *People v Williams*, 472 Mich 308; 696 NW2d 636 (2005).

An officer's questions regarding matters unrelated to the purpose of the traffic stop does not render the seizure unreasonable under the Fourth Amendment so long as the questioning does not measurably extend the duration of the stop. *Arizona v Johnson*, 555 US 323; 129 S Ct 781; 172 L Ed 2d 694 (2009).

A traffic stop is reasonable if there was probable cause to believe a traffic violation occurred regardless of the actual motivations of the individual officers involved or whether a "reasonable officer" would have been motivated to make the stop by a desire to enforce traffic laws. *Whren v United States*, 517 US 806; 116 S Ct 1769; 135 L Ed 2d 89 (1996).

The authority for a traffic-stop seizure ends "when tasks tied to the traffic infraction are—or reasonably should have been—completed." A traffic stop that exceeds the time needed to handle the matter for which the stop was made violates the Fourth Amendment's protection against unreasonable seizures. *Rodriguez v United States*, ___ US ___; 135 S Ct 1609; 191 L Ed 2d 492 (2015).

A traffic stop may be extended beyond its initial purpose if an officer develops a reasonable suspicion, based on articulable facts, that criminal activity is afoot. *People v Kavanaugh*, 320 Mich App 293; 907 NW2d 845 (2017).

Whether an officer has reasonable suspicion to extend a traffic stop is determined case by case on the basis of the totality of the facts and circumstances. *People v Kavanaugh*, 320 Mich App 293; 907 NW2d 845 (2017).

An officer may order the driver and any passengers out of a vehicle during a traffic stop. *Maryland v Wilson*, 519 US 408; 117 S Ct 882; 137 L Ed 2d 41 (1997).

Pulling alongside a parked vehicle, without more, is not a traffic stop because the vehicle is not moving; it is not a seizure for Fourth Amendment purposes. *People v Anthony*, ___ Mich App ___; ___ NW2d ___ (2019) (2019 WL 290026), see Search – Plain View/Open View, Chapter 7.

Did the officer have probable cause to believe that the driver violated a traffic law?

Officers had probable cause for a traffic stop based on the driver's failure to signal a turn. The stop was reasonable, even though the officers violated regulations limiting the authority of plainclothes officers in unmarked vehicles. The application of Fourth Amendment principles does not depend on local police policies. *Whren v United States*, 517 US 806; 116 S Ct 1769; 135 L Ed 2d 89 (1996).

Officer had probable cause to believe that the defendant had committed a traffic violation because the defendant's vehicle had tinted windows and it crossed a lane line without signaling. *United States v Noble*, 762 F3d 509 (CA 6, 2014).

An officer had probable cause for stopping the defendant because the defendant attached a towing ball on his truck that partially obstructed the view of the license

plate in violation of MCL 257.225(2). *People v Dunbar*, 499 Mich 60; 879 NW2d 229 (2016).

A traffic stop was reasonable because the vehicle's valid temporary paper license plate was not in a clearly visible position or in a clearly legible condition in violation of M.C.L. 257.225(2). *People v Simmons*, 316 Mich App 322; 894 NW2d 86 (2016).

An officer had probable cause for a traffic stop because defendant's view was obstructed by air fresheners dangling from the vehicle's rear-view mirror in violation of MCL 257.709(1)(c). The officer also observed the defendant's vehicle speeding and weaving before making the stop, and the officer's cruiser's dash-cam video confirmed his observations. *People v Davis*, 250 Mich App 357; 649 NW2d 94 (2002).

An officer did not have probable cause for a traffic stop for straddling two lanes. The vehicle straddled the lanes for a few seconds while changing lanes on a sharp incline where the highway changed from two to three lanes. The slow lane change could not reasonably be understood as violating the state statute prohibiting lane straddling. *United States v Gross*, 550 F3d 578 (CA 6, 2008).

Officer did not have probable cause to believe that the defendant violated a law against failure to keep a vehicle in a single lane "as nearly as practicable." The vehicle was a large motor home that weaved into an emergency lane for a few feet on a windy day. The isolated incident was insufficient to warrant an invasion of the defendant's Fourth Amendment rights. The same facts were likewise insufficient to support probable cause to believe that the defendant was intoxicated. *United States v Freeman*, 209 F3d 464 (CA 6, 2000).

Did officers have reasonable suspicion to prolong the stop beyond the time necessary to address the suspected traffic violation?

Whether an officer has reasonable suspicion to extend a traffic stop is determined case by case on the basis of the totality of the facts and circumstances. *People v Kavanaugh*, 320 Mich App 293; 907 NW2d 845 (2017).

> **PRACTICE POINTER:** The factors that officers have offered to justify reasonable suspicion to extend a traffic stop under the totality of the circumstances are legion (including having a Bible in the car and traveling to a music festival), but some of the most common justifications are nervousness, dubious or implausible travel plans, and inconsistent stories from the vehicle's occupants regarding the plan or purpose of travel.

An officer reasonably extended a traffic stop to ask the occupants of the vehicle follow-up questions. When the officer asked the defendant about his destination, the

defendant claimed to be going to a non-existent hotel, his passengers gave conflicting responses to the same question, and there was no luggage in the car. These were additional suspicious circumstances, revealed before the defendant's violation was resolved, that warranted further investigation. Answers provided by the defendant and other occupants to further questioning did not allay the officer's suspicions. The traffic stop was reasonable in both scope and duration. *People v Williams*, 472 Mich 308; 696 NW2d 636 (2005).

Officers' continued detention of the defendant after the driver of the vehicle had been arrested but before the officers had completed their duties at the scene was reasonable. The officers ordered the defendant to stay in the car because he was intoxicated and aggressive toward the officers, bystanders had arrived, and the weather was dangerous. The officers still had the need to control the scene, even though the driver was already placed in the backseat of the officers' cruiser. The detention was reasonable for the safety of the officers and others while the officers completed their non-investigatory duties. *People v Corr*, 287 Mich App 499; 788 NW2d 860 (2010).

Officer reasonably detained the defendant for five minutes for the purpose of running a LEIN check following a valid traffic stop. If a LEIN check confirms the validity of the driver's license and the driver's right to operate the car, the driver must be permitted to leave without further delay. In this case, however, the check revealed that the defendant had outstanding warrants. An additional extension of the stop to confirm the warrants was reasonably based on the new information discovered during the lawful scope of the stop. *People v Davis*, 250 Mich App 357; 649 NW2d 94 (2002).

> **PRACTICE POINTER**: Officers may detain a vehicle and its occupants for the time necessary to run a LEIN check. But if the check does not reveal any violations or warrants, the vehicle and its occupants must be permitted to leave without delay.

The strong odor of alcohol on a motorist's breath, standing alone, provides a police officer with a reasonable suspicion that the motorist has consumed alcohol and the alcohol may have affected the motorist's ability to operate a vehicle. After a lawful traffic stop, the strong odor of alcohol on the defendant's breath created a reasonable suspicion that she was driving under the influence of alcohol, and police could confirm their suspicion of ongoing criminal activity by performing a sobriety test. *People v Rizzo*, 243 Mich App 151; 622 NW2d 319 (2000).

Officers had reasonable suspicion to extend a traffic stop because (in part) of the defendant's extreme nervousness throughout the stop that was objectively demonstrated. The defendant lost color in his face (which got worse after he was

asked to get out of the car) and had twitching hands. *People v Lewis*, 251 Mich App 58; 649 NW2d 792 (2002).

Officers lacked reasonable suspicion to prolong a traffic stop for a dog sniff. A traffic stop that exceeds the time needed to handle the matter for which the stop was made violates the Constitution's protection against unreasonable seizures. A dog sniff is not part of an officer's traffic mission. Although officers may conduct unrelated checks during an otherwise lawful traffic stop, they may not do so in a way that prolongs the stop absent reasonable suspicion. It does not matter if a dog sniff is conducted before or after a ticket is issued; rather, the question is whether conducting the sniff prolongs the stop. *Rodriguez v United States*, ___ US ___; 135 S Ct 1609; 191 L Ed 2d 492 (2015).

> **PRACTICE POINTER:** Whether conducting a dog sniff is reasonable does not depend on whether the sniff occurs before or after a ticket is issued; what matters is whether conducting the sniff prolonged the stop.

Occupants' nervousness was not enough to support reasonable suspicion to prolong a traffic stop. Nervousness is an "unreliable indicator," especially in the context of a traffic stop. "Many citizens become nervous during a traffic stop, even when they have nothing to hide or fear." Conflicting statements from the vehicle's occupants about their travel plans were not mutually exclusive and likewise did not support reasonable suspicion. *United States v Richardson*, 385 F3d 625 (CA 6, 2004).

> **PRACTICE POINTER:** Nervousness to support an extended stop is an unreliable factor because many people with nothing to hide become nervous during traffic stops.

Officers lacked reasonable suspicion to prolong a traffic stop until a canine unit arrived. One of the officer found it unusual that the defendant immediately raised his hands when the officers first approached his vehicle, but the officer did not testify that, in his experience, such an action is linked to more extensive criminal activity. Cell phones and a Bible in the car and the unkempt condition of the interior were "weak indicators of criminal activity," insufficient to support a reasonable suspicion for continued detention. And although the defendant was not the registered owner of the car, his mother was. *United States v Townsend*, 305 F3d 537 (CA 6, 2002).

An officer did not have reasonable suspicion of criminal activity to extend a traffic stop. The officer testified that his suspicions were raised because the defendant did not pull over until he had come to end of exit ramps, he appeared to be nervous, he did not have a registration for the vehicle, he left the passenger door open when the officer directed him to sit in the front seat of the parked police vehicle, and the defendant and his passenger gave differing answers when questioned separately.

But audio-video of the stop showed that there was not ample room to pull over until the roadway widened at the end of the exit ramp, and the officer ran the vehicle's VIN number and discovered that the vehicle was registered to the defendant. The defendant's nervousness during a stop, his failing to close the passenger door, and the slightly differing answers of the defendant and his passenger were insufficient to support reasonable suspicion. *People v Kavanaugh*, 320 Mich App 293; 907 NW2d 845 (2017).

> **PRACTICE POINTER:** Officers often point to inconsistent statements from a vehicle's occupants regarding the purpose or plan of travel to justify extending a traffic stop for further investigation. But slightly differing answers are not a justifying factor. For instance, in *Kavanaugh*, the occupants differing answers to whether they were boyfriend and girlfriend did not give an officer new suspicion to extend the stop.

Officer unreasonably prolonged a traffic stop for a canine sniff. After a lawful stop, the officer questioned the driver-defendant and occupants of the vehicle, ran a LEIN check, and returned the defendant's paperwork, all of which took about 15 minutes. The investigation did not reveal any inconsistent stories, there were no outstanding warrants for the defendant or his passengers, and the officer did not observe any signs indicating drug or alcohol use. The fact that the defendant was on his way to a music festival was not relevant to the formation of reasonable suspicion. Detaining the defendant for an additional 15 minutes without reasonable suspicion violated the defendant's Fourth Amendment protections. *People v Hannigan*, unpublished per curiam opinion of the Court of Appeals, issued February 27, 2018 (Docket No. 339239).

Officer lacked reasonable suspicion to prolong a traffic stop for a canine sniff. The defendant was not unusually nervous, criminal history alone was insufficient to support reasonable suspicion, and the officer testified that he had a "hunch" or an "intuition" that criminal activity was afoot. *People v Malone*, unpublished per curiam opinion of the Court of Appeals, issued October 4, 2016 (Docket No. 329989).

Did officers otherwise exceed the scope of the traffic stop?

A dog sniff that did not extend the time beyond that needed for the officer to issue a warning ticket and conduct routine inquiries incident to a lawful traffic stop did not make the stop unlawful. While the stop was in progress, another officer arrived with a narcotics-detection dog that sniffed around the exterior of the vehicle. The sniff itself did not require reasonable suspicion because it did not disclose noncontraband items or detect lawful activity. *Illinois v Caballes*, 543 US 405; 125 S Ct 834; 160 L Ed 2d 842 (2005).

> **PRACTICE POINTER:** The fact that the police conduct a dog sniff during a traffic stop does not make the stop unlawful. It is only when a stop is extended to conduct a dog sniff that a stop becomes unlawful.

An officer did not unreasonably prolong a traffic stop. The officer stopped the defendant's vehicle on probable cause of traffic violations because it had tinted windows and had crossed a lane line without signaling. During the stop, the officer collected his tint meter and checked the vehicle's windows and administered a field sobriety check on the defendant to ensure that the defendant's erratic driving was not the result of chemical impairment. These actions were directly related to the purpose of the traffic stop and were an acceptable means of investigation likely to confirm or dispel the officer's suspicions quickly. Further, these actions happened within a few minutes. *United States v Noble*, 762 F3d 509 (CA 6, 2014).

A police officer conducting a traffic stop may frisk a passenger for weapons if the officer reasonably believes that the passenger is armed and dangerous, regardless of whether the officer has reasonable suspicion that the passenger is engaged in criminal activity. The public interest in officers' safety outweighs the incremental intrusion on a passenger's privacy beyond that already caused by the seizure incident to the traffic stop. An officer was not constitutionally required to let the defendant exit the scene without first ensuring that, in so doing, she was not permitting a dangerous person to get behind her. *Arizona v Johnson*, 555 US 323; 129 S Ct 781; 172 L Ed 2d 694 (2009).

Information that the defendant had a prior arrest on a weapons charge justified the search of the defendant and the passenger compartment of his vehicle during a traffic stop. *United States v Townsend*, 305 F3d 537 (CA 6, 2002).

Officers did not have reasonable suspicion to prolong a traffic stop for a second drug-dog sniff after the first drug dog failed to alert. Officers had reasonable suspicion to detain the defendant for 30 to 45 minutes to wait for a drug dog to arrive at the scene of the traffic stop because, among other reasons, the defendant was observed meeting with a known drug trafficker shortly before the stop. But once the first drug dog failed to alert, there was no longer reasonable suspicion to prolong the stop to wait for a second drug to arrive. Reasonable suspicion is a limited exception to the probable cause requirement; it does not permit "unlimited bites at the apple." *United States v Davis*, 430 F3d 345 (CA 6, 2005).

The defendant's driving behavior, defendant's nervousness, and information provided by an informant were not enough to support reasonable suspicion to extend a traffic stop five or ten minutes to wait for a canine unit to arrive. During the traffic stop, one of the officers recognized the defendant's name from a tip that he sold drugs. But the tip was generalized, not detailed, and thus provided no support for reasonable suspicion. Traffic violations (such as speeding) are not indicia that a motorist has drugs or weapons. Nervousness is generally sufficient to support reasonable suspicion only when combined with other factors, which were lacking here. *United States v Williams*, 114 F Supp 2d 629 (ED Mich, 2000).

WAS THERE A SEIZURE?

CHAPTER 30: SEIZURE – ARREST

Snapshot: A police officer may make an **arrest in a public place** without a warrant if the officer has **probable cause** to believe that a **crime** has been or is being committed. Probable does not require to *know* that criminal activity is taking place; it only requires a **"fair probability"** or substantial chance **of criminal activity**. The same requirement for probable cause applies to an **arrest warrant**.

KEY QUESTIONS:

- Was the arrest for investigation?
- Was probable cause based on a remote association with crime?
- Was probable cause based on criminal history or reputation?
- Was probable cause based on a description?
- Was probable cause based on possession of contraband?
- Was probable cause based on refusal to obey an officer's commands?
- Did probable cause exist for a crime other than the one the defendant was arrested for?
- Was probable cause established by the "team" approach?
- Did probable cause relate to a misdemeanor or an ordinance?
- Was probable cause based on a tip?
- Was an arrest made by a private citizen?
- Was the arrest pursuant to a warrant?
    - Was there probable cause for the warrant?
    - Was the warrant issued by a neutral and detached magistrate?
    - Was the warrant invalid?

Generally

The Fourth Amendment and Michigan Constitution protect against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11; *People v Earl*, 297 Mich App 104; 822 NW2d 271 (2012).

- MCL 764.15 provides statutory authority for warrantless arrest under a variety of circumstances, including when "[a] felony has been committed and the peace officer has reasonable cause to believe the person committed it." MCL 764.15(1)(c). The requirements for statutory "reasonable cause" and constitutionally required "probable cause" are the same. See, e.g., *People v Thomas*, 191 Mich App 576; 478 NW2d 712 (1991).

If police exert physical force, however slight, then an arrest has occurred. *California v Hodari D*, 499 US 621; 111 S Ct 1547; 113 L Ed 2d 690 (1991)

A warrantless arrest by a police officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed. *Devenpeck v Alford*, 543 US 146; 125 S Ct 588; 160 L Ed 2d 537 (2004).

The existence of probable cause is determined by the totality of the circumstances. *Illinois v Gates*, 462 US 213; 103 S Ct 2317; 76 L Ed 2d 527 (1983).

Probable cause to arrest exists where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. *People v Champion*, 452 Mich 92; 549 NW2d 849 (1996).

Probable cause to arrest exists when the circumstances "at the moment of arrest would justify a fair-minded person of average intelligence in believing that the suspected person had committed a felony." *People v Oliver*, 417 Mich 366; 338 NW2d 167 (1983).

For an arrest to be lawful, the police officer making the arrest must have probable cause, either that a felony or misdemeanor was committed by the individual in the officer's presence, or that a felony or misdemeanor punishable by imprisonment for more than 92 days occurred outside the officer's presence and that the individual in question committed the offense. *People v Vandenberg*, 307 Mich App 57; 859 NW2d 229 (2014).

A warrantless arrest of an individual in a public place for a misdemeanor committed in the officer's presence is consistent with the Fourth Amendment if the arrest is supported by probable cause. *Maryland v Pringle*, 540 US 366; 124 S Ct 795; 157 L Ed 2d 769 (2003).

A police officer's belief that a defendant has committed a felony must be based on facts which are present at moment of arrest. *People v Oliver*, 417 Mich 366; 338 NW2d 167 (1983).

Probable cause requires only a "fair probability" or substantial chance of criminal activity, not an actual showing of criminal activity. *Illinois v Gates*, 462 US 213; 103 S Ct 2317; 76 L Ed 2d 527 (1983).

Probable cause is determined by a "common-sense" analysis. *Illinois v Gates*, 462 US 213; 103 S Ct 2317; 76 L Ed 2d 527 (1983).

Circumstantial evidence, together with inferences that arise from it, is sufficient to establish probable cause to believe that the defendant committed a felony. *People v Nguyen*, 305 Mich App 740; 854 NW2d 223 (2014).

An officer making a warrantless arrest may rely on information received from an informant rather than on the officer's direct observations so long as the informant's statement is reasonably corroborated by other matters within the officer's knowledge. *People v Nguyen*, 305 Mich App 740; 854 NW2d 223 (2014).

Probable cause is determined by an objective inquiry based on the facts and circumstances of the case. *People v Maggit*, 319 Mich App 675; 903 NW2d 868 (2017).

An arresting officer's state of mind is irrelevant to the existence of probable cause. *Devenpeck v Alford*, 543 US 146; 125 S Ct 588; 160 L Ed 2d 537 (2004).

An arrest supported by probable cause does not violate the Fourth Amendment merely because the officer making the arrest had a subjective, pretext motive. Subjective intentions play no role in ordinary probable cause Fourth Amendment analysis. *Arkansas v Sullivan*, 532 US 769; 121 S Ct 1876; 149 L Ed 2d 994 (2001).

An arrest may not be used as a subterfuge to search for evidence of crime. *People v Haney*, 192 Mich App 207; 480 NW2d 322 (1991).

It is not necessary to specify the one felony for which probable cause to arrest exists if probable cause exists to believe that a suspect is guilty of one of several alternative felonies. *People v Mitchell*, 138 Mich App 163; 360 NW2d 158 (1984).

If the police have probable cause to arrest one party, but they reasonably mistake a second party for the first party, then the arrest of the second party is a valid arrest. *King v United States*, 917 F3d 409 (CA 6, 2019).

If probable cause exists, the police are not required to obtain a warrant before apprehending a suspected felon in a public place. *United States v Watson*, 423 US 411; 96 S Ct 820; 46 L Ed 2d 598 (1976).

Warrantless arrests in public places are valid, but (absent another exception such as exigent circumstances) officers may not enter a home to make an arrest without a warrant, even when they have probable cause. *Collins v Virginia*, ___ US ___; 138 S Ct 1663; 201 L Ed 2d 9 (2018).

The prosecution has the burden of establishing that an arrest without a warrant was supported by probable cause. *People v Tierney*, 266 Mich App 687; 703 NW2d 204 (2005).

The same analysis that applies to a determination of probable cause for a search applies to a determination of probable cause for an arrest. *People v Levine*, 461 Mich 172; 600 NW2d 622 (1999).

Probable cause to support an arrest is different from the probable cause standard at a preliminary examination. "The arrest standard looks only to the probability that the person committed the crime as established at the time of the arrest, while the preliminary hearing looks both to that probability at the time of the preliminary

hearing *and* to the probability that the government will be able to establish guilt at trial." *People v Cohen*, 294 Mich App 70; 816 NW2d 474 (2011).

Was the arrest for investigation?

> **PRACTICE POINTER:** An arrest for purposes of investigation (e.g., questioning or taking fingerprints) is invalid. Transporting a suspect to a police station or other site for investigative purposes amounts to an arrest.

Transportation to an investigative detention at a police station without probable cause or judicial authorization together are tantamount to a warrantless arrest in violation of the Fourth Amendment. *Hayes v Florida*, 470 US 811, 815; 105 S Ct 1643, 1646; 84 L Ed 2d 705 (1985).

An arrest may not be used as a subterfuge to search for evidence of crime. *People v Haney*, 192 Mich App 207; 480 NW2d 322 (1991).

Officers did not have probable cause to arrest the defendants (which they did by handcuffing them and detaining them at gunpoint) for purposes of investigation. *Ingram v City of Columbus*, 185 F3d 579 (CA 6, 1999).

A defendant's arrest for questioning regarding the murder of his former girlfriend was illegal because the police lacked probable cause to believe he committed that murder. The officer who ordered the arrest admitted that he did so because he wanted "to find out if he knew anything about" the murder. The defendant was not the main suspect, and there was no reason to believe that defendant drove the same type of automobile as the man with whom the victim was seen arguing the day before the murder. The victim told a friend on the day of the murder that "he" would not leave her alone until she picked up a present from him, but the friend did not know who "he" was. *People v Kelly*, 231 Mich App 627; 588 NW2d 480 (1998).

Officers did not have probable cause to arrest for investigation of murder because investigation of murder is not a crime. The officers had probable cause to arrest the defendant for assault and battery, but they did not arrest him for that. *People v Martin*, 94 Mich App 649; 290 NW2d 48 (1980).

Police officers did not have probable cause to arrest the defendant (which they did by transporting him from a traffic stop to a jail for fingerprinting) based on cash and empty plastic sandwich bags found in the defendant's pocket. The cash and bags were not contraband or directly incriminating. None of the occupants in the vehicle the defendant was in when the officers first detained him had a criminal record. And the fact that the defendant may have lied or misrepresented that he was a tribal member did not directly speak to whether he may have been engaged in illegal activity. These circumstances may have raised suspicions, but they would not

justify a fair-minded person of average intelligence in believing that the defendant had committed a felony. *People v Barrera*, unpublished per curiam opinion of the Court of Appeals, issued January 8, 2019 (Docket No. 338762).

Was probable cause based on a remote association with crime?

> **PRACTICE POINTER:** A remote association with crime, such as riding in a car that may have been used in drug transactions in the past or leaving a building where crime has occurred in the past, does not provide probable cause for arrest.

A police officer did not have probable cause to arrest a woman who was quietly walking the streets simply because she had just left a "disreputable saloon" late at night. *Klein v Pollard*, 149 Mich 200; 112 NW 717 (1907).

The police did not have probable cause to arrest the defendant based on an unnamed informant's statement regarding "word on the street" about a murder and the defendant's known association with two other suspects in the murder. Rumor and a known association with other suspects in a case would certainly justify police investigation into a person's involvement in an offense, but they do not establish probable cause to believe that the person was involved in the commission of the offense. *People v Thomas*, 191 Mich App 576; 478 NW2d 712 (1991).

Officers did not have probable cause to arrest the defendant when, at best, they had reason to believe that the defendant had chauffeured a known drug dealer while the dealer was ostensibly obtaining cocaine for a drug transaction. These facts did not justify a belief that the defendant had committed a felony. *People v Hill*, 192 Mich App 54; 480 NW2d 594 (1991), overruled on other grounds by *People v Goldston*, 470 Mich 523 (2004).

An officer did not have probable cause to arrest the defendant simply because he was a passenger in a codefendant's car that was identified as the "getaway" car from a breaking and entering that occurred two days before the arrest. While an officer might have probable cause to believe that all occupants of a vehicle were involved in a crime that had just been committed or committed recently, there was no reason to believe that co-perpetrators would be traveling in the same vehicle two days later. Further, the city police department had a policy to arrest any occupant of a car allegedly involved in a crime regardless of whether the occupant matched a description of a suspect. *People v Harrison*, 163 Mich App 409; 413 NW2d 813 (1987).

Officers did not have probable cause to arrest the defendant (which they did when they handcuffed him, placed him in the back of a cruiser, and transported to a bank for on-scene identification) simply because he walked into a house that the police

were investigating because it was the home of the person to whom a car that was involved in a robbery was registered. The officers had a description that the bank robbers were "two armed black males." If probable cause were found on these facts, the officers could have arrested any black male in the vicinity. *People v Raybon*, 125 Mich App 295; 336 NW2d 782 (1983).

Was probable cause based on criminal history or reputation?

The known history of a defendant's involvement in similar crimes may be a factor in establishing probable cause. *People v Champion*, 452 Mich 92; 549 NW2d 849 (1996)

Evidence of past drug use alone does not create probable cause for arrest. *People v Hilber*, 403 Mich 312; 269 NW2d 159 (1978), overruled in part on other grounds by *People v Kazmierczak*, 461 Mich 411 (2000).

A police officer did not have probable cause to arrest a woman who was quietly walking the streets simply because she had just left a "disreputable saloon" late at night. *Klein v Pollard*, 149 Mich 200; 112 NW 717 (1907).

A woman's reputation as a "street walker" did not give officers probable cause for her arrest. *Pinkerton v Verberg*, 78 Mich 573; 44 NW 579 (1889).

Was probable cause based on a description?

Police officers had probable cause to arrest the defendant based on the complainant's detailed description of an intruder in a break-in two days before the arrest. The description included a particular hairstyle, a particular beard, and a pronounced gap between the intruder's two front teeth. The officers recognized the defendant when they saw him at a police station in relation to another break-in. It was irrelevant that the arresting officer used the words "investigation," "suspicion," and "suspect." The objective facts demonstrated that the officer had probable cause for the arrest. *People v Hamoud*, 112 Mich App 348; 315 NW2d 866 (1981).

Police officers had probable cause to arrest the defendant based on the modus operandi described by complainants in previous robberies. *People v Horton*, 98 Mich App 62; 296 NW2d 184 (1980).

A police officer who had received by radio the details of the commission of a felony, including a description of the perpetrators, had probable cause to arrest persons matching that description who were traveling on a possible escape route from the scene of the crime shortly after its commission. *People v Knight*, 41 Mich App 293; 199 NW2d 861 (1972).

Police officers had probable cause to arrest the defendants because they closely resembled the description given by complainants in an armed robbery that had taken place just minutes before the arrest. *People v Jackson*, 11 Mich App 630; 162 NW2d 114 (1968).

An officer did not have probable cause to arrest the defendant based on a "sketchy" description that would have fit a large portion of the population of the city. *People v Harrison*, 163 Mich App 409; 413 NW2d 813 (1987).

Officers did not have probable cause to arrest the defendant on a vague description that "two armed black males" had robbed a bank. If probable cause were found on that description, the officers could have arrested any black male in the vicinity. *People v Raybon*, 125 Mich App 295; 336 NW2d 782 (1983).

An anonymous tip supported probable cause to arrest the defendant when the defendant also matched the victim's description of her assailant. *People v Wilson*, 8 Mich App 651; 155 NW2d 210 (1967).

Was probable cause based on possession of contraband?

An officer had "reasonable cause" for the defendant's warrantless arrest when the defendant signed for a package known to contain illegal drugs and claimed that he was the addressee. It is a felony to possess controlled substances, so the officer was statutorily authorized to arrest the defendant who was in possession of them. *People v Malik*, 472 Mich 874; 693 NW2d 382 (2005).

Police officers did not lack probable cause at the time of the arrest merely because a district court later ruled that there was not probable cause for bindover. The probable cause standards are different for arrest and bindover. The latter analyzes both the probability that the person committed the crime *and* the probability that the government will be able to establish guilt at trial. The officers' arrest of the defendant was supported by probable cause because they discovered a digital scale and cocaine residue in the center console of the defendant's car. Because the officers had probable cause at the time of the arrest, evidence discovered thereafter was admissible. *People v Cohen*, 294 Mich App 70; 816 NW2d 474 (2011).

Police officers had probable cause to arrest the defendant when they found cocaine and her passport during a lawful search of an abandoned briefcase. Proof of close proximity between a controlled substance and a defendant's important papers establishes a prima facie case of possession. *People v Romano*, 181 Mich App 204; 448 NW2d 795 (1989).

An officer had probable cause to arrest the defendant for possession of a stolen car because the officer knew the car was stolen, the car's hood was hot (indicating that it had just been parked), and the officer saw a lone man walking across a lawn toward car. *People v O'Neal*, 167 Mich App 274; 421 NW2d 662 (1988).

Was probable cause based on a failure to obey an officer's commands?

A person's failure to obey a police officer's lawful commands may provide probable cause to arrest. *People v Chapo*, 283 Mich App 360; 770 NW2d 68 (2009).

The defendant's refusal to identify himself under Nevada's "stop and identify" statute provided officers with probable cause to arrest him. But the Fourth Amendment precludes an officer from arresting a *Terry* stop suspect for failure to comply with a state "stop and identify" law if the officer's request for identification is not reasonably related to circumstances justifying stop. *Hiibel v Sixth Judicial Dist Court of Nevada, Humboldt Co*, 542 US 177; 124 S Ct 2451; 159 L Ed 2d 292 (2004).

> **PRACTICE POINTER:** *Hiibel* does not provide probable cause for arrest when a person refuses provide identification in Michigan because Michigan does not have a statute comparable to Nevada's "stop and identify" law. See *People v Barrera*, unpublished per curiam opinion of the Court of Appeals, issued January 8, 2019 (Docket No. 338762).

An officer had probable cause to arrest the defendant in a murder case because, in part, when the officer first approached him, the defendant said, "Just shoot me. I can't spend the rest of my life in prison. Let me kill myself." The officer also knew at the time that the defendant was a suspect in the case, that he was infatuated with one of the victims, and that he had not shown up for work that day. *People v Tierney*, 266 Mich App 687; 703 NW2d 204 (2005).

The defendant's failure to obey officers' lawful and repeated commands provided the officers with probable cause to arrest the defendant. *People v Pannell*, unpublished per curiam opinion of the Court of Appeals, issued February 12, 2019 (Docket No. 341309).

Flight alone does not justify an arrest, particularly when the defendant's running is not flight from the scene of a reported crime. Officers lacked probable cause to arrest the defendant (which they did when they made him lie on the ground and handcuffed him) simply because he ran at the sight of their police car. *People v Tebedo*, 81 Mich App 535; 265 NW2d 406 (1978).

Did probable cause exist for a crime other than the one the defendant was arrested for?

ICE agents had probable cause to arrest the defendant, even though the arrest was made for an immigration violation rather than the criminal felony the defendant was ultimately charged with. The agents had all the information necessary to arrest for the felony, and there was a substantial identity between the immigration and criminal statutes at issue. *United States v Abdi*, 463 F3d 547 (CA 6, 2006).

Officers did not have probable cause to arrest for investigation of murder because investigation of murder is not a crime. The officers had probable cause to arrest the defendant for assault and battery, but they did not arrest him for that. *People v Martin*, 94 Mich App 649; 290 NW2d 48 (1980).

Was probable cause established by the "team" approach?

The police had probable cause for defendant's warrantless arrest based on the "collective information" known to two police agencies under the "police team" approach. Between the two agencies, officers had reliable information from an informant that the defendant possessed a substantial amount of cocaine, and the information was corroborated by police surveillance and correct predictions of the defendant's future movements. *People v Nguyen*, 305 Mich App 740; 854 NW2d 223 (2014).

Did probable cause relate to a misdemeanor or an ordinance?

A police officer may make a warrantless arrest for a misdemeanor violation if the officer has probable cause that a misdemeanor was committed by the individual in the officer's presence or that a misdemeanor punishable by imprisonment for more than 92 days occurred outside the officer's presence and that the individual in question committed the offense. *People v Vandenberg*, 307 Mich App 57; 859 NW2d 229 (2014).

The warrantless arrest of a driver after an officer observed an open beer can and a cognac bottle on the floor of a car's front seat was authorized by an ordinance prohibiting open containers in vehicles; MCL 764.15(1)(a) authorizes a peace officer to arrest a person without a warrant when an ordinance violation is committed in the peace officer's presence. *People v Sinistaj*, 184 Mich App 191; 457 NW2d 36 (1990).

A police officer lacked probable cause to arrest the defendant for trespassing in a business's parking lot under a city ordinance prohibiting a person from unlawfully remaining on land to the annoyance or disturbance of the lawful occupants. The defendant was on property that was open to the public during business hours for a

very brief period, and the defendant was not told to leave the property or that he annoyed or disturbed anyone. *People v Maggit*, 319 Mich App 675; 903 NW2d 868 (2017).

Was probable cause based on a tip?

- For more cases addressing probable cause based on an informant's tip see Search – Warrant, Chapter 8.

Police officers had probable cause based on an informant's tip, even though the officers did not witness illegal activity themselves. The informant's previous drug-related activities were well-known to police, he gave a detailed account of a conversation he had with the defendant arranging a time and place for a drug deal, and the officers independently observed the defendant arrive at that time and place. *United States v Strickland*, 144 F3d 412 (CA 6, 1998).

Was the tip anonymous?

An anonymous tip alone does not provide probable cause for arrest, but it may assist the police in narrowing the search for a criminal, and it may support probable cause when an officer has additional information. *People v Wilson*, 8 Mich App 651; 155 NW2d 210 (1967).

An anonymous tip may provide probable cause to arrest if it is sufficiently corroborated by independent sources. *People v Walker*, 401 Mich 572; 259 NW2d 1 (1977).

An anonymous tip that several persons and a large quantity of marijuana would be at a certain place provided probable cause because it was independently corroborated by a police officer who had extensive experience in drug investigations and who observed comings and goings from the location late at night (consistent with drug trafficking) and verified through official records the names of the individuals who the informant said would be there. The informant was anonymous because he was an undercover investigator who continued to be involved in an undercover operation. This was a search case, but the Court stated that the analysis would apply equally to an arrest. *People v Levine*, 461 Mich 172; 600 NW2d 622 (1999).

An anonymous tip that the defendant had left the city to pick up a "load of dope" and would return in five hours with two women in one of two described vehicles to a specific address provided probable cause for the defendant's arrest. The tip was corroborated by an independent police investigation that revealed that one of the described vehicles was registered to a woman living at the address that the informant had provided and that the other vehicle was in the driveway at that

address, and the police spotted the woman's car on the highway leading into the city at approximately the predicted time. *People v Walker*, 401 Mich 572; 259 NW2d 1 (1977).

> **PRACTICE POINTER:** *Walker* was decided under the former two-pronged *Aguilar-Spinelli* test. That test was replaced by the *Gates* totality of the circumstances test. But cases that met the two-pronged test would certainly meet the more flexible *Gates* test. *People v Levine*, 461 Mich 172; 600 NW2d 622 (1999).

An anonymous tip of an ongoing robbery provided probable cause for the defendant's arrest because the tip was detailed and it was corroborated by independent police work. *People v Robideau*, 94 Mich App 663; 289 NW2d 846 (1980).

An anonymous tip supported probable cause to arrest the defendant when the defendant also matched the victim's description of her assailant. *People v Wilson*, 8 Mich App 651; 155 NW2d 210 (1967).

Was the tip from a confidential informant?

An informant's veracity, reliability, and basis of knowledge are all highly relevant in determining the value of his report, and they can be used to determine whether probable cause exists. *People v Nguyen*, 305 Mich App 740; 854 NW2d 223 (2014).

Although an informant's basis of knowledge and veracity are still highly relevant to the existence of probable cause, the failure of one no longer requires the conclusion that probable cause does not exist. Rather, deficiencies in one may be compensated for by strengths of the other, or by other factors. *People v Faucett*, 442 Mich 153; 499 NW2d 764 (1993).

The police had probable cause to arrest the defendant because they had information from a confidential informant that defendant was in possession of cocaine. The informant had provided credible and reliable information in the past, and the informant's statement was corroborated by police surveillance and correct predictions of the defendant's future movements. *People v Nguyen*, 305 Mich App 740; 854 NW2d 223 (2014).

The tip from a confidential informant provided probable cause for arrest without the need for corroboration because the informant had provided reliable information six times in the past. *People v Beachman*, 98 Mich App 544; 296 NW2d 305 (1980).

PRACTICE POINTER: An informant's record of providing reliable information is an important factor in determining whether a tip provided probable cause.

Was the tip from an ordinary citizen tip?

Probable cause for an arrest may exist where an unknown citizen makes a complaint as a victim or eyewitness to a crime if the underlying circumstances demonstrate the citizen's firsthand knowledge. *People v Powell*, 201 Mich App 516; 506 NW2d 894 (1993).

Information provided to police officers by a restaurant employee was sufficient to support the defendant's warrantless arrest, even though the information was not corroborated. The employee told the officers that she had seen white powder on the table in front of the defendant, that the defendant had offered her a "toot," and that she believed the powder was cocaine. The employee's reliability was sufficient to support defendant's arrest because she gave a detailed account, she was known to the restaurant's manager, she had sought the manager's advice about what she observed, and she was not going to leave the scene after speaking with the police. *People v Goeckerman*, 126 Mich App 517; 337 NW2d 557 (1983).

PRACTICE POINTER: A known informant's continued availability is an important factor in determining reliability.

Officers had probable cause to arrest the defendant based on a citizen tip. The owner of a restaurant called the police to report a disturbance involving the defendant, the owner indicated that disturbance was narcotics related, the owner had reported similar incidents in the past, the area in general was known to police as a site of substantial drug trafficking, the defendant was a suspected narcotics user, the owner singled out defendant upon the arrival of the police, and the defendant attempted to flee when he was pointed out as subject of the alleged disturbance. The then-applicable *Aguilar* test did not apply to tips from ordinary citizens. *People v Harris*, 95 Mich App 507; 291 NW2d 97 (1980).

Was the tip from an arrested individual?

Police officers had probable cause to arrest the defendant for manufacture of methamphetamine based, in part, on information provided by other individuals arrested earlier that day. The officers also possessed other, corroborative information from their independent investigation. *United States v Marrero*, 651 F3d 453 (CA 6, 2011).

Was an arrest made by a private citizen?

The probable cause analysis does not apply to arrest by a private person. Under MCL 764.16(b), a private person may make an arrest only if the person arrested actually committed a felony. A facially valid arrest warrant does not give a private person the authority to arrest; arrest warrants are directed only to law enforcement officers. *Bright v Ailshie*, 465 Mich 770; 641 NW2d 587 (2002).

Was the arrest pursuant to a warrant?

MCL 764.1a provides statutory authority for an arrest warrant. For a warrant to be valid under the statute, a proper complaint alleging the commission of an offense and supporting reasonable (same as probable) cause to believe that the person listed in the complaint committed that offense. MCL 764.1a(1).

A complaint must be sworn to before a magistrate or clerk. MCL 764.1a(1).

Reasonable (same as probable) cause may be based on the factual allegations in the complaint, the complainant's sworn testimony, the complainant's affidavit, or any other sworn testimony or affidavits of other persons. MCL 764.1a(2).

> **PRACTICE POINTER:** The rules that apply to arrest warrants are the same as those that apply to search warrants. The probable cause requirement for an arrest warrant is the same as that for a warrantless arrest or for a search. The only functional difference between a warrantless arrest and one made pursuant to a warrant is that the police may enter a dwelling (under certain circumstances) to make an arrest with a warrant.

The requirements for statutory "reasonable cause" and constitutionally required "probable cause" are the same. *People v Thomas*, 191 Mich App 576; 478 NW2d 712 (1991).

The same requirements for reliability and particularity in a search warrant apply to arrest warrants. *People v Burrill*, 391 Mich 124; 214 NW2d 823 (1974).

An accused person has a constitutional due process right to be sufficiently apprised of the charges against him or her. *People v Higuera*, 244 Mich App 429; 625 NW2d 444 (2001).

Was there probable cause for the warrant?

The requirements for probable cause to support an arrest warrant are the same those applicable to warrantless arrests (above, this Chapter) and to search warrants

(Search – Warrant, Chapter 8). See *Giordenello v United States*, 357 US 480; 78 S Ct 1245; 2 L Ed 2d 1503 (1958).

> **PRACTICE POINTER:** MCL 764.1a(2) does not contain the same requirements as those in MCL 780.653 for establishing the validity of an informant's tip in support of probable cause (personal knowledge and credibility or reliability). But the critical issue is compliance with constitutional requirements for reliance on such information (which MCL 780.653 no longer embodies). For those requirements see this Chapter (*Was probable cause based on a tip?*) and Search – Warrant, Chapter 8.

Was the warrant issued by a neutral and detached magistrate?

A magistrate who issued an arrest warrant for the defendant was not neutral or detached because he had previously prosecuted the defendant and had been sued by the defendant. *People v Lowenstein*, 118 Mich App 475; 325 NW2d 462 (1982).

Was the warrant invalid?

An invalid arrest warrant does not divest a court of jurisdiction over a defendant. *People v Muhammad*, 326 Mich App 40; ___ NW2d ___ (2018), app den 925 NW2d 878 (2019).

The only remedy for apprehension on an invalid arrest warrant is suppression of the evidence obtained from the arrestee following the illegal arrest. *People v Burrill*, 391 Mich 124; 214 NW2d 823 (1974).

> **PRACTICE POINTER:** The only remedy for arrest on an invalid warrant is suppression of the evidence obtained incident to that arrest.

WAS THERE A SEIZURE?

CHAPTER 31: SEIZURE – ARREST - EXECUTION

Snapshot: The police **may not enter a dwelling** to make a **warrantless arrest**. The police **may enter the arrestee's dwelling** to execute an **arrest warrant** if they reasonably believe that the arrestee is there. But whether the police may enter a **third-party dwelling** when they reasonably believe that the arrestee is there to execute an arrest warrant is **undecided** in Michigan law. **Constructive entry** may occur when the police **coerce** a person out of a dwelling to make a warrantless arrest. The police may use **reasonable force** to arrest a resisting arrestee, but the use of **unreasonable force** violates the Fourth Amendment protection against unreasonable seizures.

KEY QUESTIONS

- Was a warrantless arrest made in a public place?
- Did the police enter a dwelling to make a warrantless arrest?
- Did the police enter a third-party dwelling to execute an arrest warrant?
- Did the police make a "constructive entry" for a warrantless arrest?
- Did the arrest follow unlawful police conduct?
- Did the police use unreasonable force?

Generally

Police with a valid arrest warrant may not execute the warrant by unlawful means just because the warrant is valid. *United States v Hudson*, 405 F3d 425 (CA 6, 2005).

An arrest warrant alone carries with it the limited authority to enter the dwelling of the subject of the warrant when there is reason to believe the subject is inside the dwelling. *Payton v New York*, 445 US 573, 603; 100 S Ct 1371, 1388; 63 L Ed 2d 639 (1980).

Was a warrantless arrest made in a public place?

Warrantless arrests in public places are valid. *Collins v Virginia*, ___ US ___; 138 S Ct 1663; 201 L Ed 2d 9 (2018).

A hospital room is a public place for purposes of a warrantless arrest. Patients in hospitals have some expectation of privacy (that no will search their bags, for instance) but those expectation are not similar in nature to the expectations people have in their homes or hotel rooms where a person legitimately expects to keep the whole world outside by keeping the door closed. Hospital staff routinely enter hospital rooms at all hours, and hospitalized persons are continuously monitored. "No one who had ever spent any time in a hospital room could continue to harbor any false expectations about his personal privacy or his ability to keep the world outside from coming through the door." *People v Courts*, 205 Mich App 326; 517 NW2d 785 (1994).

The lobby of an apartment building is a public place for purposes of a warrantless arrest. *People v Collier*, 183 Mich App 473; 455 NW2d 313 (1989).

The front steps of the entrance to an apartment building is a public place for purposes of a warrantless arrest. *People v Adams*, 150 Mich App 181; 388 NW2d 254 (1986).

Did the police enter a dwelling to make a warrantless arrest?

> **PRACTICE POINTER:** Entering a dwelling to make a warrantless arrest violates the Fourth Amendment absent probable cause of exigent circumstances.

Officers may not enter a home to make a warrantless arrest (absent another exception such as exigent circumstances), even when they have probable cause to arrest. *Collins v Virginia*, ___ US ___; 138 S Ct 1663; 201 L Ed 2d 9 (2018).

A police officer's warrantless entry into the defendant's home to arrest him was unconstitutional. Probable cause to arrest is not enough to justify an entry to make a warrantless arrest absent exigent circumstances (such as hot pursuit). To make a lawful warrantless entry into a home to arrest, police must have both probable cause to arrest or search and probable cause to believe that exigent circumstances exist. Because there were no exigent circumstances, the entry violated the Fourth Amendment. *Kirk v Louisiana*, 536 US 635; 122 S Ct 2458; 153 L Ed 2d 599 (2002).

Officers' forced entry into a house to arrest the defendants without a warrant or exigent circumstances was unconstitutional. *People v Woodard*, 111 Mich App 528; 314 NW2d 680 (1981).

Did the police enter a third-party dwelling to execute an arrest warrant?

Searching a third-party home for the subject of an arrest warrant without a search warrant violated the Fourth Amendment rights of the homeowners. An arrest warrant does not leave the decision as to which homes should be searched for the subject of the warrant to the "unfettered discretion" of the police. *Steagald v United States*, 451 US 204; 101 S Ct 1642; 68 L Ed 2d 38 (1981).

An officer's entry into the home of a third-party to execute an arrest warrant against the defendant based on the officer's reasonable belief (a lower standard than probable cause) that the defendant was in the home did not violate the Fourth Amendment. The officer's belief that the defendant was inside the third-party dwelling was reasonable because the defendant's probation officer received an anonymous but detailed and corroborated tip that the defendant had been in the dwelling two hours before the officers entered, and a person leaving the dwelling confirmed that the defendant was inside. *United States v Pruitt*, 458 F3d 477 (CA 6, 2006).

> *NOTE: The Michigan Supreme Court has noted the tension between the holdings in* Steagald *and* Pruitt. *The Court granted oral argument on the application on March 29, 2019, in* People v Towne *(Docket No. 157210, see 924 NW2d 250) on issues including "the appropriate standard to be used by a reviewing court to determine whether the police are permitted to enter a third-party's home or curtilage to execute an arrest warrant, see* Steagald v United States*, 451 US 204 (1981);* United States v Pruitt*, 458 F3d 477 (CA 6, 2006);* United States v Hardin*, 539 F3d 404 (CA 6, 2008)."*

Officers' entry into a third-party apartment (through the agency of the apartment complex manager) was unlawful because they lacked a reasonable belief that the subject of their arrest warrant would be found there. The officers were acting on a tip from a confidential informant, but the informant did not say when the informant had last seen the subject of the warrant or that the informant had ever seen the

subject at the apartment the officers entered. *United States v Hardin*, 539 F3d 404 (CA 6, 2008).

Did the police make a "constructive entry" for a warrantless arrest?

> **PRACTICE POINTER:** The police can effect a warrantless arrest inside a dwelling without ever entering if they constructively enter by using coercion to force a suspect outside of a dwelling for the purpose of arresting the suspect in a public place.

Officers violated the prohibition against entry of a home for a warrantless arrest when they constructively entered the defendant's mother's home by coercing the defendant to come to the door while holding a gun and expose himself to warrantless arrest. The officers surrounded the home, flooded it with spotlights, and summoned the defendant from his mother's home "with the blaring call of a bullhorn." Under these circumstances, the defendant was arrested inside a private home; although the officers never entered the home, their constructive entry accomplished the same thing. Forcing the defendant to the front door by coercive conduct violated his Fourth Amendment rights. *United States v Morgan*, 743 F2d 1158 (CA 6, 1984).

Officers did not constructively enter the defendant's apartment when he came out in response to officers' repeated requests to do so and was arrested without a warrant. The level of coercion was not high enough to constitute constructive entry; the officers did not draw their weapons or use coercive language, and they did not touch the defendant until he crossed the apartment's threshold. *People v Gillam*, 479 Mich 253; 734 NW2d 585 (2007).

> *NOTE: The Michigan Supreme Court heard oral argument in* People v Hammerlund *on April 24, 2019, addressing the issue of "whether it is constitutionally permissible for a police officer to compel, coerce, or otherwise entice a person located in his or her home to enter a public place to perform a warrantless arrest." (Docket No. 156901; see 501 Mich 1086 (2018)).*

Did the arrest follow unlawful police conduct?

> **PRACTICE POINTER:** If an arrest is made in an illegal manner, the remedy is the exclusion of related evidence, not invalidation of the arrest.

If the police effectuate an arrest in an illegal manner but nonetheless have probable cause to make the arrest, the proper Fourth Amendment remedy is to exclude only that evidence that is a fruit of the illegality, not to invalidate the arrest. *United States v Hudson*, 405 F3d 425 (CA 6, 2005).

The defendant's warrantless arrest was valid, even though officers effectuated the arrest unconstitutionally by entering his dwelling without an arrest warrant and without exigent circumstances. The remedy for the Fourth Amendment violation was suppression of statements that the defendant made during the arrest in his home, not invalidation of his arrest. His continued custody was supported by probable cause and, thus, lawful; the defendant could not claim "immunity from prosecution because his person was the fruit of an illegal arrest." *New York v Harris*, 495 US 14; 110 S Ct 1640; 109 L Ed 2d 13 (1990).

The defendant's arrest on outstanding warrants was valid, even though the defendant's initial encounter with police officers was an unconstitutional investigatory stop (because officers lacked reasonable suspicion for the stop). When an encounter is initiated by an unlawful stop, evidence seized as a result is subject to the exclusionary rule, and evidence discovered during the stop was suppressed. But the exclusionary rule does not extend to the arrest itself; the defendant was not immune from arrest and prosecution simply because the police executed a valid arrest in an illegal manner. *United States v Hudson*, 405 F3d 425 (CA 6, 2005).

Did the police use unreasonable force?

The Fourth Amendment's prohibition against unreasonable seizures protects citizens from excessive use of force by law enforcement officers. *Godawa v Byrd*, 798 F3d 457 (CA 6, 2015).

If a police officer lawfully arrests an individual, he may use reasonable force if that individual resists. *People v Jones*, 297 Mich App 80; 823 NW2d 312 (2012).

The police may not use deadly force to seize an unarmed, nondangerous suspect. If the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. *Tennessee v Garner*, 471 US 1; 105 S Ct 1694; 85 L Ed 2d 1 (1985).

If an officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. *Tennessee v Garner*, 471 US 1; 105 S Ct 1694; 85 L Ed 2d 1 (1985).

Determining whether the force used to effect a particular seizure is "reasonable" under the Fourth Amendment requires a careful balancing of "the nature and quality of the intrusion on the individual's Fourth Amendment interests" against the countervailing governmental interests at stake. *Graham v Connor*, 490 US 386; 109 S Ct 1865; 104 L Ed 2d 443 (1989).

The determination of whether the force used in an arrest was reasonable "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Kisela v Hughes*, ___ US ___; 138 S Ct 1148; 200 L Ed 2d 449 (2018).

The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. *Kisela v Hughes*, ___ US ___; 138 S Ct 1148; 200 L Ed 2d 449 (2018).

"The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham v Connor*, 490 US 386; 109 S Ct 1865; 104 L Ed 2d 443 (1989).

An officer acted reasonably when he terminated a car chase by ramming his vehicle's bumper into the vehicle of a fleeing motorist, even though that action posed a high likelihood of serious injury or death for the motorist. The motorist intentionally placed himself and the public in danger by unlawfully engaging in a reckless, high-speed, ten-mile flight. This conduct created an imminent threat to any pedestrians present, to other motorists, and other officers involved in the chase. The governmental interest in public safety outweighed the nature of the intrusion on the defendant's interest. *Scott v Harris*, 550 US 372; 127 S Ct 1769; 167 L Ed 2d 686 (2007).

Where a suspect is attempting to flee in a vehicle, police officers are justified in using deadly force against a driver who objectively appears ready to drive into an officer or bystander with his car. *Godawa v Byrd*, 798 F3d 457 (CA 6, 2015).

The use of handcuffs, by itself, is not unreasonable force. *Brewer v Perrin*, 132 Mich App 520; 349 NW2d 198 (1984).

> **PRACTICE POINTER:** Unreasonable force has been found when (among other circumstances) officers tasered a non-threatening arrestee who was not resisting arrest, put pressure on a face-down arrestee's back, struck an arrestee from behind without warning, beat and kicked a restrained arrestee, pepper-sprayed a restrained arrestee, and tasered an arrestee multiple times.

Tasering a non-threatening arrestee who is not actively resisting arrest is a violation of the Fourth Amendment protection against unreasonable seizure. *Brown v Chapman*, 814 F3d 447 (CA 6, 2016).

Putting substantial or significant pressure on an arrestee's back while the arrestee is in a face-down prone position after being subdued or incapacitated constitutes unreasonable force. *Champion v Outlook Nashville, Inc*, 380 F3d 893 (CA 6, 2004).

Striking a suspect without warning from behind with a nightstick violates the Fourth Amendment protection against unreasonable seizures. *Dugan v Brooks*, 818 F2d 513 (CA 6, 1987).

Beating and kicking a restrained suspect who is in the control of the police is a violation of the Fourth Amendment protection against unreasonable seizures. *Lewis v Downs*, 774 F2d 711 (CA 6, 1985).

Police officers used unreasonable force when they continued spraying pepper spray into the face of a suspect who was handcuffed, hobbled, placed in a police car, and was already blinded and incapacitated. *Champion v Outlook Nashville, Inc*, 380 F3d 893 (CA 6, 2004).

Police officers used excessive force in detaining arrestee, even though the arrestee attempted to evade the officers and choked one of them, when the officers held the arrestee face down in the mud, struck him with batons at least ten times after he was restrained, and tasered him directly on his bare skin three times in the span of a few seconds. *Landis v Baker*, 297 Fed Appx 453 (CA 6, 2008).

Under the traditional common-law rule, a person may resist an unlawful arrest. *People v Moreno*, 491 Mich 38; 814 NW2d 624 (2012).