

Chapter 23

Motions To Suppress Tangible Evidence

Part A. Introduction: Tools and Techniques for Litigating Search and Seizure Claims

§ 23.01 OVERVIEW OF THE CHAPTER AND BIBLIOGRAPHICAL NOTE

The Fourth Amendment to the Constitution of the United States, forbidding “unreasonable searches and seizures,” is the subject of an extensive jurisprudence. Issues raised by the numerous Fourth Amendment doctrines are multiple and complex; the law is often uncertain and in flux. The best general treatment of the subject is WAYNE R. LAFAVE, *SEARCH AND SEIZURE* (5th ed. & Supp.). *See also* JOSEPH G. COOK, *CONSTITUTIONAL RIGHTS OF THE ACCUSED – PRETRIAL RIGHTS* 175-461 (1972); JOHN WESLEY HALL, JR., *SEARCH AND SEIZURE* (3d ed. 2000); ARNOLD MARKLE, *THE LAW OF ARREST AND SEARCH AND SEIZURE* (1974); WILLIAM E. RINGEL, *SEARCHES & SEIZURES, ARRESTS AND CONFESSIONS* (2d ed. 2003 & Supp.); JOSEPH A. VARON, *SEARCHES, SEIZURES AND IMMUNITIES* (2d ed. 1974). There are voluminous law review articles of good quality on specific subtopics.

Rather than attempt still another doctrinal discourse here, this chapter approaches the law of search and seizure from a different angle. After a brief description of the major constitutional guarantees that defense counsel may invoke to challenge the legality of police searches and seizures and thereby the admissibility of prosecution evidence produced by those activities (§ 23.02 *infra*), the text sets out a checklist of questions that counsel can ask and answer (with minimal investigation) about the facts of any particular case s/he is handling (§ 23.03 *infra*). The references following each question will direct counsel to subsequent sections containing functional analyses of the law applicable to the basic factual situation targeted by the question. These analyses should assist counsel in identifying particular aspects of law enforcement activity that may be assailable in each situation, together with the theoretical grounds and supporting authorities for assailing them.

Counsel should particularly heed the advice in § 7.09 *supra* to invoke state statutory and constitutional provisions as well as the federal Fourth Amendment when challenging searches or seizures. This is an area in which state constitutional law has increasingly become more defense-friendly than federal constitutional law. *See* LaKeith Faulkner & Christopher R. Green, *State-Constitutional Departures from the Supreme Court: The Fourth Amendment*, 89 MISS. L. J. 197 (2020); *State v. Short*, 851 N.W.2d 474, 486 (Iowa 2014) (“As a result of the United States Supreme Court’s retreat in the search and seizure area, there has been a sizeable growth in independent state constitutional law. A survey of jurisdictions in 2007 found that a majority of the state supreme courts have departed from United States Supreme Court precedents in the search and seizure area to some degree.”).

Throughout the sections on search and seizure law, an emphasis will be placed on issues

likely to arise in a typical juvenile delinquency practice. Issues such as searches of students in school will receive greater attention than, for example, electronic surveillance (which tends to be used primarily in police investigations of adult perpetrators) or administrative searches (which tend to be searches of the workplace, thereby involving primarily adults). When issues like electronic surveillance or administrative searches do crop up in a delinquency case, counsel should consult the treatises cited in the first paragraph of this section.

Most of the caselaw discussed in this chapter is adult court caselaw, since most of the developments in search-and-seizure law have taken place in adult court prosecutions. However, the Supreme Court has made clear that the Fourth Amendment applies to adults and juveniles alike and that adult court precedents regarding search and seizure are equally applicable to juvenile prosecutions. *See New Jersey v. T.L.O.*, 469 U.S. 325, 337-38 (1985) (equating the privacy rights of children and adults and demonstrating that prior adult court precedents also define the limits of police intrusiveness in searching or seizing children).

§ 23.02 CONSTITUTIONAL AND STATUTORY RESTRAINTS ON SEARCHES AND SEIZURES

§ 23.02(a) General Principles of Fourth Amendment Law

The Fourth Amendment's proscription of unreasonable searches and seizures governs federal prosecutions by its express terms and state prosecutions by incorporation into the Due Process Clause of the Fourteenth Amendment, *Mapp v. Ohio*, 367 U.S. 643 (1961). It regulates the actions of the police, other law enforcement agents, other government officials (see § 23.34 *infra*) and, in limited circumstances, private citizens (*see, e.g., United States v. Shelton*, 997 F.3d 749 (7th Cir. 2021); *State v. Scrotsky*, 39 N.J. 410, 189 A.2d 23 (1963); *Milan v. Bolin*, 795 F.3d 726, 729 (7th Cir. 2015) (dictum); *cf. Wilson v. Layne*, 526 U.S. 603, 614 (1999) (dictum) (“We hold that it is a violation of the Fourth Amendment for police to bring members of the media or other third parties into a home during the execution of a warrant when the presence of the third parties in the home was not in aid of the execution of the warrant”)).

Perhaps the simplest way of viewing the vast array of Fourth Amendment caselaw is by breaking it down into six categories of cases:

(i) Caselaw defining the powers of police officers to conduct a search of a person, place, or thing, and to seize items discovered in that search, without the benefit of a search warrant. The Supreme Court has repeatedly declared that “searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions.” *Katz v. United States*, 389 U.S. 347, 357 (1967). *See, e.g., Carpenter v. United States*, 138 S. Ct. 2206, 2221 (2018); *Riley v. California*, 573 U.S. 373, 382 (2014); *Georgia v. Randolph*, 547 U.S. 103, 109 (2006); *Kyllo v. United States*, 533 U.S. 27, 31 (2001); *Minnesota v. Dickerson*, 508 U.S. 366, 372-73 (1993); *Thompson v. Louisiana*, 469 U.S. 17, 19-20 (1984); *United States*

v. Karo, 468 U.S. 705, 714-15, 717 (1984). The “jealously and carefully drawn” exceptions to the warrant requirement (*Jones v. United States*, 357 U.S. 493, 499 (1958)) include searches and seizures made with the valid consent of an authorized person (see § 23.18 *infra*), incident to a valid arrest (see § 23.08 *infra*), under “exigent circumstances” (see § 23.20 *infra*), in an operable motor vehicle that there is probable cause to believe contains criminal objects (see § 23.24 *infra*), and after an officer’s observation of contraband or crime-related objects in “plain view” (see § 23.22(b) *infra*). In addition to these specific exceptions to the warrant requirement, the courts also will excuse the absence of a warrant and will test a search or seizure under the standard of “general reasonableness” in situations in which the “intrusion on the individual’s Fourth Amendment interests” is minimal (*United States v. Place*, 462 U.S. 696, 703 (1983); *see, e.g., Samson v. California*, 547 U.S. 843 (2005); *United States v. Sczubelek*, 402 F.3d 175, 184-87 (3d Cir. 2005)), or the police conduct at issue is of a type that “historically has not been, and as a practical matter could not be, subjected to the warrant procedure,” *Terry v. Ohio*, 392 U.S. 1, 20 (1968); *see, e.g., Illinois v. McArthur*, 531 U.S. 326, 330-37 (2001); *Delaware v. Prouse*, 440 U.S. 648, 653-55 (1979); *Michigan v. Summers*, 452 U.S. 692, 699-701 (1981), or “in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant . . . requirement impracticable,” *O’Connor v. Ortega*, 480 U.S. 709, 720 (1987) (plurality opinion), “and where the ‘primary purpose’ of the searches is ‘[d]istinguishable from the general interest in crime control,’” *City of Los Angeles v. Patel*, 576 U.S. 409, 420 (2015); *see, e.g., Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002); *Griffin v. Wisconsin*, 483 U.S. 868 (1987); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

(ii) Caselaw concerning warrantless seizures of the person, either in the form of an “arrest” or in the form of the less extensive restraint first differentiated in *Terry v. Ohio*, 392 U.S. 1 (1968), and commonly called a “*Terry stop*.” See §§ 23.04-23.14 *infra*.

(iii) Caselaw dealing with searches and seizures made pursuant to a search warrant. See § 23.17 *infra*.

(iv) Caselaw pertinent to the procedural issue of when a respondent has a sufficient interest in the area searched or the item seized to mount a challenge to the search or seizure. See §§ 23.15, 23.23 *infra*.

(v) Caselaw addressing the procedural question of whether, if a search or seizure was unconstitutional, the prosecution may nevertheless use particular items of evidence at trial because they are not viewed as “tainted” by the unlawful search or seizure. See §§ 23.37-23.40 *infra*.

(vi) Caselaw defining the extent of Fourth Amendment regulation of searches and seizures by government officials who are not in the field of law enforcement, such as public school teachers (*see Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls, supra; Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995); *New Jersey*

v. T.L.O., supra) and probation officers (*see Griffin v. Wisconsin, supra*), and searches or seizures by private citizens acting in collaboration with the police. See § 23.33-23.36 *infra*.

§ 23.02(b) State Constitutional Protections Against Searches and Seizures

As explained in § 7.09 *supra*, some state courts in recent years have begun to construe state constitutional provisions as providing greater protections than the parallel provisions of the Constitution of the United States as interpreted by the Supreme Court of the United States. This has occurred particularly in the area of searches and seizures. *See, e.g., State v. Short*, 851 N.W.2d 474, 486 (Iowa 2014) (“A survey of jurisdictions in 2007 found that a majority of the state supreme courts have departed from United States Supreme Court precedents in the search and seizure area to some degree.”). Quite a few state courts have developed an extensive body of state constitutional law on searches and seizures, rejecting major doctrines that limit Fourth Amendment rights. Although the state constitutional decisions are too numerous to survey systematically, some of the most significant ones will be noted in the relevant subsections of this chapter. As § 7.09 advises, defense counsel should always invoke state constitutional provisions in addition to the federal Fourth Amendment, even when there are no state constitutional precedents on the issue. This is a cost-free practice, and the advantages of winning a search-and-seizure claim on state-law grounds always make that possibility worth pursuing. See the concluding paragraph of § 7.09.

§ 23.02(c) Statutory Provisions Relating to Searches and Seizures

In many jurisdictions there are statutes (i) delineating the circumstances under which a police officer or a private citizen may make an arrest for a felony or misdemeanor (see § 23.07 *infra*), (ii) limiting the degree of force that may be employed in the course of an arrest (*cf.* § 23.07 concluding paragraph); and (iii) enacting “knock-and-announce” requirements under which a police officer must give adequate warning of the officer’s identity and intention to enter a dwelling before entering forcibly (see § 23.21 *infra*). Other statutory regulations of searches and seizures are found in some States and may provide grounds for suppression motions. *See, e.g., State v. Gilman*, 173 Vt. 110, 787 A.2d 1238 (2001); *Casillas v. People*, 2018 CO 78M, 427 P.3d 804 (Colo. 2018) (alternative ground).

In addition to statutes applicable to both adult and juvenile cases, many jurisdictions have special statutory provisions governing police conduct in arresting and booking juveniles. See § 3.06 *supra*; § 24.14 *infra*. Violations of these procedures may, in an appropriate case, result in the suppression of tangible evidence.

Finally, there is a federal statute (18 U.S.C. §§ 2510-2520 (2019)) and, in several jurisdictions, state statutes, governing police use of electronic surveillance.

§ 23.03 ANALYZING SEARCH AND SEIZURE ISSUES: THE QUESTIONS TO ASK

In examining a case for possible search and seizure issues, counsel should begin by breaking down the series of governmental actions into their component parts, since each specific act by a government agent may give rise to a separate claim for relief. For example, in a case in which the police stop a person, pat the person down, arrest the person, and seize objects from the person's possession, counsel should consider all of the following issues: Did the police have a sufficient basis for making the initial *Terry* stop? Even if the police had the requisite basis for a *Terry* stop, did they have the additional "specific and articulable facts" necessary for a *Terry* frisk? If there was an adequate basis for the *Terry* frisk, did the manner in which the frisk was conducted exceed constitutional limits for a pat-down? Did the police thereafter have an adequate basis for an arrest? Did the subsequent search incident to arrest exceed constitutional limits? If not, was the seizure of each particular object that the search uncovered constitutionally justified? Any of the distinct police actions identified in these questions could generate a basis for suppressing evidence.

The following questions should be asked in analyzing search and seizure claims:

- (1) Was the respondent stopped, accosted, arrested, or taken into custody by government agents at any time?
 - (a) If so, is it in the interest of the defense to characterize the agents' action as an arrest or as a *Terry* stop? See § 23.05 *infra*. Do the facts support the preferred characterization? See § 23.06 *infra*.
 - (b) If the agents' action is characterized as an arrest:
 - (i) Did the agents have the requisite probable cause to make the arrest? See §§ 23.07, 23.11 *infra*.
 - (ii) Did the agents search the respondent incident to the arrest? If so, did the search comply with the requirements for searches incident to arrest? See § 23.08 *infra*.
 - (iii) Did the post-arrest custodial treatment of the respondent comport with constitutional and statutory requirements? See §§ 23.08(c), 23.14 *infra*.
 - (c) If the agents' action is characterized as a *Terry* stop:
 - (i) Did the agents have the requisite factual basis for a *Terry* stop? See §§ 23.09, 23.11 *infra*.
 - (ii) Did the agents conduct a *Terry* frisk? If so, did they have the requisite facts to support a *Terry* frisk? See §§ 23.10-23.11 *infra*.

- (iii) Was the period of the stop unduly extended or the post-stop investigation conducted in a manner that exceeded the justifications for search activities incidental to the stop? See §§ 23.06(a), 23.27, 23.28 *infra*.
 - (d) Did the agents search any closed containers that the respondent had in his or her possession? See §§ 23.08(b), 23.12 *infra*.
 - (e) Was the respondent's body or clothing inspected? Was any physical examination of the respondent made? Were any tests conducted on the respondent's body or on any object or fluid, hair, or like substance taken from the respondent's body? See § 23.14 *infra*.
 - (f) Did the incident occur in a school setting? See §§ 23.33-34, 23.36 *infra*.
- (2) Did government agents enter or search the respondent's home, any premises with which s/he had more than transitory connections, or any premises in which the respondent was legitimately present at the time of the agents' entry or search?
 - (a) If so, does the respondent have a constitutionally protected interest that permits him or her to challenge the agents' entry into the premises, the agents' search of areas within the premises, or both? See § 23.15 *infra*.
 - (b) If the respondent does have the requisite interest:
 - (i) Was the agents' entry and was the search authorized by a search warrant? If so, was the warrant validly issued, and was it validly executed? See § 23.17 *infra*.
 - (ii) Was the agents' entry and was the search authorized by an arrest warrant? If so, did the agents limit their activities to arresting the subject of the warrant or use the arrest entry to conduct an impermissible search? See §§ 23.19, 23.22(d) *infra*.
 - (iii) Was the agents' entry and was the search authorized by exigent circumstances? If so, did the agents confine their activities to a range within the scope of this justification? See §§ 23.20, 23.22(d) *infra*.
 - (iv) Was the agents' entry and was the search authorized by the consent of the respondent? If so, was the respondent's consent voluntary? See § 23.18(a) *infra*.

- (v) Was the agents' entry and was the search authorized by the consent of some individual other than the respondent? If so, did that individual have the authority to consent to the search of the area? Was the consent voluntary? See § 23.18(b) *infra*.
 - (c) Did the agents at any time after they entered the premises detain or search the person of the respondent? If so:
 - (i) Did the agents have the requisite basis for detaining the respondent? See § 23.22(c) *infra*.
 - (ii) Did the agents have the requisite basis for searching the person of the respondent? See § 23.22(c) *infra*.
 - (d) Did the agents seize any item that was allegedly in plain view? If so, did the seizure comport with the rules governing the plain view exception to the warrant requirement? See § 23.22(b) *infra*.
 - (e) Did the agents comply with the rules requiring them to announce their identity and intention to enter before effecting a forcible entry of a dwelling? See § 23.21 *infra*.
- (3) Did the agents stop, search, or seize any motor vehicle?
- (a) If so, does the respondent have a constitutionally protected interest that permits him or her to challenge the agents' conduct in stopping, searching or seizing the vehicle? See § 23.23 *infra*.
 - (b) If the respondent does have the requisite interest:
 - (i) Did the agents stop the vehicle while it was moving? If so, did the agents have the requisite factual basis for a *Terry* stop? See § 23.27 *infra*.
 - (ii) Did the agents order the respondent out of the vehicle? If so, did they have the requisite basis to issue that order? See § 23.28 *infra*.
 - (iii) Did the agents conduct a search of the vehicle incident to an arrest of the respondent? If so, was the arrest valid? Was the search properly limited in scope? See § 23.26 *infra*.
 - (iv) Did the agents conduct an evidentiary search of the vehicle? If so, did they have the requisite probable cause for that search? See

§ 23.24 *infra*.

- (v) During the stop or search of the vehicle, did the agents seize any item that was allegedly in plain view? If so, did the seizure comport with the rules governing the plain view exception to the warrant requirement? See § 23.22(b) *infra*.
 - (vi) Was the asserted basis for the stop of the vehicle a traffic infraction? See § 23.28 *infra*.
 - (vii) Was the vehicle impounded and thereafter searched in an “inventory search”? If so, was the search conducted pursuant to standardized procedures? Was the alleged inventory a mere pretext for an otherwise impermissible evidentiary search? See § 23.25 *infra*.
 - (viii) Did the agents open any closed containers that were in the vehicle? See § 23.24 *infra*.
- (4) Was the respondent or were his or her possessions searched while at school?
- (a) If so, was the search conducted by a school official without the involvement of the police? Was it:
 - (i) A search of the respondent’s person? See §§ 23.33-23.34 *infra*.
 - (ii) A search of the respondent’s locker or desk? See § 23.35 *infra*.
 - (b) Was the search conducted by a police officer or by a school official acting under the direction of, or in conjunction, with a police officer? See § 23.36 *infra*.
- (5) Did government agents search or seize any physical object belonging to the respondent, whether or not on premises in which s/he has an interest? See § 23.15(d) *infra*.
- (6) Did government agents act on the basis of information obtained from informants, whether those informants were “special agents,” police spies, or private citizens? See § 23.32 *infra*.

In the preceding paragraphs, the phrase “government agents” is used advisedly. The personnel to whom the Fourth Amendment’s strictures are most commonly applied in criminal and juvenile delinquency cases are police and other law enforcement officers, but the

Amendment is held to govern the conduct of many other government employees as well. *See, e.g., Ferguson v. City of Charleston*, 532 U.S. 67, 76 (2001) (“[b]ecause . . . [the hospital operated by the Medical University of South Carolina] is a state hospital, the members of its staff are government actors, subject to the strictures of the Fourth Amendment”); *New Jersey v. T.L.O.*, 469 U.S. 325, 333 (1985) (“the Fourth ‘Amendment’s prohibition on unreasonable searches and seizures applies to searches conducted by public school officials”); *State v. Bee*, 2021 ND 61, 956 N.W.2d 380 (N.D. 2021) (Police officers accompanied a social worker who went to the defendant’s home to remove her child; the defendant fled out of the house with the child and was restrained by the police outside the house; the “social worker [then] entered the residence to obtain personal belongings for the child, and an officer followed. Once the officer was inside, the social worker pointed out a glass smoking pipe. Bee was subsequently charged with Child Neglect; Possession of Methamphetamine; Possession of Drug Paraphernalia; and Refusal to Halt.” *Id.* at 382. Here, regardless of their intent, the officers violated the Fourth Amendment by crossing the threshold of the residence without a warrant. The State’s argument that the officers were merely acting in the regular course of duty to assist social services is unavailing because the social workers are also bound by the Fourth Amendment. . . . The State has not provided persuasive reasoning or authority to avoid application of the exclusionary rule in these circumstances.” *Id.* at 383.); *Dyas v. Superior Court*, 11 Cal. 3d 628, 522 P.2d 674, 114 Cal. Rptr. 114 (1974) (uniformed, armed Housing Authority patrol officer). At the least, any government employee who is acting in collaboration with law enforcement, at the instance of law enforcement authorities (as a general matter or in the particular case at bar), or with the aim of furthering criminal law enforcement is subject to Fourth Amendment regulation. *See, e.g., Piazzola v. Watkins*, 316 F. Supp. 624, 626-27 (M.D. Ala. 1970), *aff’d*, 442 F.2d 284 (5th Cir. 1971); *Picha v. Wielgos*, 410 F. Supp. 1214, 1219-21 (N.D. Ill. 1976); *M.J. v. State*, 399 So.2d 996, 998 (Fla. App. 1981); and see § 23.18(c) *infra*. A rare case finding that a government employee’s conduct was not constrained by the Amendment is *United States v. Johnlouis*, 44 F.4th 331 (5th Cir. 2022). In that case, a U.S. Postal Service letter carrier accidentally stuck her thumb through a preexisting hole in a package she was delivering, felt something she believed to be marijuana, lifted a torn flap of the package to examine the contents further, and saw what she took to be methamphetamine. Loth to deliver meth to a location where there were lots of children, she took the package to a private individual who was the property manager for the house to which the package was addressed as well as for a number of adjacent houses, and she suggested that this person call the police. The property manager did so, and law-enforcement follow-up resulted in the confiscation of the meth and then in Johnlouis’s prosecution. The Fifth Circuit’s opinion rejecting Johnlouis’ contention that the letter carrier was a government agent for Fourth Amendment purposes notably contains the following observations: “Of course, we have ‘never limited the [Fourth] Amendment’s prohibition on unreasonable searches and seizures to operations conducted by the police. *New Jersey v. T.L.O.*, 469 U.S. 325, 335 (1985). ‘[W]e have held the Fourth Amendment applicable to the activities of civil as well as criminal authorities,’ including building inspectors, firefighters, teachers, healthcare workers, and, yes, even USPS employees. *Id.* After all, ‘[t]he basic purpose of this Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.’ *Camara v. Mun. Ct. of City & Cnty. of S.F.*, 387 U.S. 523, 528 (1967). ‘Because the individual’s

interest in privacy and personal security suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards, it would be anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when [he] is suspected of criminal behavior. *New Jersey*, 469 U.S. at 335. . . . ¶ But the building inspectors, firefighters, teachers, healthcare workers, and USPS employees that courts have identified as government actors to whom the Fourth Amendment applies were all carrying out law enforcement functions. The same cannot be said of . . . [the letter carrier here]. 44 F.4th at 336-37. In addition, the *Johnlouis* opinion is at pains to point out that: "Ordinarily, this resolution would not dispose of Johnlouis's Fourth Amendment claim because he could argue that . . . [the letter carrier] was a private person acting in the capacity of a government agent by searching the package with the knowledge of, or in order to assist, law enforcement. . . . Where a search is conducted by someone other than 'an agent of the government,' this court has held that it still violates the Fourth Amendment if (1) 'the government knew of and acquiesced in the intrusive conduct' and (2) 'the party performing the search intended to assist law enforcement efforts or to further his own ends.' . . . But Johnlouis explicitly disclaims any such alternative argument . . . [and] has thus abandoned any argument that the Fourth Amendment applies to . . . [the letter carrier] outside of his contention that her employment by USPS per se renders her subject to the Fourth Amendment." 44 F.4th at 337. *See also State v. Ellingsworth*, 966 P.2d 1220, 1224 (Utah App. 1998), and cases cited (holding that the actions of a Workers Compensation Fund investigator were not subject to Fourth Amendment constraint and quoting *Commonwealth v. Cote*, 15 Mass. App. Ct. 229, 234, 444 N.E.2d 1282, 1286 (1983): "'Perhaps the single general principle which may be distilled from cases is the precept that mere employment by an arm of government is not enough to make an actor a government agent for purposes of the Fourth Amendment. Rather, the nature of the actor's employment, his specific duties and authority to act for the State and the circumstances of the search are all taken into account in deciding whether a search was 'private' or governmental in nature.'").

When law enforcement activity that may give rise to search and seizure issues has occurred, it is important to think comprehensively about all the items that could be suppressed as a result of a ruling that the search or seizure was unconstitutional. For example, if an arrest is found to be unlawful, the suppressible fruits of that arrest may include any physical object or substance seized at or after the time of the arrest, any show-up or lineup observations made at or after the time of the arrest, identifications of the respondent's photograph in a photographic array that was made possible because the respondent was photographed upon arrest, confessions or statements of the respondent made in custody after the arrest or otherwise induced by pressures flowing from the arrest, any physical object or substance or observation obtained by a search or seizure whose validity depends upon consent given while the respondent was in custody after the arrest or upon consent otherwise induced by pressures flowing from the arrest, testimony of witnesses whose identity was learned by interrogation of the respondent following the arrest, and fingerprint identification evidence based upon exemplars taken at the time of the arrest. See § 23.37 *infra*. While some of these potential fruits of the arrest may be found eventually to be too far removed from the illegality to require suppression, see *id.*, counsel cannot afford to overlook

any conceivably viable suppression arguments.

In analyzing the validity of a search or seizure, it is crucial to isolate the facts and circumstances known to the police at the time of the search or seizure from those facts later learned by the police. The constitutionality of police officers' conduct "must [be] judge[d] . . . in light of the information available to them at the time they acted." *Maryland v. Garrison*, 480 U.S. 79, 85 (1987). See also *Florida v. J.L.*, 529 U.S. 266, 271 (2000) ("The reasonableness of official suspicion must be measured by what the officers knew before they conducted their search."); *United States v. Jacobsen*, 466 U.S. 109, 115 (1984) ("[t]he reasonableness of an official invasion of the citizen's privacy must be appraised on the basis of the facts as they existed at the time that invasion occurred"); *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968) (the constitutionality of a search or seizure is determined by asking "would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?"); *State v. Amstutz*, 169 Idaho 144, 150, 492 P.3d 1103, 1109 (2021) (same); *United States v. Thomas*, 65 F.4th 922, 925 (7th Cir. 2023) ("[t]he validity of a search depends on what law enforcement knew when they conducted the search"); *United States v. Frazier*, 30 F.4th 1165, 1174 (10th Cir. 2022), summarized in § 23.06(a) *infra* ("we consider only those facts known to the trooper at the point he diverted from his traffic-based mission to arrange the dog sniff"); *United States v. Hurtt*, 31 F.4th 152, 159 (3d Cir. 2022) ("[a]fter the *Rodriguez* moment, 'nothing later in the stop can inform our reasonable suspicion analysis'"); *State v. Deuble*, 2020-Ohio-3970, 2020 WL 4532961, at *6 (Ohio App. 2020) (a prosecutor's investigator posing as a 15-year-old girl on a social-media site posted a provocative message that triggered a series of interchanges with one "EY" in which EY proposed to have sex with "her" and arranged to meet "her" in a designated park at a specified time; police surveilled the park, knowing nothing more about EY than that he was a thin white male, 21 to 25 years old, who drove a green Honda; they saw no green Honda but did observe Deuble, a thin, young white male, playing basketball; the investigator initiated a series of messages to EY and the police observed that whenever a message was posted, Deuble stopped playing basketball and used his cell phone; the police moved in – four or more officers surrounding Deuble – and handcuffed him; the investigator then picked Deuble's cell phone up off the ground and sent a test message which confirmed that Deuble was EY; the court of appeals "find[s] that . . . probable cause did not occur until after the police arrested Deuble. Prior to Deuble's arrest, the police knew that he was present at the meeting place, and he was using a cell phone at the same time the suspect was using a cell phone. He matched the suspect's description, but that description was vague, indicating race, gender, a 'thin' build, and approximate age. Furthermore, there was no sign of the green Honda the suspect was purportedly driving"; Deuble's arrest therefore violated the Fourth Amendment, and all evidence resulting from it, including information on his cell phone and a confession, should have been suppressed); *White v. Commonwealth*, 2005 WL 2807242 (Ky. App. 2005). It is not always easy to determine what facts were known by the police at the time of a search or seizure. For example, police officers often amend the complaint report, supposedly containing the facts learned from the victim on the scene (see § 8.19 *supra*), to add a detailed description of the respondent based upon the officers' observations of the respondent after arrest. Counsel should not accept these reports at face value but must cross-examine the

police officer to ascertain what precise facts were known to him or her when s/he undertook the search or seizure.

In a few categories of cases, the Supreme Court has held that an unlawful police search or seizure may not require suppression if the actions of the police were so obviously in “good faith” and objectively reasonable that suppression would not further the exclusionary rule’s rationale of deterring police misconduct. The context in which this principle is most often invoked – a police officer’s good faith reliance on a search warrant issued by a magistrate which turns out to have been defective because the magistrate was mistaken in finding probable cause – is discussed in § 23.17 *infra*. The other situations in which the Court has recognized a “good faith” exception to the exclusionary rule are (1) when the police, in making an arrest, reasonably relied on a computer record of a warrant which a court clerk erroneously failed to update to reflect the later quashing of the warrant (*Arizona v. Evans*, 514 U.S. 1, 14-16 (1995)); (2) when an arresting officer’s reasonable but erroneous belief in the existence of “an outstanding arrest warrant” stemmed from “a negligent bookkeeping error by another police employee” who failed to update the police computers when the warrant was recalled (*Herring v. United States*, 555 U.S. 135, 137 (2009)), although this version of the “good faith” rule would be inapplicable and “exclusion [of the fruits of the arrest] would certainly be justified” “[i]f the police have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests” or if “systemic errors” in a warrant system were so “routine or widespread” as to make it “reckless for officers to rely on . . . [the] unreliable warrant system” (*id.* at 146-47); (3) “when the police conduct a search in compliance with binding precedent that is later overruled” (*Davis v. United States*, 564 U.S. 229, 232 (2011)); and (4) “when officers act in objectively reasonable reliance upon a *statute* authorizing . . . [certain] searches, but where the statute is ultimately found to violate the Fourth Amendment” (*Illinois v. Krull*, 480 U.S. 340, 342 (1987)). The Supreme Court also has held that a police officer’s “mistake of law can . . . give rise to the reasonable suspicion necessary to uphold . . . [a] seizure under the Fourth Amendment” as long as the mistake was “*objectively* reasonable.” *Heien v. North Carolina*, 574 U.S. 54, 57, 68 (2014) (upholding the validity of a police officer’s stop of a car “because one of its two brake lights was out” and “[i]t was . . . objectively reasonable for an officer . . . to think that [the] . . . faulty right brake light was a violation of North Carolina law” even though “a [North Carolina appellate] court later determined that a single working brake light was all the law required” (*id.* at 57, 68); compare *People v. Owen*, 2019 WL 3312531 (Mich. App. 2019) (finding a Fourth Amendment violation requiring suppression of evidence obtained through a traffic stop where the officer knew all of the facts necessary to establish that the speed limit on the road where the stop was made was 55 m.p.h. but believed that the limit was 25 m.p.h. because he was ignorant of the statutory law which precluded a village from reducing the state speed limit without meeting certain posting requirements: “The deputy in this case did not make a reasonable mistake of law because the Motor Vehicle Code since 2006 established the rule of law regarding speed limits throughout Michigan. Under the Motor Vehicle Code, unposted roads were 55 miles per hour. . . . The deputy’s testimony does not reflect a reasonable interpretation of the Motor Vehicle Code or even a plausible understanding of the applicable law. The record indicates that he never considered the Motor Vehicle Code at all. We conclude that the deputy did not have an

objectively reasonable belief that probable cause existed to stop defendant because the totality of the circumstances established that he made an unreasonable mistake of law merely based on an unsupported hunch that the speed limit was 25 miles per hour because other roads were posted elsewhere in the village with that speed limit. However, since 2006, nearly 10 years before the traffic stop, the Motor Vehicle Code repealed blanket village-wide speed limits. The circuit court erred because it essentially held that a law enforcement officer's unreasonable ignorance of the law was equivalent to a reasonable mistake of the law.")). See also § 23.28 *infra*. Finally, as discussed, in § 23.21 *infra*, the Supreme Court has withdrawn the exclusionary rule as a remedy for violations of the Fourth Amendment's "knock and announce" requirement. See *Hudson v. Michigan*, 547 U.S. 586, 588, 594 (2006). In some States, one or more of the foregoing limitations on the availability of suppression have been rejected by the state courts as a matter of state constitutional law. See, e.g., § 23.17 *infra* (citing state caselaw that relies on the state constitution to reject the Supreme Court's good faith rule for search warrants issued without probable cause); and see *State v. Scott*, 619 N.W.2d 371 (Iowa 2000). See generally § 7.09 *supra*.

Part B. On-the-Street Encounters with the Police: Arrests, Searches Incident to Arrest, Terry Stops, Terry Frisks, and Other Encounters

§ 23.04 THE SPECTRUM OF ON-THE-STREET ENCOUNTERS BETWEEN CITIZENS AND THE POLICE: CONTACTS, *TERRY* STOPS AND ARRESTS

As the Supreme Court has observed, "[s]treet encounters between citizens and police officers are incredibly rich in diversity. They range from wholly friendly exchanges of pleasantries or mutually useful information to hostile confrontations of armed men involving arrests, or injuries, or loss of life." *Terry v. Ohio*, 392 U.S. 1, 13 (1968). The Court thus far has identified three categories of encounters, which have differing ramifications for police prerogatives and citizens' rights: contacts, *Terry* stops, and arrests.

§ 23.04(a) Contacts

The Fourth Amendment is not called into play by "law enforcement officers . . . merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen . . . [even if] the officer identifies himself as a police officer. . . . The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. . . . He may not be detained even momentarily without [triggering Fourth Amendment protections that require] reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds." *Florida v. Royer*, 460 U.S. 491, 497-98 (1983) (plurality opinion). Compare *Kolender v. Lawson*, 461 U.S. 352 (1983), with *Hiibel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177 (2004), discussed in § 23.11(b) *infra*.

§ 23.04(b) The Dividing Line Between Contacts and "Seizures" Within the Meaning of

the Fourth Amendment

If a police officer, going beyond this kind of detention-free contact, “accosts [the] individual and restrains his freedom to walk away, he has ‘seized’ that person” within the meaning of the Fourth Amendment’s restrictions upon “seizures.” *Terry v. Ohio*, 392 U.S. 1, 16 (1968); *Brown v. Texas*, 443 U.S. 47, 50 (1979); *Brendlin v. California*, 551 U.S. 249, 254-55 (2007). The restraint may be physical, *Sibron v. New York*, 392 U.S. 40, 67 (1968), or it may take the form of a command to “stand still” or to “come along” or any other gesture or expression indicating that the person is not free to go as s/he pleases. *Dunaway v. New York*, 442 U.S. 200, 203, 207 n.6 (1979); see *Florida v. Royer*, 460 U.S. 491, 501-03 & n.9 (1983) (plurality opinion); *id.* at 511-12 (concurring opinion of Justice Brennan); *Brendlin v. California*, 551 U.S. at 254-55. “What has evolved from our cases is a determination that an initially consensual encounter between a police officer and a citizen can be transformed into a seizure or detention within the meaning of the Fourth Amendment, ‘if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.’” *Immigration and Naturalization Service v. Delgado*, 466 U.S. 210, 215 (1984). The touchstone of a Fourth Amendment seizure of a person is whether the police behavior “would . . . have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.” *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988). *Accord, Kaupp v. Texas*, 538 U.S. 626, 629 (2003) (per curiam); and see *Baude v. Leyshock*, 23 F.4th 1065, 1071 (8th Cir. 2022) (“[w]hen a person is surrounded by officers on all sides, he would reasonably believe that he is no longer free to leave and that he has been seized”); *United States v. Washington*, 490 F.3d 765, 771-72 (9th Cir. 2007) (“We have identified several non-exhaustive situations where an officer’s actions escalate a consensual encounter into a seizure: ‘when a law enforcement officer, through coercion, physical force, or a show of authority, in some way restricts the liberty of a person,’ . . . or ‘if there is a threatening presence of several officers, a display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer’s request might be compelled.’ . . . [We have] identified several factors to consider in determining if a person was seized, any one of which, if present, could constitute a seizure: (1) the number of officers; (2) whether weapons were displayed; (3) whether the encounter occurred in a public or non-public setting; (4) whether the officer’s tone or manner was authoritative, so as to imply that compliance would be compelled; and (5) whether the officers informed the person of his right to terminate the encounter.”); *United States v. Lopez*, 907 F.3d 472, 486-87 (7th Cir. 2018) (“The government argues that the stop here was not excessively long because, when the officer asked Lopez for permission to search his house, he was no longer being detained by police and was free to leave. The officer had told Lopez ‘that he was not under arrest, that he didn’t have to speak’ to officers, and that ‘he was free to go.’ In assessing whether a person has been seized, we look to the totality of the circumstances and ask whether ‘a reasonable person would feel free to terminate the encounter.’ . . . ¶ . . . [W]hile one officer was assuring Lopez that he was free to go, the other officers still had Lopez’s keys, van, and cellphone. At least eight officers remained on the scene at his garage and house. In this case, no reasonable person in Lopez’s shoes would conclude that one officer’s words meant more than all eight officers’ actions. Lopez remained in police detention for as long as officers functionally

blocked his exit by the overwhelming physical presence of eight officers and by retaining his van, car keys, and cellphone.”); *see also Brendlin v. California*, 551 U.S. at 254-55, 262 (“A police officer may make a seizure by a show of authority and without the use of physical force, but there is no seizure without actual submission; otherwise, there is at most an attempted seizure, so far as the Fourth Amendment is concerned. . . . When the actions of the police do not show an unambiguous intent to restrain or when an individual’s submission to a show of governmental authority takes the form of passive acquiescence, there needs to be some test for telling when a seizure occurs in response to authority, and when it does not. The test was devised by Justice Stewart in *United States v. Mendenhall*, 446 U.S. 544 (1980), who wrote that a seizure occurs if ‘in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave,’ *id.*, at 554 (principal opinion). Later on, the Court adopted Justice Stewart’s touchstone . . . but added that when a person ‘has no desire to leave’ for reasons unrelated to the police presence, the ‘coercive effect of the encounter’ can be measured better by asking whether ‘a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter’ [W]hat may amount to submission depends on what a person was doing before the show of authority: a fleeing man is not seized until he is physically overpowered, but one sitting in a chair may submit to authority by not getting up to run away.”). *See, e.g., United States v. Smith*, 794 F.3d 681, 682, 684-88 (7th Cir. 2015); *United States v. Black*, 707 F.3d 531, 537-39 (4th Cir. 2013); *Clark v. State*, 994 N.E.2d 252, 263 (Ind. 2013); *State v. White*, 887 N.W.2d 172, 176-77 (Iowa 2016). *Cf. United States v. Drayton*, 536 U.S. 194, 203-04 (2002) (police questioning of passengers on a bus did not amount to a “seizure” for Fourth Amendment purposes when “[t]he officers gave the passengers no reason to believe that they were required to answer the officers’ questions,” “left the aisle free so that [passengers] could exit,” and did “[n]othing . . . that would suggest to a reasonable person that he or she was barred from leaving the bus or otherwise terminating the encounter”); *California v. Hodari D.*, 499 U.S. 621 (1991) (there was no “seizure” for purposes of the Fourth Amendment when police officers chased a suspect who failed to comply with their directive to halt; therefore, the officers’ lack of a basis for the directive and the pursuit provided no Fourth Amendment ground for suppression of contraband the suspect discarded during the chase; the Court says that “the so-called *Mendenhall* test, formulated by Justice Stewart’s opinion in *United States v. Mendenhall*, 446 U.S. 544, 554 (1980), and adopted by the Court in later cases . . . [citing *Chesternut* and *Delgado*] states a *necessary*, but not a *sufficient*, condition for seizure – or, more precisely, for seizure effected through a ‘show of authority.’ *Mendenhall* establishes that the test for 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,” *id.* at 627-28; if, after such a show of authority, the citizen does not attempt to flee or resist but rather “yield[s],” s/he is deemed to have been seized, *id.* at 626; *see also id.* at 629; but if, instead of complying with the show of authority, the citizen flees, no “seizure” is effected until s/he is thereafter physically restrained or submits to restraint, *id.* at 628-29). *Compare Torres v. Madrid*, 141 S. Ct. 989, 993-94 (2021) (“The question in this case is whether a seizure occurs when an officer shoots someone who temporarily eludes capture after the shooting. The answer is yes: The application of physical force to the body of a person with intent to restrain is a seizure, even if the force does not succeed in subduing the person.”);

Campbell v. Cheatham County Sheriff's Department, 47 F.4th 468, 479 (6th Cir. 2022) (“‘When an officer fires a gun at a person,’ but ‘the bullet does not hit the person, the “show of authority . . . ha[s] the intended effect of contributing to [the person]’s immediate restraint”’ and under our caselaw is a seizure.[’] . . . By firing at the Campbells’ home, Fox made a show of authority. This show of authority restricted the Campbells’ movement such that a reasonable person, under these circumstances, would not feel free to leave. Therefore, Fox seized the Campbells under the Fourth Amendment.”); *Johnson v. VanderKooi*, 509 Mich. 524, 983 N.W.2d 779 (2022) (“Fingerprinting an individual without probable cause, a warrant, or an applicable warrant exception violates an individual’s Fourth Amendment rights.” *Id.* at 529-30, 983 N.W.2d N.W.2d at 782. “As directed by [*United States v.*] *Jones*[, 565 U.S. 400 (2012)] and Grady [*v. North Carolina*, 575 U.S. 306 (2015)], we consider whether there was a physical trespass on a constitutionally protected area and whether there was an attempt to obtain information. Again, the Fourth Amendment protects both the right of people to be secure in their own persons as well as in their houses and effects. The fingerprinting of each of the plaintiffs in these cases constituted a physical trespass onto a person’s body, a constitutionally protected area. That the act of fingerprinting is done for the very purpose of obtaining information is clear; defendants’ entire argument justifying the P&P policy [a police department policy of photographing and fingerprinting individuals stopped without probable cause whenever an officer deemed photographing and fingerprinting necessary given the facts and circumstances] was that fingerprinting was necessary under these circumstances to confirm an individual’s identity. Accordingly, we hold that fingerprinting pursuant to the P&P policy constitutes a search under the Fourth Amendment.” *Id.* at 537-38, 983 N.W.2d at 786-87.); *United States v. Gaines*, 918 F.3d 793 (10th Cir. 2019) (while the defendant was seated in his car in a parking lot, two marked police cars came up behind him and stopped with their roof lights flashing; one uniformed officer signaled the defendant to get out of his car and told him that the police had a report he was there selling PCP; during this conversation, the other officer circled the defendant’s car and looked inside; when he saw an open container of alcohol and smelled PCP, he advised the defendant that the defendant would be detained; the defendant then grabbed a pouch from the car and fled but was caught and arrested; distinguishing *Hodari D.*, the court holds that the defendant was seized for Fourth Amendment purposes and yielded to a show of authority before his flight; thus, evidence found on his person had to be suppressed); *Commonwealth v. Adams*, 651 Pa. 440, 450, 205 A.3d 1195, 1200-01 (2019) (an officer approached a car parked at night in a lot behind commercial properties, saw that the driver’s seat was occupied, and knocked on the window; the occupant started to open the door; the officer, fearing for his safety, pushed it shut and told the occupant to open his window: “We agree with Adams that he was ‘seized’ for Fourth Amendment purposes when [the] Officer . . . would not allow Adams to exit his vehicle, closing the door as Adams opened it. This action, constituting both an act of physical force and a show of authority, is precisely the type of escalatory factor that compels a finding that a seizure occurred.”); *United States v. Bowman*, 884 F.3d 200 (4th Cir. 2018) (following a traffic stop, a highway patrol officer instructed the driver to sit in the patrol car while the officer verified his license and registration information; the officer then issued the driver a warning citation, returned his license and registration documents, and shook his hand but told him to stay in the patrol car while the officer questioned a passenger who had remained in the stopped vehicle; the directive

to stay in the patrol car – to which the driver responded “okay” – was a seizure of the driver and violated the Fourth Amendment in the absence of reasonable suspicion); *United States v. Peters*, 60 F.4th 855, 863 (4th Cir. 2023) (“[W]e find that Peters was seized approximately one minute into the encounter when Officer Butler threatened to exercise his authority to take Peters to jail for trespass and suggested that Peters should consent to a pat down. Both the officers were in uniform, with their service weapons holstered, and exited their patrol car upon seeing Peters and Garrison. They spoke in ‘stern’ and ‘authoritative’ tones of voice while asking Peters and Garrison if they were armed and to lift their shirts. . . . Although the Government maintains that the officers’ interaction with Peters constituted a consensual encounter, we find otherwise. . . ¶ A reasonable person would not feel free to leave if an officer says he can take the person to jail for a specific crime, or threatens that he will do so. This is especially true after being accused of the specific crime several times.”); *United States v. McKinney*, 980 F.3d 485, 491 (5th Cir. 2020) (“When [an] Officer . . . jumped out of the police SUV and approached the group [of three men and a woman standing on a sidewalk], he shined his flashlight on the woman who appeared to be walking away and ordered that she return. No reasonable person would have felt free to walk away. As a result, each person in the group was seized at that moment.”); *Commonwealth v. Cost*, 224 A.3d 641, 650-51 (Pa. 2020) (observing the defendant and two other men in an alley in a high-crime neighborhood, police officers parked at the mouth of the alley, announced that they were police, and asked the men for identification; all three handed ID cards to the officers, who retained the ID’s while phoning in for a warrants check; meanwhile, the defendant removed his backpack and an officer asked him whether there was anything in it that the police should know about; the defendant admitted that the backpack contained a gun, which the police then seized; applying “the ‘free-to-leave’ standard,” the Pennsylvania Supreme Court finds that a Fourth Amendment seizure occurred and, unsupported by reasonable suspicion, requires suppression of the gun; the court stops short of adopting the *per se* rule established by some courts that recognize “‘the impractical and unrealistic option of a reasonable person in modern society to abandon one’s identification’” and walk away leaving it in the hands of a police officer, but concludes that “‘the retention by police of an identification card to conduct a warrant check will generally be a material and substantial escalating factor within the totality assessment.’”).

“When assessing whether a juvenile was seized for purposes of the fourth amendment, [it is appropriate to] . . . modify the reasonable person standard to consider whether a reasonable juvenile would have thought that his freedom of movement was restricted.” *People v. Lopez*, 229 Ill. 2d 322, 346, 353-54, 892 N.E.2d 1047, 1061, 1065-66, 323 Ill. Dec. 55, 69, 73-74 (2008). The precedents for considering the particular susceptibility of young people to be overawed by an aura of police authority when a court is determining whether a juvenile is in “custody” for *Miranda* purposes are discussed in § 24.08(a) *infra* and should be persuasive in the present context as well. *See J.D.B. v. North Carolina*, 564 U.S. 261, 264-65, 271-72 (2011) (“a child’s age properly informs the *Miranda* custody analysis” because the relevant inquiry is “‘how a reasonable person’ in the suspect’s position ‘would perceive his or her freedom to leave,’” and “[i]t is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave”). *See also, e.g., In re Elijah W.*, 2017 IL App (1st) 162648, 74 N.E.3d 176, 185, 411 Ill. Dec. 867, 876 (2017) (“we believe that the

holding in *J.D.B.* should apply to a fourth amendment analysis when determining whether an encounter between a minor and law enforcement was consensual. . . . Considering all the circumstances surrounding the encounter, we agree with the trial court and find a 13-year-old youth would not have believed he or she could have denied the officer's two requests to 'come here' and avoid the police without raising further suspicion. Although the officers drove an unmarked vehicle, Elijah observed four officers wearing bullet proof vests and visible badges. Officer Acevedo initially passed Elijah and then drove in reverse to approach him. He twice called to Elijah in a stern voice to 'come here.' We find a 13-year-old under the same circumstances presented would not feel free to disregard the officer's request.").

As a doctrinal matter, these rules involve a strictly objective inquiry; they do not turn either on the suspect's subjective belief that s/he is or is not free to leave (*Brendlin v. California*, 551 U.S. at 258 n.4) or on the officer's unmanifested intentions to restrain the suspect if the suspect attempts to leave (*id.* at 259-62) (the passenger in a stopped automobile was "seized" within the meaning of the Fourth Amendment even though the record did not establish that the officer "'was even aware [the passenger] was in the car prior to the vehicle stop'" and thus the officer may not have intended to stop the passenger: "the objective *Mendenhall* test of what a reasonable passenger would understand . . . leads to the intuitive conclusion that all the occupants were subject to like control by the successful display of authority"); *accord*, *Villanueva v. California*, 986 F.3d 1158, 1166 (9th Cir. 2021) (a passenger in a truck was "seized" for Fourth Amendment purposes when police fired at the vehicle and killed the driver, bringing the truck to a stop: "[a] person is seized under the Fourth Amendment 'when there is a governmental termination of freedom of [his] movement through means intentionally applied.'"). *See also* *Kaupp v. Texas*, 538 U.S. at 632 (handcuffing of a suspect was a significant factor in the classification of police conduct as a seizure tantamount to an arrest notwithstanding evidence that the sheriff's department "'routinely'" used handcuffs for safety reasons when transporting individuals: "the officers' motivation of self-protection does not speak to how their actions would reasonably be understood" by the suspect); *United States v. Mendenhall*, 446 U.S. at 554 n.6 (opinion of Justice Stewart, announcing the judgment of the Court); *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984); *United States v. Hensley*, 469 U.S. 221, 234-35 (1985); *Nieves v. Bartlett*, 139 S. Ct. 1715, 1724-25 (2019). *Cf. United States v. Guerrero*, 19 F.4th 547, 549 (1st Cir. 2021) (recognizing that "the Supreme Court has issued opinion after opinion interpreting (in various contexts) the Constitution's reasonableness command as not depending on the officer's 'actual motivations' –and that is because the Fourth Amendment generally prefers 'objective' inquiries over 'subjective' ones."). However, as a practical matter, judges conducting a suppression hearing in the first instance often tend to be moved in the direction of finding a "seizure" when the officers can be gotten to concede that they would not have permitted the suspect to leave if the suspect had attempted to do so. Therefore, counsel may be well advised to ask the officer or officers a question like: "If [the client] had simply ignored you, turned [his] [her] back on you and walked away, are we to understand that you would have done nothing to prevent [him] [her] from taking off?" Officers with an ego will commonly be unwilling to say that they would have done nothing in this insulting situation; and, if they do say so, the question and answer will have done the defense no harm under the ultimate "objective *Mendenhall* test"

(*Brendlin v. California*, 551 U.S. at 260). Prosecutorial objections to the question can be met by the observation that U.S. Supreme Court opinions attach significance to the information that the question seeks to elicit, *see, e.g., Florida v. Royer*, 460 U.S. at 503 (plurality opinion) (“the State conceded in the Florida courts that Royer would not have been free to leave the interrogation room had he asked to do so. Furthermore, the state’s brief in this Court interprets the testimony of the officers at the suppression hearing as indicating that had Royer refused to consent to a search of his luggage, the officers would have held the luggage and sought a warrant to authorize the search.”); *Dunaway v. New York*, 442 U.S. at 203, 212 (“although . . . [Dunaway] was not told he was under arrest, he would have been physically restrained if he had attempted to leave”); *id.* at 212 (Dunaway “was never informed that he was ‘free to go’; indeed, he would have been physically restrained if he had refused to accompany the officers or had tried to escape their custody”) – perhaps because an officer’s subjective intentions will frequently manifest themselves in subtle, visible appearances or “actions . . . [that] show an unambiguous intent to restrain” (*Brendlin v. California, supra*, 551 U.S. at 255). Janus-like observations quoting officers’ statements which reveal that the reasons which drove their actions were impermissible and appearing to rely on those statements to condemn their actions while simultaneously disavowing any such reliance are found in numerous judicial opinions. *E.g., United States v. McKinney*, 980 F.3d 485, 493 (5th Cir. 2020), summarized in § 23.11(a) *infra* (“The record strongly supports a finding that the comments we have already quoted from the officers were the actual and insufficient reasons for the stop. Officer Carmona said his ‘reasonable suspicion’ was that there had been multiple shootings. Officer Holland believed it was enough to stop people who ‘are hanging out over here,’ especially if the people are members of a gang – presumably meaning anyone wearing red. Even though the articulated reasons fail, the test to be applied is objective, meaning it does not depend on what the officers claimed as reasons. . . . We look at the remainder of the relevant evidence to determine whether other facts known to these officers objectively justified the stop.”).

Also, notwithstanding the dogma that the subjective perceptions of the parties are not to be considered in determining whether police-civilian interactions amount to a constitutionally prohibited seizure of the person, “race is an appropriate circumstance to consider in conducting the totality of the circumstances seizure analysis. *See State v. Hight*, 146 N.H. 746, 750-51, 781 A.2d 11 (2001) (considering the races of a Caucasian police officer and an African-American suspect in deciding whether the state purged the taint of an unlawful detention followed by a consent to search). “As the Seventh Circuit has concluded, ‘race is “not irrelevant” to the question of whether a seizure occurred,’ but ‘it is not dispositive either.’ [*United States v. Smith*, 794 F.3d [681] at 688 [(2015)]; *see United States v. Mendenhall*, 446 U.S. 544, 558 . . . (1980) (noting that the defendant’s race was ‘not irrelevant’ to determining whether she consented to accompany police officers).” *State v. Jones*, 172 N.H. 774, 780, 235 A.3d 119, 126 (2020). *See also Dozier v. United States*, 220 A.3d 933, 937, 942-45 (D.C. 2019) (concluding that the African-American defendant’s race was “relevant in evaluating the coercive character of the overall setting of the encounter” with the police and in holding that the trial court was incorrect to find that the defendant “voluntarily agreed to a pat-down”: “Even the innocent person we posit in our Fourth Amendment analysis might well fear that he is perceived with particular suspicion

by hyper-vigilant police officers expecting to find criminal activity in a particular area. ¶ This fear is particularly justified for persons of color, who are more likely to be subjected to this type of police surveillance. As is known from well-publicized and documented examples, an African-American man facing armed policemen would reasonably be especially apprehensive. The fear of harm and resulting protective conditioning to submit to avoid harm at the hands of police is relevant to whether there was a seizure because feeling ‘free’ to leave or terminate an encounter with police officers is rooted in an assessment of the consequences of doing so. . . . We cannot turn a blind eye to the reality that not all encounters with the police proceed from the same footing, but are based on experiences and expectations, including stereotypical impressions, on both sides. . . . In the isolated setting where the encounter took place, appellant, who is African-American, reasonably could have feared that unless he complied with the police requests, he would be vulnerable to police violence, without hope that anyone would come to his aid or witness what happened.”); *Commonwealth v. Warren*, 475 Mass. 530, 58 N.E.3d 333 (2016), and *Miles v. United States*, 181 A.3d 633 (D.C. 2016), quoted in § 23.11(b) *infra*; *Millan-Hernandez v. Barr*, 965 F.3d 140 (2d Cir. 2020) (per curiam), quoted in § 23.28 *infra*; *United States v. Washington*, 490 F.3d at 775-76; *D.Y. v. State*, 28 N.E.2d 249, 256 (Ind. App. 2015); *State v. Sum*, 199 Wash. 2d 627, 630-31, 511 P.3d 92, 97 (2022) (holding that the “circumstances” a court must consider in “determin[ing] whether a person has been seized” “include[] the race and ethnicity of the allegedly seized person”: “we now clarify that a person is seized for purposes of article I, section 7 [of the Washington Constitution] if, based on the totality of the circumstances, an objective observer could conclude that the person was not free to leave, to refuse a request, or to otherwise terminate the encounter due to law enforcement’s display of authority or use of physical force. For purposes of this analysis, an objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in disproportionate police contacts, investigative seizures, and uses of force against Black, Indigenous, and other People of Color (BIPOC) in Washington.”).

Some state courts extend their state constitutional guarantees against unreasonable searches and seizures to police conduct that would not be characterized as a “seizure” under the federal Fourth Amendment caselaw. *See, e.g., People v. McIntosh*, 96 N.Y.2d 521, 755 N.E.2d 329, 730 N.Y.S.2d 265 (2001) (striking down a seizure as violating state law under factual circumstances which the U.S. Supreme Court in *United States v. Drayton*, 536 U.S. at 203-04, viewed as not constituting a seizure); *People v. Holmes*, 81 N.Y.2d 1056, 1057-58, 619 N.E.2d 396, 397-98, 601 N.Y.S.2d 459, 460-61 (1993) (finding a police officer’s pursuit of an individual to be an unlawful seizure even though the U.S. Supreme Court in *Hodari D.*, 499 U.S. at 629, declined to classify police pursuits as “seizures”). *See generally* § 7.09 (strategies and techniques for using state court caselaw that construes state constitutional provisions as providing greater protections than the U.S. Constitution).

§ 23.04(c) Terry Stops

There is a “general rule that seizures of the person require probable cause to arrest” (*Florida v. Royer*, 460 U.S. 491, 499 (1983) (plurality opinion)), but the Court in *Terry v. Ohio*

“created a limited exception to this general rule: certain seizures are justifiable under the Fourth Amendment if there is articulable suspicion that a person has committed or is about to commit a crime” (*Florida v. Royer*, 460 U.S. at 498 (plurality opinion)). “The predicate permitting seizures on suspicion short of probable cause is that law enforcement interests warrant a limited intrusion on the personal security of the suspect. The scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case. This much, however, is clear: an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer’s suspicion in a short period of time.” *Id.* at 500. For further discussion of the circumstances justifying a *Terry* stop, see § 23.09 *infra*; for discussion of the rules governing *Terry* frisks, see § 23.10 *infra*.

§ 23.04(d) Arrests

The line on the spectrum that separates *Terry* stops from arrests can be described as the “point [at which] . . . police procedures [are] . . . qualitatively and quantitatively . . . so intrusive with respect to a suspect’s freedom of movement and privacy interests as to trigger the full protection of the Fourth and Fourteenth Amendments.” *Hayes v. Florida*, 470 U.S. 811, 815-16 (1985). Obviously, that line is not always easy to pinpoint. As the Court itself has observed, its decisions in “*Terry* [v. *Ohio*, *supra*], *Dunaway* [v. *New York*, *supra*], [*Florida v.*] *Royer*[, *supra*] and [*United States v.*] *Place*, [462 U.S. 696 (1983)] considered together, may in some instances create difficult line-drawing problems in distinguishing an investigative stop from a *de facto* arrest.” *United States v. Sharpe*, 470 U.S. 675, 685 (1985). Certainly, any time the police “forcibly remove a person from his home or other place in which he is entitled to be and transport him to the police station, where he is detained, although briefly, for investigative purposes,” the police have “crossed” the line between *Terry* stops and arrests and have effected a “seizure[] . . . sufficiently like [an] arrest[] to invoke the traditional rule that arrests may constitutionally be made only on probable cause.” *Hayes v. Florida*, 470 U.S. at 816. *Accord*, *Kaupp v. Texas*, 538 U.S. 626, 631-32 (2003) (per curiam) (seizure requiring probable cause occurred when “a group of police officers rous[ted] . . . [the 17-year-old defendant] out of bed in the middle of the night,” handcuffed him and took him to the police station in his underwear, and then questioned him in an interrogation room, even though the officers said “we need to go and talk,” the defendant verbally acquiesced, and the sheriff’s department routinely used handcuffs for transporting individuals); *Dunaway v. New York*, 442 U.S. at 212 (when police removed defendant from his home, transported him to the police station against his will and interrogated him, the defendant’s “detention . . . was in important respects indistinguishable from a traditional arrest”). With respect to lesser intrusions upon an individual’s freedom, the point of arrest is flexible, determined on a case-by-case basis by whether the circumstances of the detention were “more intrusive than necessary to effectuate an investigative detention otherwise authorized by the *Terry* line of cases,” *Florida v. Royer*, 460 U.S. at 504 (plurality opinion); *United States v. Bailey*, 743 F.3d 322, 340-41 (2d Cir. 2014) (the police “exceeded the reasonable bounds of a *Terry* stop when they handcuffed Bailey”: although “not every use of handcuffs automatically renders a stop an arrest requiring probable cause,” the “government failed to make . . . [the

requisite] showing” that the police had “a reasonable basis to think that the person detained pose[d] a present physical threat and that handcuffing [was] the least intrusive means to protect against that threat”); *Mareska v. Bernalillo County*, 804 F.3d 1301, 1310 (10th Cir. 2015) (“the deputies, by ordering the Marescas out of the car one-by-one at gunpoint, making them lie on the ground, handcuffing four of them and placing them in separate patrol cars, effected an arrest”); *Reid v. State*, 428 Md. 289, 293, 51 A.3d 597, 599 (2012) (police officer’s “use of a Taser to fire two metal darts into Reid’s back converted what otherwise may have been a *Terry* stop into a *de facto* arrest for Fourth Amendment purposes”). *Accord*, *Michigan v. Summers*, 452 U.S. 692, 696-97 (1981) (to escape “the general rule that an official seizure of the person must be supported by probable cause, even if no formal arrest is made,” the detention must be “significantly less intrusive than an arrest”). The criteria normally considered in making that assessment are described in § 23.06 *infra*. For further discussion of the standards for making an arrest, see § 23.07 *infra*.

There are some situations that do not fit neatly into the ordinary set of categories – contacts, *Terry* stops, arrests – used to adjudicate Fourth Amendment claims arising from the restraint or detention of a person. For example, in *United States v. Conley*, 69 F.4th 519 (8th Cir. 2023), the defendant was admitted to a hospital with a gunshot wound and placed on a gurney in a stabilization room. When medical personnel urged him to allow them to remove his clothing so that they could examine him completely, he refused to cooperate; a hospital security officer placed a hand on the defendant to get him to lie down flat on the gurney; the defendant struggled and attempted to get off the gurney; and two additional security officers came to the aid of the first and held him down. One of the officers felt a handgun in the defendant’s pocket and alerted a sheriff’s deputy who seized the gun. Charged with being a felon in possession of a weapon, the defendant moved to suppress the gun, arguing that the security officers’ restraint of his body was an unconstitutional seizure of the person. The Eighth Circuit agreed that the defendant had been seized for Fourth Amendment purposes and characterized the issue as the constitutionality of a noninvestigatory seizure. “A noninvestigatory seizure can be justified by an officer’s reasonable belief ‘that an emergency exists requiring the officer’s attention.’” *Id.* at 523. “We recently explained that ‘all seizures – whether brief detentions or arrests – done for noninvestigatory purposes are governed by the Fourth Amendment’s reasonableness balancing test.’ *Graham v. Barnette*, 5 F.4th 872, 885 (8th Cir. 2021). Under the balancing test, ‘the greater the intrusion on a citizen, the greater the justification required for that intrusion to be reasonable.’ . . . Noninvestigatory seizures are reasonable if they are ‘based on specific articulable facts’ and the ‘governmental interest’ in effectuating the seizure in question ‘outweighs the individual’s interest in being free from arbitrary government interference.’” *Id.* Except in cases of violent or prolonged restraint, counsel wants to avoid this kind of unconventional analysis if possible, because defendants fare better under the more rule-bound tripartite category structure that calls into play the specific precedents governing contacts, *Terry* stops and arrests respectively. A fluid “balancing” test is characteristically invoked when judges want to work outside the framework of clear-cut Fourth Amendment protective doctrines in order to justify governmental seizures (or searches) that strike them as not particularly offensive.

§ 23.04(e) “Custody” for Purposes of the *Miranda* Doctrine

It should be noted that there is one other constitutionally significant point on the spectrum of intrusiveness of police contacts with citizens. The protections established in *Miranda v. Arizona*, 384 U.S. 436 (1966), and its progeny, are triggered by the police placing a criminal defendant or juvenile respondent in “custody.” See § 24.08(a) *infra*. In *Berkemer v. McCarty*, 468 U.S. 420 (1984), the Court made clear that the *Miranda* concept of custody envisions a greater degree of intrusiveness than a *Terry* stop. See *id.* at 439-40. It is uncertain, however, whether the *Miranda* concept of “custody” is synonymous with the Fourth Amendment concept of “arrests” that require probable cause. For detailed discussion of what constitutes “custody” under *Miranda*, see § 24.08(a) *infra*.

§ 23.05 TACTICAL REASONS FOR SEEKING A CATEGORIZATION OF POLICE CONDUCT AS AN ARREST OR AS A *TERRY* STOP

Because there is no “litmus-paper test for distinguishing a consensual encounter from a seizure or for determining when a seizure exceeds the bounds of an investigative stop,” *Florida v. Royer*, 460 U.S. 491, 506 (1983) (plurality opinion), the classification of the police action in each case will depend substantially upon the facts that defense counsel elicits from the witnesses and on the quality of counsel’s arguments.

Obviously, it is always in the interest of the defense to characterize a police action as a seizure of the person rather than a “consensual encounter,” because only seizures trigger the protections of the Fourth Amendment. The determination whether the defense stands to gain by characterizing the seizure as a *Terry* stop or as an arrest is not quite so clear-cut. Before the criteria for classifying seizures are discussed, it is useful to examine the strategic considerations that may make one or the other of the two classifications more beneficial to the respondent.

Ordinarily, defense counsel will wish to establish that a particular restraint was an arrest rather than a *Terry* stop (or, in cases in which the degree of police restraint escalated over a period of time, that the arrest occurred earlier, rather than later, in the sequence of events). The arrest categorization usually favors the defense because the preconditions for a valid arrest are more demanding than those for a *Terry* stop, see §§ 23.07, 23.09 *infra*, making it more difficult for the prosecution to justify the seizure. Moreover, in certain cases, the classification of the seizure as an “arrest” will provide additional grounds for suppression apart from the central claim that the invalidity of the seizure tainted all evidence derived from it. (For discussion of the concept of “derivative evidence,” see § 23.37 *infra*.) For example, in cases involving confessions or other statements of the respondent, the greater level of custody involved in an arrest will ordinarily guarantee *Miranda* protection. See § 24.08(a) *infra*; *Orozco v. Texas*, 394 U.S. 324, 327 (1969); compare *Berkemer v. McCarty*, 468 U.S. 420, 434 (1984) (“there can be no question that respondent was ‘in custody’ at least as of the moment he was formally placed under arrest and instructed to get into the police car”), with *id.* at 439-42; cf. § 23.04(e) *supra*. And the greater degree of coerciveness inherent in an arrest will be a factor for consideration in determining the

voluntariness both of incriminating statements (see § 24.04 *infra*; *cf. Payne v. Arkansas*, 356 U.S. 560, 567 (1958)) and of consents to search or seizure (see § 23.18 *infra*; *cf. Schneckloth v. Bustamonte*, 412 U.S. 218, 240 n.29 (1973) (dictum) (“courts have been particularly sensitive to the heightened possibilities for coercion when the ‘consent’ to a search was given by a person in custody”).

In certain cases, however, it may be in the interest of the defense to characterize a restraint as a *Terry* stop rather than an arrest. One of the most important examples of this is when the classification of the restraint as a *Terry* stop can be used to invalidate a subsequent search of the respondent. If the restraint were characterized as an arrest and the arrest was lawful because the police had probable cause to arrest, then any postarrest search would be valid as a search incident to arrest. See § 23.08 *infra*. On the other hand, if the restraint were classified as a *Terry* stop and if the police lacked the requisite basis for a *Terry* frisk – specific and articulable facts warranting a reasonable conclusion that the respondent was armed and dangerous, see § 23.10 *infra* – then the frisk would be invalid (see *Thomas v. Dillard*, 818 F.3d 864, 874-86 (9th Cir. 2016) (dictum) and cases collected) and the fruits of the frisk would have to be suppressed. (Before deciding to attempt to bring a case within the latter principle, however, counsel should consider whether s/he can also bring it within the general rule that “a search incident to a lawful arrest may not precede the arrest,” *Sibron v. New York*, 392 U.S. 40, 67 (1968), and can avoid the narrow exception permitting a search incident to arrest to be made immediately preceding the arrest as a part of a single course of action. See § 23.08(d) *infra*.)

§ 23.06 CRITERIA FOR CATEGORIZING A RESTRAINT (THAT IS, ANY SEIZURE OF THE PERSON) AS A *TERRY* STOP ON THE ONE HAND OR AN ARREST ON THE OTHER

As already explained, the defense will always want to classify a police action as a “seizure of the person,” in order to bring the Fourth Amendment’s protections into play. This initial step of showing that a “seizure” occurred is ordinarily achieved by establishing that the police made some “show of official authority,” *Florida v. Royer*, 460 U.S. 491, 502 (1983) (plurality opinion), that would cause a “reasonable person” to believe “that he was not free to leave,” *id.* See § 23.04(b) *supra*. Thus, in *Royer*, the plurality concluded that a Fourth Amendment “seizure” had occurred when officers approached a suspect in an airport concourse, identified themselves as narcotics agents, told the defendant that he was suspected of transporting drugs, asked him to accompany them to the police room while retaining his airplane ticket and driver’s license, and in no way indicated that he was free to leave. *Id.* at 502-03. See also *Reid v. Georgia*, 448 U.S. 438 (1980) (per curiam).

The next step is to categorize the seizure as either a *Terry* stop or, conversely, an arrest. See, e.g., *Mareska v. Bernalillo County*, 804 F.3d 1301, 1308-10 (10th Cir. 2015). “There is no simple test for determining at which point a prolonged investigative stop turns into a de facto arrest, but important factors include unnecessary delays, handcuffing the suspect, confining the suspect in a police car, transporting the suspect, isolating the suspect, and the degree of fear and

humiliation engendered by the police conduct.” *State v. Shaw*, 237 N.J. 588, 612-13, 207 A.3d 229, 243 (2019) (“Once it was determined that Shaw was unarmed and had no outstanding warrants . . . there was no particularized suspicion that Shaw was engaged in criminal activity that would justify Shaw’s further detention. We do not accept the State’s argument that a person’s mere presence in the car of a suspected drug dealer warrants indefinite detention without any individualized suspicion. Rather than conducting a true investigatory stop, the officers appear to have been operating from the assumption that the passengers were . . . [the dealer’s] confederates. While such a hunch may be reasonable, it is insufficient to justify the extent of the investigatory detention here. . . . ¶ . . . [T]he State failed to demonstrate any reason for continuing the investigatory detention of Shaw after his warrant check returned negative. . . . [I]solating Shaw in the back of a patrol car despite a negative warrant check was a de facto and an unlawful arrest.” *Id.* at 613-13, 207 A.3d at 243.). Counsel should consider developing the facts on each of the following subjects that bear upon the stop-versus-arrest classification.

§ 23.06(a) The Length of the Restraint

On numerous occasions the Court has said that one of the factors that distinguishes *Terry* stops from arrests is the relative brevity of a *Terry* stop. *See, e.g., United States v. Place*, 462 U.S. 696, 709 (1983) (explaining that “[a]lthough we have recognized the reasonableness of seizures longer than the momentary ones involved in *Terry*, . . . the brevity of the invasion of the individual’s Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion,” and then invalidating a 90-minute detention of an air traveler’s luggage on reasonable suspicion: “[A]lthough we decline to adopt any outside time limitation for a permissible *Terry* stop, we have never approved a seizure of the person for the prolonged 90-minute period involved here and cannot do so on the facts presented by this case”); *Florida v. Royer*, 460 U.S. at 500 (plurality opinion) (“This much, however, is clear: an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop”); *Dunaway v. New York*, 442 U.S. 200, 212 (1979) (stops are limited to “brief and narrowly circumscribed intrusions”); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 880-82 (1975); *Terry v. Ohio*, 392 U.S. at 10. *See also, e.g., United States v. Arvizu*, 534 U.S. 266, 273 (2002) (dictum) (“brief investigatory stops”). *Cf. United States v. Sokolow*, 490 U.S. 1, 10-11 (1989) (dictum).

In *United States v. Sharpe*, 470 U.S. 675 (1985), the Court retreated somewhat from an iron-clad rule that a *Terry* stop must be no longer than momentary. While continuing to recognize that “brevity . . . is an important factor” (*id.* at 685, quoting *United States v. Place, supra*), the Court in *Sharpe* stressed that “our cases impose no rigid time limitations on *Terry* stops” (*Sharpe*, 470 U.S. at 685) and stated:

“[W]e have emphasized the need to consider the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes. . . . In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means

of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant. . . . A court making this assessment should take care to consider whether the police are acting in a swiftly developing situation” *Id.* at 685-86.

Applying this standard in *Sharpe*, the Court concluded that the 20-minute investigative detention there was a *Terry* stop, not an arrest because: (i) the police officer “pursued his investigation in a diligent and reasonable manner” and “proceeded expeditiously,” and there was no indication “that the officers were dilatory in their investigation”; (ii) to perform the investigation it was necessary to detain the suspect during the 20-minute period; (iii) the police were acting in a swiftly developing situation; and (iv) “[t]he delay in this case was attributable almost entirely to the evasive actions” of one of the suspects and, in the absence of that suspect’s “maneuvers, only a short and certainly permissible pre-arrest detention would likely have taken place,” *id.* at 687-88.

In the wake of the *Sharpe* decision, the primary question is whether the detention exceeded the “time reasonably needed to effectuate” the “law enforcement purposes to be served by the stop,” *id.* at 685; *accord, Rodriguez v. United States*, 575 U.S. 348, 350 (2015) (“We hold that a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution’s shield against unreasonable seizures.”); *Illinois v. Caballes*, 543 U.S. 405, 407 (2005) (dictum) (“A seizure . . . can become unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission” justifying the seizure); *Illinois v. McArthur*, 531 U.S. 326, 332 (2001) (dictum) (“this time period was no longer than reasonably necessary for the police, acting with diligence, to [complete the activity that justified the suspect’s restraint]”); *and see, e.g., Johnson v. Thibodeaux City*, 887 F.3d 726, 733-35 (5th Cir. 2018); *United States v. Jenson*, 462 F.3d 399, 404 (5th Cir. 2006); *State v. Coles*, 218 N.J. 322, 344-47, 95 A.3d 136, 148-50 (2014). (The predicate for this question – and thus another necessary element for characterizing a police action as a stop rather than as an arrest – is that the purposes served by the officer’s actions are consistent with the function of a *Terry* stop, to confirm or dispel an officer’s suspicions by nonintrusive methods of investigation. *See, e.g., People v. Ryan*, 12 N.Y.3d 28, 30-31, 904 N.E.2d 808, 809-10, 876 N.Y.S.2d 672, 673-74 (2009) (even assuming that the police had reasonable suspicion to stop the defendant, the detention exceeded the permissible bounds of a *Terry* stop and became a seizure requiring probable cause when the police held the defendant at the location for 13 minutes while they conducted a photo identification procedure, apparently “to make it convenient for the police to arrest defendant if a positive identification subsequently occurred”). When, as in *United States v. Place*, the police seized a suspect’s luggage for 90 minutes in order to arrange for a narcotics-sniffing dog and when the police had forewarning of the suspect’s arrival which would have permitted them to make advance preparations and thereby shorten the detention period, a reviewing court could properly conclude that the police failed to act diligently. *See United States v. Sharpe*, 470 U.S. at 684-85 (explaining the holding in *Place*); *United States v. Frazier*, 30 F.4th 1165 (10th Cir. 2022) (“Under *Rodriguez*, . . . an unlawful seizure occurs when an officer (1) diverts from the traffic-based mission of the stop to investigate ordinary criminal conduct, (2) in a way that “prolongs” (i.e., adds time to) the stop, and (3) the

investigative detour is unsupported by any independent reasonable suspicion. . . . Even de minimis delays caused by unrelated inquiries violate the Fourth Amendment in the absence of reasonable suspicion. ¶ . . . [W]e think it clear that the trooper’s efforts to arrange for a dog sniff diverted from the traffic-based mission of the stop and thereby extended its duration.” *Id.* at 1173. “Consequently, because the trooper lacked reasonable suspicion to extend the stop by several minutes to arrange for the dog sniff, Mr. Frazier’s seizure violated the Fourth Amendment.” *Id.* at 1178); *accord, United States v. Hurtt*, 31 F.4th 152, 160 (3d Cir. 2022) (the Court of Appeals adds that “police may not vary from the original mission and thereby create an exigency to support the resulting delay and any subsequent arrest. This police-created exigency doctrine prevents the government from deliberately creating its own exigent circumstances to justify otherwise unconstitutional intrusions.”); *compare United States v. Rederick*, 65 F.4th 961 (8th Cir. 2023). But diligence is not the only issue. The most diligent of police officers is not permitted to extend a *Terry* stop indefinitely simply because the purpose of the stop cannot be achieved in a finite period of time. As the Court acknowledged in elaborating its new standard in *Sharpe*, “[o]bviously, if an investigative stop continues indefinitely, at some point it can no longer be justified as an investigative stop.” 470 U.S. at 685. And the Court in *Sharpe*, when describing the need for allowing the police to pursue their investigations, specified that it was contemplating investigations that were to be conducted “quickly.” *Id.* at 686. *Compare United States v. Lopez*, 907 F.3d 472, 486 (7th Cir. 2018) (“Even if the initial stop had been justified, it lasted too long. A *Terry* stop may ‘last no longer than is necessary to effectuate’ its purpose. . . . ¶ In this case, the officers clearly extended the stop beyond the time necessary to complete any investigation based on the claimed reasonable suspicion. There was not a sufficient justification for the *Terry* stop in the first place, but even that inadequate justification evaporated when the officers looked inside the paper bags in the garage. . . . ¶ This case presents a wrinkle not present in *Rodriguez v. United States*, where the police search occurred after the defendant had refused the officers’ request to conduct the search. Here, by contrast, Lopez consented to the search. So one might think that a person’s consent to a search might absolve the officers’ illegal extension of the search. To the contrary, ‘[q]uestioning that prolongs the detention, yet cannot be justified by the purpose of such an investigatory stop, is unreasonable under the fourth amendment.’ . . . ¶ The question does not depend on exactly how many minutes the stop lasts. It depends on whether law enforcement has detained the person longer than needed to carry out the investigation that was justified by the reasonable suspicion.”), and *Mahaffy v. State*, 486 P.3d 170 (Wyo. 2021) (two deputy sheriffs stopped a car when a passenger tossed a lit cigarette out of the window; while writing up a citation for this violation, they summoned a drug-sniffing dog; “About twelve minutes into the stop, . . . [the passenger was asked] to get out of the car and . . . [walk] to the front of . . . [the deputies’] patrol car. Eleven seconds later, . . . [the deputy] completed the citation and asked . . . [the passenger], ‘Is there a reason you guys are so nervous while I’m talking to you?’ That discussion lasted approximately thirty seconds. . . . [The deputy] then proceeded to explain the citation.” *Id.* at 172. The dog alerted to the presence of drugs and the deputy who was issuing the citation was informed of this while he was still explaining the citation to the passenger. “Twenty-three seconds later, . . . [the deputy] completed his explanation and began to inquire about drugs in the car. The entire extension of the stop, from the time . . . [the deputy] finished writing the citation to the time he began questioning about drugs, took

approximately one and a half minutes.” *Id.* Finding a Fourth Amendment violation that required the suppression of drugs found in the car, the Wyoming Supreme Court writes that “the United States Supreme Court soundly rejected the argument that a *de minimis* extension of a stop is acceptable in *Rodriguez*, 575 U.S. at 350-53 [The deputy] unlawfully extended the duration of the traffic stop after he had completed the citation by asking unrelated questions about nervousness.” 486 P.3d at 176.), and *Baxter v. Roberts*, 54 F.4th 1241 (11th Cir. 2022) (similar), with *United States v. Cole*, 21 F.4th 421, 425 (7th Cir. 2021) (en banc) (holding that a vehicle stop for a traffic violation was not unduly prolonged when the trooper questioned the driver about his travel plans: (“[W]e hold that travel-plan questions ordinarily fall within the mission of a traffic stop. Travel-plan questions, however, like other police inquiries during a traffic stop, must be reasonable under the circumstances. And here they were. The trooper inquired about the basic details of Cole’s travel, and his follow-up questions were justified given Cole’s less-than-forthright answers. The stop itself was lawfully initiated, and the trooper developed reasonable suspicion of other criminal activity before moving the initial stop to the gas station for . . . [a] dog sniff. We therefore affirm the district court’s denial of Cole’s motion to suppress [drugs found in a search of the vehicle after the dog alerted to their presence].”), and *United States v. Nault*, 41 F.4th 1073, 1078 (9th Cir. 2022) (“An officer’s ‘mission’ includes certain ‘ordinary inquiries incident to the traffic stop,’ even if they are not required to investigate a particular traffic violation [quoting *Rodriguez*, 575 U.S. at 355]. . . . Those inquiries ‘[t]ypically . . . involve checking the driver’s license, determining whether there are outstanding warrants against the driver, and inspecting the automobile’s registration and proof of insurance.’ *Id.* Such routine checks ‘ensur[e] that vehicles on the road are operated safely and responsibly.’ *Id.* By contrast, unrelated inquiries such as dog sniffs or other nonroutine checks, which are ‘aimed at “detect[ing] evidence of ordinary criminal wrongdoing,”’ lack the same ‘close connection to roadway safety,’ and must be justified by independent reasonable suspicion. *Rodriguez*, 575 U.S. at 355-56 . . . ; see [*United States v.*] *Landeros*, 913 F.3d . . . [862,] 868 [9th Cir. 2019] (requesting passenger’s identification was not part of an officer’s traffic stop mission because ‘[t]he identity of a passenger . . . will ordinarily have no relation to a driver’s safe operation of a vehicle’”); cf. *Johnson v. VanderKooi*, 509 Mich. 524, 540, 983 N.W.2d 779, 788 (2022), summarized in § 23.04(b) *supra* (“Fingerprinting pursuant to the . . . [photographing and fingerprinting] policy exceeded the permissible scope of a *Terry* stop because it was not reasonably related in scope to the circumstances that justified the stop”); and see *United States v. Foreste*, 780 F.3d 518, 525 & n.4 (2d Cir. 2015) (if police officers conduct successive stops of the same individual based on the “same reasonable suspicion,” and if “the officer conducting the subsequent investigation is aware of the prior investigation and the suspicion that supported it, the investigations’ duration and scope must be both individually and collectively reasonable under the Fourth Amendment”; “The same would be true were the suspicion justifying the second investigation generated from the first investigation rather than if it were identical to it. In either case, the second stop can be viewed as an extension of the first stop, justifying the stops’ joint evaluation for reasonableness under the Fourth Amendment.”).

§ 23.06(b) Whether the Police Transported the Respondent from the Location of the Stop

The police frequently transport a suspect from the place of initial accosting to another location, either to conduct questioning in a more private setting, or to display the suspect to an eyewitness in a show-up identification procedure, or for some other investigative purpose. In *Hayes v. Florida*, 470 U.S. 811 (1985); *Dunaway v. New York*, 442 U.S. 200 (1979); *Florida v. Royer*, 460 U.S. 491 (1983); and *Kaupp v. Texas*, 538 U.S. 626 (2003) (per curiam), the ambulatory nature of the detention was a significant factor in the Court’s classification of the detention as an arrest rather than a *Terry* stop.

In *Hayes v. Florida*, the Court concluded that the forcible removal of a suspect from his home and the non-consensual transportation of the suspect to the police station constituted such an “intrusi[on] with respect to a suspect’s freedom of movement and privacy interests as to trigger the full protection of the Fourth and Fourteenth Amendments.” 470 U.S. at 816. Similarly, in *Dunaway v. New York*, two of “[t]he pertinent facts relied on by the Court” in finding that the detention was an arrest “were that (1) the defendant was taken from a private dwelling; [and] (2) he was transported unwillingly to the police station.” *United States v. Sharpe*, 470 U.S. at 684 n.4 (explaining the holding in *Dunaway*).

In *Royer*, one of the factors that transformed “[w]hat had begun as a consensual inquiry in a public place” (460 U.S. at 503) into a full arrest was the transportation of the defendant some 40 feet to a small airport room for questioning. In condemning this movement of the suspect, the plurality in *Royer* stressed that “[t]he record does not reflect any facts which would support a finding that the legitimate law enforcement purposes which justified the detention in the first instance were furthered by removing Royer to the police room prior to the officer’s attempt to gain his consent to a search of his luggage.” 460 U.S. at 505. See also *United States v. Sharpe*, 470 U.S. at 684 (discounting the portion of the *Royer* opinion that seemed to rely on the length of the detention, and defining the opinion as being concerned primarily with “the fact that the police confined the defendant in a small airport room for questioning”).

In the *per curiam* opinion in *Kaupp v. Texas*, the Court relied on the reasoning in *Hayes v. Florida* and *Dunaway v. New York* to hold that the police conducted a seizure that was ““in important respects indistinguishable from a traditional arrest’ and therefore required probable cause or judicial authorization” when they removed the 17-year-old defendant from his home in the middle of the night in handcuffs, “placed [him] in a patrol car, dr[o]ve[] [him] to the scene of a crime and then to the sheriff’s offices, where he was taken into an interrogation room and questioned.” *Kaupp v. Texas*, 538 U.S. at 631. “[W]e have never ‘sustained against Fourth Amendment challenge the involuntary removal of a suspect from his home to a police station and his detention there for investigative purposes . . . absent probable cause or judicial authorization.’” *Id.* at 630 (quoting *Hayes v. Florida*, 470 U.S. at 815). The Court in *Kaupp* reiterated that “[s]uch involuntary transport to a police station for questioning is ‘sufficiently like arres[t] to invoke the traditional rule that arrests may constitutionally be made only on probable cause.’” *Kaupp v. Texas*, 538 U.S. at 630 (quoting *Hayes v. Florida*, 470 U.S. at 816).

§ 23.06(c) The Nature of the Setting in Which the Detention Takes Place

In *Berkemer v. McCarty*, 468 U.S. 420 (1984), in the course of holding *Miranda* inapplicable to roadside questioning of motorists detained pursuant to traffic stops, the Court made some general observations concerning the distinction between *Terry* stops and arrests. Explaining that typical traffic stops differ from the usual *Miranda* custodial setting in that the “exposure to public view . . . diminishes the motorist’s fear that, if he does not cooperate, he will be subjected to abuse,” the Court then commented that in this respect, “the usual traffic stop is more analogous to a so-called ‘*Terry* stop’ . . . than to a formal arrest.” *Id.* at 438-39. The Court noted that *Terry* stops are normally characterized by “[t]he comparatively non-threatening character of [the] detentions.” *Id.* at 440.

Non-public setting played an important part in the decision in *Florida v. Royer*, *supra*. In condemning the transportation of the suspect, the plurality stressed that the effect of the move was to shift the suspect from a “public place” to “a small room – a large closet . . . [where] [h]e was alone with two police officers,” 460 U.S. at 502. Although the *Royer* plurality did not expressly characterize the change in location as designed to increase the pressure on the suspect, that conclusion is implicit in the plurality’s strong criticism of the lack of any “legitimate law enforcement purposes” in “removing Royer to the police room prior to the officers’ attempt to gain his consent to a search of his luggage.” *Id.* at 505.

Significantly, the progenitors of the “stop” doctrine, *Terry v. Ohio* and *Sibron v. New York*, originally recognized the “stop” power in the context of stops made on the street or in a public place. In extending that power to cases in which police officers board a bus and question passengers, the Court in *United States v. Drayton*, 536 U.S. 194 (2002), and *Florida v. Bostick*, 501 U.S. 429 (1991), said that “[t]he fact that an encounter takes place on a bus does not on its own transform standard police questioning of citizens into an illegal seizure.” *Drayton*, 536 U.S. at 204; *Bostick*, 501 U.S. at 439-40. Acknowledging that “[w]here the encounter takes place is one factor” in assessing whether a “seizure” has taken place, *Bostick*, 501 U.S. at 437, the Court explained that “an encounter [that] takes place on a bus” may be no more intrusive than one that “occurred on the street” “because many fellow passengers are present to witness [the] officers’ conduct, [and thus] a reasonable person may feel even more secure in his or her decision not to cooperate with police on a bus than in other circumstances,” *Drayton*, 536 U.S. at 195.

Except for a pair of scenarios – one of which the Supreme Court has addressed in several decisions – all of the Court’s rulings upholding stops have involved “on-the-street” situations, *Dunaway v. New York*, 442 U.S. at 210-11, or encounters in similarly public places, such as buses or airport concourses (*United States v. Mendenhall*, 446 U.S. 544, 560-66 (1980) (plurality opinion on this point)). The first exception is a situation in which officers who are executing a valid search warrant for contraband in a home detain an occupant of the premises during the search – a scenario the Court addressed in *Michigan v. Summers*, 452 U.S. 692 (1981), and again in *Muehler v. Mena*, 544 U.S. 93 (2005). See § 23.22(c) *infra*. In *Summers*, the Court held that in this situation, officers executing a valid search warrant have “the limited authority to detain the

occupants of the premises while a proper search is conducted,” 452 U.S. at 705. *Accord*, *Los Angeles County v. Rettele*, 550 U.S. 609, 613-14 (2007) (per curiam). *Cf. Bailey v. United States*, 568 U.S. 186, 193 (2013) (*Summers* doctrine is strictly limited to “cases [in which] the occupants detained were found within or immediately outside a residence at the moment the police officers executed the search warrant”); *United States v. Watson*, 703 F.3d 684, 691-92 (4th Cir. 2013). In *Muehler*, the Court added that the police also may engage in the additional intrusion of handcuffing an occupant during the search if this measure is necessitated by “inherently dangerous” circumstances such as those that existed in the *Muehler* case, where the “warrant authoriz[ed] a search for weapons and a wanted gang member reside[d] on the premises” and there was a “need to detain multiple occupants.” 544 U.S. at 100. But, as the Court emphasized in establishing the general rule in *Summers*, the police officers’ possession of a search warrant in these cases precludes any possibility that the police have arranged for detention in a non-public place for the sake of exploiting the coercive atmosphere to gain information or consent to a search or seizure. The *Summers* Court made a point of explaining that “the type of detention imposed here is not likely to be exploited by the officer” to extract information from the suspect since “the information the officers seek normally will be obtained through the search and not through the detention.” *Summers*, 452 U.S. at 701. *See also Muehler*, 544 U.S. at 101-02 (explaining that, although the police questioned the handcuffed suspect about her immigration status, the case did not require that the Court consider the constitutionality of “questioning that extended the time [the detainee] . . . was detained” or that otherwise “constitute[d] an independent Fourth Amendment violation”). Moreover, in this scenario, extraction of a consent to search or seize would be superfluous since the officers already have a warrant.

The second exceptional scenario is *Illinois v. McArthur*, 531 U.S. 326 (2001), where the Court upheld the conduct of police who, after discussions with a homeowner on his front porch, refused to permit him to enter his home unaccompanied by a police escort during a two-hour period while they were seeking a search warrant for the home, based on probable cause to believe there was marijuana inside. The Court justified the restraint of the homeowner’s freedom because “the police had good reason to fear that, unless restrained, . . . [he] would destroy the drugs before they could return with a warrant, *id.* at 332, and it noted that, on the two or three occasions when a police officer accompanied the homeowner into the house during the two-hour wait, the homeowner had “reentered simply for his own convenience, to make phone calls and to obtain cigarettes” and had given his consent to the officer’s escorting him inside for these purposes, *id.* at 335. *See United States v. Curry*, 965 F.3d 313, 326-29 (4th Cir. 2020) (en banc) (reading *MacArthur* narrowly).

Accordingly, in situations other than the *Summers-Muehler* and *McArthur* scenarios, counsel can argue that any detention of a suspect in a “police dominated” setting (*Berkemer v. McCarty*, 468 U.S. at 439), where no or few other members of the public are “present to witness officers’ conduct” (*United States v. Drayton*, 536 U.S. at 204) and to reinforce “[t]he comparatively nonthreatening character of [the] detention[]” (*Berkemer v. McCarty*, 468 U.S. at 440), transforms what might otherwise be merely a *Terry* stop into an arrest requiring probable cause. The argument has particular force when the police have moved the suspect from a public

location to a setting of that sort – a particularly intimidating action. See the discussion of *Florida v. Royer* in the second paragraph of this section.

§ 23.06(d) Whether the Detention Was for the Purpose of Interrogation

If the purpose of police detention of a suspect is interrogation, the courts are particularly likely to view the interrogation as an arrest requiring probable cause rather than a *Terry* stop. In *Dunaway v. New York*, the Court concluded that when the police transported the suspect to the police station for the purpose of interrogation, the “detention . . . was in important respects indistinguishable from a traditional arrest.” 442 U.S. at 212; *see also United States v. Sharpe*, 470 U.S. at 684 n.4 (explaining the holding in *Dunaway*). In *Kaupp v. Texas*, *supra*, the Court applied the reasoning of *Dunaway* to hold that the police had conducted a seizure that was “‘in important respects indistinguishable from a traditional arrest’ and therefore required probable cause or judicial authorization” when they removed the 17-year-old defendant from his home in the middle of the night in handcuffs and drove him “to the sheriff’s offices, where he was taken into an interrogation room and questioned.” 538 U.S. at 631 (quoting *Dunaway v. New York*, 442 U.S. at 212). Such “involuntary transport to a police station *for questioning*,” the Court explained, is “‘sufficiently like arres[t] to invoke the traditional rule that arrests may constitutionally be made only on probable cause.’” *Kaupp v. Texas*, 538 U.S. at 630 (emphasis added)). Similarly, in *Florida v. Royer*, it was deemed significant that the police transported the defendant to the police room for the purpose of interrogation rather than legitimate “reasons of safety and security.” 460 U.S. at 504-05 (plurality opinion). By contrast, in *Michigan v. Summers*, 452 U.S. at 701-02 & n.15, the Court emphasized that the detention of the suspect, which the Court classified as a *Terry* stop, was not designed to extract information from the suspect.

Because the general rule for evaluating police conduct under the Fourth Amendment turns on the officer’s behavior – in theory, an objective test that eschews any inquiry into the officer’s motivation (*see Whren v. United States*, 517 U.S. 806 (1996), and cases cited together with *Whren* in § 25.4.1 *infra*; *but see State v. Arreola*, 176 Wash. 2d 284, 294, 290 P.3d 983, 989 (2012) (“[p]retexual traffic stops are unconstitutional under article I, section 7” of the Washington Constitution); *Schuster v. State Department of Taxation and Revenue, Motor Vehicle Division*, 2012-NMSC-025, 283 P.3d 288, 297 (2012) (citing *State v. Gonzales*, 2011-NMSC-012, 150 N.M. 74, 257 P.3d 894, 896, 897-98 (2011), and *State v. Ochoa*, 2009-NMCA-002, 146 N.M. 32, 206 P.3d 143 (N.M. App. 2008): “New Mexico has departed from United States Supreme Court precedent in *Whren v. United States* . . . by holding that pretextual traffic stops are constitutionally unreasonable. . . . ‘[A] pretextual stop [is] a detention supportable by reasonable suspicion or probable cause to believe that a traffic offense has occurred, but is executed as a pretense to pursue a “hunch,” a different[,] more serious investigative agenda for which there is no reasonable suspicion or probable cause.’”)) – the *purpose of interrogation* criterion depends for the most part on whether the police do indeed interrogate a detained individual. But doctrine does not always hobble judges who can be persuaded by the glaring facts of a case that the police were acting from an illicit motive and using a *Terry* stop as a pretext to

justify some impermissible investigative technique. The several criteria for a valid *Terry* stop have sufficient flexibility to provide a tenable counterstrategy for holding such a stop or its protraction unconstitutional. *See, e.g., United States v. Frazier*, 30 F.4th 1165 (10th Cir. 2022), summarized in § 23.06(a) *supra*; *United States v. Hurtt*, 31 F.4th 152 (3d Cir. 2022); *United States v. Walker*, 965 F.3d 180 (2d Cir. 2020); *United States v. Blair*, 524 F.3d 740 (6th Cir. 2008); *cf. United States v. Williams*, 731 F.3d 678, 686-87 (7th Cir. 2013), summarized in § 23.10 *infra* (invalidating a manifestly pretextual *Terry* frisk).

23.06(e) The Intrusiveness of the Restraint; Police Behavior Conventionally Associated with Arrest

Handcuffing or otherwise physically restraining an individual is a factor that counts in favor of characterizing police action as an arrest. *See, e.g., Mwangangi v. Nielsen*, 48 F.4th 816, 826-27 (7th Cir. 2022) (“[T]he use of handcuffs substantially aggravates the intrusiveness of a *Terry* stop’ and, as a meaningful ‘restraint[] on freedom of movement,’ is ‘normally associated with arrest.’ . . . While there is no categorical rule that an officer’s decision to place a suspect in handcuffs *always* transforms the interaction from a *Terry* stop into an arrest, it is the ‘rare case’ in which ‘common sense and ordinary human experience convince us that an officer believed reasonably that an investigative stop could be effectuated safely only in this manner.’ . . . [S]ee also *United States v. Howard*, 729 F.3d 655, 661 (7th Cir. 2013) (‘Handcuffs in a *Terry* stop and frisk are not and should not be the norm.’); *White v. United States*, 68 A.3d 271, 279 (D.C. 2013) (‘Handcuffing does not necessarily transform an investigative detention into an arrest, but it is recognized as “a hallmark of a formal arrest.”’); *Reagan v. Idaho Transportation Department*, 169 Idaho 689, 697, 502 P.3d 1027, 1035 (2021) (‘Handcuffing a suspect alone does not automatically convert an investigative detention into an arrest where ‘the use of handcuffs was a reasonable precaution for the officer’s safety.’ . . . However, the threshold for showing that handcuffs were a reasonable precaution for officer safety is high. . . . ¶ Here, the act of handcuffing Reagan exceeded the bounds of what was reasonably intrusive in conducting an investigative detention and so requires this Court to conclude that the use of handcuffs converted the investigative detention into an arrest. Nothing indicates that Reagan posed any threat to officer safety. Indeed, the officer made no attempt to articulate that such a threat even existed. The alleged crime did not involve violence.”); *State v. Snyder*, 240 Ariz. 551, 555, 382 P.3d 109, 113 (Ariz. App. 2016) (“A significant factor in determining whether an arrest has occurred ‘is the extent that freedom of movement is curtailed and the degree and manner of force used.’ . . . ‘Another significant factor is the display of official authority, such that “a reasonable person would . . . not [feel] free to leave.” . . . ‘Handcuffing a suspect is an indicia [sic] of arrest.’”); *compare Longshore v. State*, 399 Md. 486, 924 A.2d 1129 (2007) (“generally, a display of force by a police officer, such as putting a person in handcuffs, is considered an arrest” (399 Md. at 502, 924 A.2d 1129, 1138); “Maryland has recognized very limited instances in which a show of force, such as placing a suspect in handcuffs, is not an arrest. This Court has upheld the use of such force when done to protect the officer . . . and the intermediate appellate court has upheld use of such force when done to prevent a suspect’s flight . . .” 399 Md. at 509, 924 A.2d at 1142; “Because Longshore was neither a flight nor safety risk, there was no justification for

placing Longshore in handcuffs. This was, therefore, no mere detention; it was, in fact, an arrest.” 399 Md. at 515, 924 A.2d 1129, 1145.), with *Chase v. State*, 449 Md. 283, 309, 144 A.3d 630, 645 (2016) (“Chase’s reliance on *Longshore* . . . is misplaced. In that case, the officers presented no particularized observations nor did they indicate a belief that Longshore was armed, dangerous or that they were concerned with their safety. Under those circumstances, we held that the officers had no justification for placing Longshore in handcuffs. The instant case differs significantly from *Longshore* in that Detective Melnyk testified that the ‘reason for the handcuffs were solely based on the safety of everybody involved, based on the furtive movements that we observed inside the vehicle as we were approaching the vehicle.’”); and see *United States v. Coulter*, 41 F.4th 451 (5th Cir. 2022) (a 2-1 panel decision holding that the defendant was not in custody for *Miranda* purposes although he was handcuffed during a traffic stop by a lone officer who had reason to suspect that he had a gun). More generally, “[a] *Terry* stop becomes an arrest if officers use more force than reasonably necessary to facilitate the detention.” *United States v. Stevenson*, 66 F.4th 1143, 1145 (8th Cir. 2023) (dictum). “Giving a defendant *Miranda* warnings is also ‘considered a factor weighing in favor of concluding that there was an arrest because most people associate the warnings with arrest.’” *State v. Snyder, supra*, 240 Ariz. at 555, 382 P.3d at 113. And an explicit statement that the individual is under arrest is likely to be decisive. See *United States v. Mota*, 982 F.2d 1384, 1387 (9th Cir. 2004); *Reagan v. Idaho Transportation Department, supra*, 169 Idaho at 698, 502 P.3d at 1036.

§ 23.07 CIRCUMSTANCES JUSTIFYING AN ARREST

§ 23.07(a) Authorization by Statute or Common Law

“Whether an officer is authorized to make an arrest ordinarily depends, in the first instance, on state law.” *Michigan v. DeFillipo*, 443 U.S. 31, 36 (1979). See, e.g., *Sweetin v. City of Texas City*, 48 F.4th 387 (5th Cir. 2022). In virtually all jurisdictions the conditions for a valid arrest are specified by either statute or caselaw. See, e.g., *N.S. v. Hughes*, 335 F.R.D. 337 (D. D.C. 2020); *State of New York v. U.S. Immigration and Customs Enforcement*, 466 F. Supp. 3d 439 (S.D.N.Y. 2020); accord, *Doe v. U.S. Immigration and Customs Enforcement*, 490 F. Supp. 3d 672 (S.D.N.Y. 2020). State law may require the suppression of evidence obtained as a consequence of a legally unauthorized arrest, see, e.g., *Commonwealth v. Le Blanc*, 407 Mass. 70, 75, 551 N.E.2d 906, 909 (1990) (“The police officer in this case acted without statutory or common law authority both when he stopped the defendant and when he arrested him. Our case law supports exclusion of evidence when such conduct prejudices the defendant. . . . The requirement that a police officer have lawful authority when he deprives individuals of their liberty is closely associated with the constitutional right to be free from unreasonable searches and seizures.”); *Commonwealth v. Clark*, 558 Pa. 157, 165-66, 735 A.2d 1248, 1253 (1999); *People v. Alesi*, 89 Cal. App. 3d 537, 152 Cal. Rptr. 623 (1979); cf. *City of Billings v. Whalen*, 242 Mont. 293, 790 P.2d 471 (1990), but such an arrest does not *eo ipso* violate the Fourth Amendment or require suppression as a matter of federal constitutional law (*Virginia v. Moore*, 553 U.S. 164, 176-77 (2008); *Cornel v. Hawai’i*, 37 F.4th 527, 533-34 (9th Cir. 2022)). The state-law validity of an arrest may also have other consequences unaffected by federal law: In

many States, for example, a defendant or respondent can be convicted of the crime of resisting arrest only if the arrest is lawful. *E.g.*, *State v. Robinson*, 6 Ariz. App. 424, 433 P.2d 75 (1967); *People v. Peacock*, 68 N.Y.2d 675, 496 N.E.2d 683, 505 N.Y.S.2d 594 (1986); *State v. Mobley*, 240 N.C. 476, 83 S.E.2d 100 (1954).

In several jurisdictions the juvenile court statutes establish additional requirements for arrests of juveniles. See §§ 3.03-3.09 *supra*.

§ 23.07(b) Arrest Warrants

In cases in which a juvenile respondent is arrested on an arrest warrant (in some jurisdictions called a “custody order”), the defense can challenge the validity of the warrant, and thereby the validity of the arrest, by arguing that the warrant was issued without a showing of probable cause to believe that the respondent committed an offense. *See Giordenello v. United States*, 357 U.S. 480 (1958), as explained in *Aguilar v. Texas*, 378 U.S. 108, 112 n.3 (1964); *Steagald v. United States*, 451 U.S. 204, 213 (1981) (dictum). In determining whether such an argument is viable, counsel will need to obtain the affidavit or sworn complaint submitted by the police or prosecutor in support of the request for the arrest warrant and examine the sufficiency of the facts presented to the magistrate or judge who issued the warrant. In cases in which an arrest warrant does not correctly name the respondent and instead is issued on the basis of an alias, a nickname, or a description of the person sought, counsel also may be able to challenge the validity of the warrant on the grounds that it does not identify the respondent with the requisite particularity. *See, e.g., United States v. Doe*, 703 F.2d 745 (3d Cir. 1983). “[A] seizure conducted pursuant to an arrest warrant must conform to the terms of that warrant.” *Simon v. City of New York*, 893 F.3d 83, 94 (2d Cir. 2018). The arresting officer’s deviation from those terms will render the arrestee’s detention unconstitutional under the general Fourth Amendment principle that “because a warrant generally authorizes no more than what it expressly provides, to act unreasonably beyond the terms of a warrant is akin to acting without a warrant at all” (*id.*). *And see Arizmendi v. Gabbert*, 919 F.3d 891, 901 (5th Cir. 2019) (dictum) (“*Vance [v. Nunnery]*, 137 F.3d 270 (5th Cir. 1988) rejected the possibility that an officer could arrest someone based on a warrant and then, on its challenge, retroactively justify his conduct by arguing that he had probable cause to arrest the person without a warrant for a different offense”).

The practical value of challenging arrest warrants has been drastically curtailed by the holdings in *United States v. Leon*, 468 U.S. 897 (1984), and *Massachusetts v. Sheppard*, 468 U.S. 981 (1984), that the exclusionary rule does not apply to evidence obtained through police actions taken in “good faith” reliance upon an apparently valid warrant issued as a consequence of a magistrate’s erroneous finding of probable cause. For discussion of this complicated subject, see § 23.17 *infra*.

§ 23.07(c) Arrests Without a Warrant: The Basic Authorizations for Warrantless Arrest

In most jurisdictions the requirements for a warrantless arrest depend upon whether the underlying crime is a felony or a misdemeanor:

(i) If the underlying crime is a felony, a warrantless arrest can be made whenever the arresting officer (or the officer who ordered or requested the arrest) was in possession of facts providing probable cause to believe that the crime was committed and that the person to be arrested had committed it. *Maryland v. Pringle*, 540 U.S. 366, 370 (2003); *United States v. Watson*, 423 U.S. 411 (1976); *United States v. Santana*, 427 U.S. 38 (1976); *Michigan v. DeFillippo*, 443 U.S. 31, 36 (1979). This is the ubiquitous state-law rule and is also the rule of the Fourth Amendment.

(ii) If the underlying crime is a misdemeanor, the rule in most jurisdictions is that a warrantless arrest can be made only when the offense was committed in the presence of the arresting officer. *See, e.g., State v. Amstutz*, 169 Idaho 144, 146-47, 492 P.3d 1103, 1105-06 (2021); *Juliano v. State*, 260 A.3d 619, 628, 632 (Del. 2021); *Roseborough v. Commonwealth*, 281 Va. 233, 704 S.E.2d 414 (2011); *cf. People v. Hammerlund*, 504 Mich. 442, 939 N.W.2d 129 (2019) (anticipating *Lange v. California*, 141 S. Ct. 2011 (2021), summarized in § 23.20 *infra*, in holding that when an officer has personal knowledge of all of the elements of a minor misdemeanor, it is unreasonable, and a violation of the Fourth Amendment, to arrest an individual in his or her home for such an offense); *and see Atwater v. City of Lago Vista*, 532 U.S. 318, 355-60 (2001) (“Appendix to Opinion of the Court,” listing and quoting state statutes). The Supreme Court has explicitly reserved the question “whether the Fourth Amendment [also] entails an ‘in the presence’ requirement for purposes of misdemeanor arrests.” *See id.* at 341 n. 11, citing, with a “*cf.*” signal, Justice White’s statement in a dissent in *Welsh v. Wisconsin*, 466 U.S. 740, 756 (1984), that the “‘requirement that a misdemeanor must have occurred in the officer’s presence to justify a warrantless arrest is not grounded in the Fourth Amendment.’” The answer to that question is important because “violations of state arrest law” are not necessarily “also violations of the Fourth Amendment” (*Virginia v. Moore*, 553 U.S. 164, 173 (2008)). *See* § 23.07(a) *supra*.

(A) Counsel contending that the Fourth Amendment does embody the majority state-law rule limiting misdemeanor arrests to offenses committed in the presence of the arresting officer can point to passages in a number of Supreme Court opinions which treat that proposition as axiomatic. *See id.* at 171 (“In a long line of cases, we have said that when an officer has probable cause to believe a person committed even a minor crime in his presence, . . . [t]he arrest is constitutionally reasonable.”); *id.* at 178 (“When officers have probable cause to believe that a person has committed a crime in their presence, the Fourth Amendment permits them to make an arrest”); *Maryland v. Pringle*, 540 U.S. 366, 370 (2003) (“A warrantless arrest of an individual in a public place for a felony, or a misdemeanor committed in the officer’s presence, is consistent with the Fourth Amendment if the arrest is supported by probable cause.”); *Atwater v. City of Lago Vista*, 532 U.S. at 354 (“[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.”).

(B) The argument for a “presence” requirement also has strong historical support. Most of the common-law authorities extensively canvassed in the *Atwater* opinion, 532 U.S. at 326-43, condition an officer’s arrest power in misdemeanor cases upon the circumstance that the misdemeanor was “committed in the presence of the arresting officer” (JACOB W. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT – A STUDY IN CONSTITUTIONAL INTERPRETATION* 45 (Johns Hopkins University Studies in Historical and Political Science, Ser. 84, No. 1, 1966), quoted in *Atwater*, 532 U.S. at 336; and see the earlier American commentaries cited in *id.* at 343) or “committed in his view” (see the English treatises quoted in *Atwater*, 532 U.S. at 330-31), or that the offender was found or “taken in the very act” (*Money v. Leach*, 3 Burr. 1742, 1766, 97 Eng. Rep. 1075, 1088 (K.B.1765), quoted in *Atwater*, 532 U.S. at 332 n.6).

(C) Pre-*Atwater* decisions of the federal courts of appeals in several Circuits had rejected the “presence” requirement as a Fourth Amendment precondition for valid arrest upon probable cause, and it is unclear to what extent *Atwater* will spark a reconsideration of those precedents. See, e.g., *United States v. Laville*, 480 F.3d 187, 191-94 (3d Cir. 2007); *United States v. Dawson*, 305 Fed. Appx. 149, 160 n.9 (4th Cir. 2008); *United States v. McNeill*, 484 F.3d 301, 311 (4th Cir. 2007); *Rockwell v. Brown*, 664 F.3d 985, 996 (5th Cir. 2011); *Hall v. Hughes*, 232 Fed. Appx. 683, 684-85 (9th Cir. 2007); *Graves v. Mahoning County*, 821 F.3d 772 (6th Cir. 2016) (“[I]t’s an open question at the Supreme Court . . . ‘whether the Fourth Amendment’ requires officers to get a warrant ‘for purposes of misdemeanor arrests’ committed ‘[outside] the[ir] presence.’ *Atwater* . . . ¶ But it’s not an open question at our court. The ‘requirement that a misdemeanor must have occurred in the officer’s presence to justify a warrantless arrest,’ we have explained, ‘is not mandated by the Fourth Amendment.’ . . . This may be why the plaintiffs don’t mention the issue in their appellate brief or for that matter distinguish the rules for misdemeanor and felony arrests. ¶ Other circuits agree with our approach.” 821 F.3d at 778. “All the while, though, no court has devoted much more than a line or two to this issue. ¶ There are, to be sure, some sound reasons for our court’s position . . .” *Id.* at 779. “But there are valid competing arguments that deserve to be addressed at some point. The common law, most sources say, prohibited an officer from ‘mak[ing] a [warrantless] arrest for a misdemeanor [unless] the crime was committed in his presence.’ . . . What was reasonable at common law often tells us what is reasonable under the Fourth Amendment. It ‘sheds light on the obviously relevant, if not entirely dispositive,’ meaning of ‘reasonable.’” *Id.* at 779-80. “Some state courts, following this logic, have constitutionalized the common law rule. They have held that statutes that ‘authorize[] an arrest, without a warrant, for a misdemeanor not committed in the presence of the officer making the arrest’ are unconstitutional . . . ¶ With sound arguments on each side, it’s no wonder that the Court has left the question open, even while deciding related questions about warrantless arrests. . . . And it’s no wonder that some judges have flagged the issue. . . . Today, however, is not the day to address it.” *Id.* at 780.); *United States v. Barajas*, 517 F. Supp. 3d 1008, 1021 (N.D. Cal. 2021) (“[t]he Sixth Circuit’s recent opinion in *Graves* . . . appears to be the most in depth analysis on this issue to date”); *Veatch v. Bartels Lutheran Home*, 627 F.3d 1254, 1258 (8th Cir. 2010) (“[T]he Supreme Court has not decided whether the Fourth Amendment permits a warrantless arrest for a misdemeanor when the alleged offense did not occur in the presence of the arresting officer. See *Atwater* . . . Although the weight of authority holds that the Fourth

Amendment does not impose an ‘in the presence’ requirement of this type, . . . this circuit has not decided the point, . . . and we need not address the issue in this case.”). Pending Supreme Court resolution of the issue, counsel should press the claim, when relevant, that the Fourth Amendment does prohibit misdemeanor arrests for offenses of which the arresting officer has no personal, observational knowledge, so that s/he is relying solely on third parties for the information necessary to establish probable cause.

(iii) If the arrest is for a mental health evaluation, probable cause is required. *Graham v. Barnette*, 5 F.4th 872, 886 (8th Cir. 2021) (“[W]e now make explicit that which has long been implicit in our case law and align our circuit with the unanimous consensus in all other circuits. We conclude that only probable cause that a person poses an emergent danger – that is, one calling for prompt action – to herself or others can tip the scales of the Fourth Amendment’s reasonableness balancing test in favor of the government when it arrests an individual for a mental-health evaluation because only probable cause constitutes a sufficient ‘governmental interest’ to outweigh a person’s ‘interest in freedom.’”).

§ 23.07(d) The Probable Cause Requirement for Arrest

As indicated in the preceding two sections, a showing of “probable cause” is the minimum precondition for a valid arrest, with or without a warrant.

Much of the law of the Fourth Amendment is concerned with the concept of “probable cause.” Not only arrest warrants but also search warrants are issued upon a magistrate’s or a judge’s finding of probable cause; not only warrantless arrests but also many types of warrantless searches depend upon the officer’s possession of probable cause. Whether the issue is the validity of an arrest or a search, the constitutional phrase *probable cause* means “‘a reasonable ground for belief,’” *Brinegar v. United States*, 338 U.S. 160, 175 (1949): “Probable cause exists where ‘the facts and circumstances within . . . [the officers’] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the [requisite] belief . . . ,’” *id.* at 175-76; *accord, Florida v. Harris*, 568 U.S. 237, 243-44 (2013) (“A police officer has probable cause to conduct a search when ‘the facts available to [him] would ‘warrant a [person] of reasonable caution in the belief’” that contraband or evidence of a crime is present. . . . The test for probable cause is not reducible to ‘precise definition or quantification.’ . . . All we have required is the kind of ‘fair probability’ on which ‘reasonable and prudent [people,] not legal technicians, act.’”); *Safford Unified School District # 1 v. Redding*, 557 U.S. 364, 371 (2009) (“a ‘fair probability’ . . . or a ‘substantial chance’”); *District of Columbia v. Wesby*, 138 S. Ct. 577, 586 (2018); *Maryland v. Pringle*, 540 U.S. at 370-71; *Wong Sun v. United States*, 371 U.S. 471, 479 (1963); *Braun v. Village of Palatine*, 56 F.4th 542, 545, 549 (7th Cir. 2022) (finding probable cause to arrest a driver for DWI after his car crashed into a telephone pole: although he passed a breathalyzer test, he failed other standard field sobriety tests; he had slurred speech, bloodshot and glassy eyes, and difficulty balancing; he told the arresting officer that “he lived in ‘Chicago-Miami’”; he acknowledged drinking a beer earlier in the evening; he did not inform the officer that he was subject to seizures – which, in retrospect,

likely explained both the accident and the symptoms of intoxication; “probable cause [was not] eliminated because an innocent explanation for the crash and Braun’s behavior emerged later”). *Cf. Carpenter v. United States*, 138 S. Ct. 2206, 2221 (2018) (holding that a showing of “‘reasonable grounds’ for believing that . . . records were ‘relevant and material to an ongoing investigation . . .’ . . . [fell] well short of the probable cause required for a warrant” because “[t]he Court usually requires ‘some quantum of individualized suspicion’ before a search or seizure may take place”). *See, e.g., Bickford v. Hensley*, 832 Fed. Appx. 549, 554-55 (10th Cir. 2020) (a Facebook message asserting that one “Chaz” was in possession of marijuana did not establish probable cause for Bickford’s arrest: “First, the Facebook message between third-parties constitutes hearsay. Although the fact that hearsay evidence would be inadmissible at trial ‘does not make it unusable as a source of probable cause for a warrantless arrest,’ . . . longstanding legal principles generally consider hearsay statements to be inherently unreliable. . . . Second, the Facebook message did not mention . . . [Bickford] by name, but merely referred to someone named ‘Chaz,’ who Deputy Hensley *thinks* is . . . [Bickford]. The lack of specific identification of . . . [Bickford] in an uncorroborated conversation that did not even involve . . . [Bickford] further undermines the ability of the message to establish probable cause of any offense.”). “The ‘totality of the circumstances’” known to the officer must be considered (*District of Columbia v. Wesby*, 138 S. Ct. at 588); *Johnson v. City of Minneapolis*, 901 F.3d 963 (8th Cir. 2018); *Gilliam v. Sealey*, 932 F.3d 216, 234 (4th Cir. 2019) (“In making . . . [the probable-cause] inquiry, we consider only the information the officers had at the time of the arrest. . . . ¶ . . . A coerced or fabricated confession that police know to be coerced – . . . based on the use of coercive interrogation tactics, the age and intellectual disabilities of . . . [suspects] and the inconsistencies between the confessions and the crime scene – does not give police probable cause to arrest the suspect as a matter of law.”); *Ouza v. City of Dearborn Heights, Michigan*, 969 F.3d 265, 282 (6th Cir. 2020) (a police officer investigated a domestic dispute and concluded that an ex-husband had assaulted his wife; responding to a second call shortly after the first, the officer was met by the husband outside the residence and told by the husband that the wife had assaulted him; the wife and a daughter disputed this, but the officer arrested the wife; these facts permitted a finding of lack of probable cause: “a person has a right to be free from arrest based solely on an eyewitness account that is in some way untruthful or unreliable.”); *Nichols v. Macias*, 695 Fed. Appx. 291 (9th Cir. 2017) (“if ‘specific intent is a required element of the offense, the arresting officer must have probable cause for that element in order to reasonably believe that a crime has occurred’”); *Rieves v. Town of Smyrna, Tennessee*, 959 F.3d 678, 696 (6th Cir. 2020) (the actions of two prosecutors in pressing the police to make arrests of the proprietors of stores selling legal cannabidiol products “were objectively unreasonable because their probable cause determinations rested on the inconclusive results in . . . [laboratory] reports. It is unreasonable to submit an innocuous product to a lab test that is incapable of determining its legality, then rely on that inconclusive evidence to say that the substance was probably illegal.”); *Nichols v. City of Riverside*, 775 Fed. Appx. 845, at 845 (9th Cir. 2019) (“the existence of a dispute over the amount of a bill or the right to possess are civil in nature and ordinarily do not give rise to probable cause to arrest”); *Reynaga Hernandez v. Skinner*, 969 F.3d 930, 938 (9th Cir. 2020) (a deputy sheriff “conducted a *Terry* stop when he confronted . . . [a Mexican national] outside the courtroom [in which a witness had testified that

the suspect was an illegal alien], asked him questions regarding his immigration status, and requested identification”; “The parties agree that at the time . . . [the deputy] conducted the stop, the only relevant information available to . . . [him] was . . . [a] statement [by the presiding judge] that he had heard sworn testimony that . . . [the suspect] was ‘not a legal citizen.’”; this information was inadequate to provide “reasonable suspicion or probable cause to conduct the stop and [a subsequent] arrest, respectively”: “Unlike illegal *entry* into the United States – which is a crime under 8 U.S.C. § 1325 – illegal *presence* is not a crime.”); *Friend v. Gasparino*, 61 F.4th 77 (2d Cir. 2023), summarized in § 23.11(b) *infra* (there is no probable cause for arrest when the arrestee’s conduct is, as a matter of law, beyond the reach of the statute that purportedly underlies the arrest); *Gorsky v. Guajardo*, 2023 WL 3690429 (5th Cir. 2023) (an arrest for interfering with a police officer’s investigation would lack probable cause if it was based on the arrestee’s refusal of the officer’s demand to bring the arrestee’s wife out of their home to talk with the officer; interfering with a police officer in the performance of his or her duties requires active obstruction, not mere failure to obey the officer’s commands); *Duncan v. City of Sandy Springs*, 2023 WL 3862579 (11th Cir. 2023). Specifically, probable cause to *arrest* is established when there are reasonable grounds to believe that the particular person sought to be arrested has committed a crime; probable cause for a *search* is established when there are reasonable grounds to believe that objects connected to criminal activity or otherwise subject to seizure are presently located in the particular place to be searched. *Zurcher v. Stanford Daily*, 436 U.S. 547, 556-57 n.6 (1978); *Steagald v. United States*, 451 U.S. 204, 213 (1981); *Safford Unified School District # 1 v. Redding*, 554 U.S. at 370; *State v. Thompson*, 419 S.C. 250, 797 S.E.2d 716 (2017). There are elaborate definitions of the concept of probable cause, *e.g.*, *Gerstein v. Pugh*, 420 U.S. 103, 111-12 (1975); *Dunaway v. New York*, 442 U.S. 200, 208 n.9 (1979), and innumerable constructions of it in individual factual situations.

The topic of probable cause for the issuance of warrants will be taken up in discussing search warrants. See § 23.17 *infra*. With respect to warrantless arrests, the probable cause requirement must be “strictly enforced” (*Henry v. United States*, 361 U.S. 98, 102 (1959)) because “the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others . . . while acting under the excitement that attends the capture of persons accused of crime” (*United States v. Lefkowitz*, 285 U.S. 452, 464 (1932)).

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

enforcement agent.” (*Johnson v. United States*, 333 U.S. 10, 13-14 (1948).)

Accord, *United States v. Watson*, 423 U.S. 411, 432 n.6 (1976) (Powell, J., concurring) (emphasizing the Court’s “longstanding position that . . . [such a warrantless arrest] should receive careful judicial scrutiny”).

In determining whether the police had probable cause to arrest, the central question is what facts the police knew before the arrest. *See, e.g., Michael v. Trevena*, 899 F.3d 528 (8th Cir. 2018). “[A]n arrest is not justified by what the subsequent search discloses.” *Henry v. United States*, 361 U.S. at 104. *See also Maryland v. Pringle*, 540 U.S. at 371 (“To determine whether an officer had probable cause to arrest an individual, we examine the events leading up to the arrest, and then decide ‘whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to’ probable cause”); *Florida v. Harris*, 568 U.S. 237, 249 (2013) (“we do not evaluate probable cause in hindsight, based on what a search does or does not turn up”); *cf. Wright v. City of Euclid*, 962 F.3d 852, 873-74 (6th Cir. 2020) (an officer “conceded that he did not have probable cause to arrest Wright until he started ‘resisting.’ This puts the cart before the horse. When an underlying arrest is for resisting arrest and nothing more, ‘the officers could not, as a matter of law, have probable cause to arrest [Wright] where the underlying arrest was not lawful.’”); and see § 23.03 *supra*. “If probable cause is established at any early stage of the investigation, it may be dissipated if the investigating officer later learns additional information that decreases the likelihood that the defendant has engaged, or is engaging, in criminal activity. A person may not be arrested, or must be released from arrest, if previously established probable cause has dissipated. ‘As a corollary . . . of the rule that the police may rely on the totality of facts available to them in establishing probable cause, they also may not disregard facts tending to dissipate probable cause.’” *United States v. Ortiz-Hernandez*, 427 F.3d 567, 574 (9th Cir. 2005); *accord, Hicks v. Ferreyra*, 64 F.4th 156, 170 (4th Cir. 2023) (“The jury’s findings in the special interrogatories, which the officers do not challenge, make plain the officers’ violation of Hicks’s Fourth Amendment rights. The . . . [vehicle] stop began when Officer Ferreyra conducted a ‘welfare check’ on the well-being of the driver, Hicks, in a car parked on the side of a highway. Even if we assume that Officer Ferreyra’s observation of the gun on the front passenger seat gave rise to an objectively reasonable suspicion of criminal activity, that justification ceased when Ferreyra confirmed that Hicks, as a Secret Service agent, was authorized to carry a firearm. . . . Moreover, as the jury found, the . . . [U.S. Park Police] did not have a customary practice that a supervisor come to the scene before an officer could release an individual who had displayed a weapon. Thus, the prolonged first detention of nearly an hour after any justification ceased plainly violated Hicks’s Fourth Amendment right to be free from unreasonable seizures.”); *Nicholson v. Guttierrez*, 935 F.3d 685 (9th Cir. 2019); *Barnett v. MacArthur*, 956 F.3d 1291 (11th Cir. 2020); *United States v. Brinkley*, 980 F.3d 377, 387 (4th Cir. 2020). *See also Haynes v. Minnehan*, 14 F.4th 830, 836 (8th Cir. 2021), summarized in the last paragraph of this section (saying, in a *Terry*-stop context, that “as new information flows in, a reasonable belief can dissolve into an unreasonable one”); *Sanders v. Jones*, 728 Fed. Appx. 563, 566 (6th Cir. 2018) (holding, in the context of a Fourth Amendment malicious prosecution action, that the probable cause provided by a confidential informant’s identification of Sanders as

the individual who sold him drugs would be dissipated if the police officer who received the informant's report subsequently viewed a videotape of the controlled drug buy and "knew or strongly suspected from viewing the video that the person who sold the confidential informant the drugs was not Sanders"); *cf. Neal v. Ficcadenti*, 895 F.3d 576, 581 (8th Cir. 2018) (saying, in the context of an excessive-force claim, that "a reasonable officer is not permitted to ignore changing circumstances and information that emerges once arriving on scene"); *Harris v. Klare*, 902 F.3d 630 (6th Cir. 2018), summarized in § 23.37 subdivision (d) *infra*. "[I]n determining whether there is probable cause, officers are charged with knowledge of any 'readily available exculpatory evidence' that they unreasonably fail to ascertain. . . . '[T]he probable cause standard of the Fourth Amendment requires officers to reasonably interview witnesses readily available at the scene, investigate basic evidence, or otherwise inquire if a crime has been committed at all before invoking the power of warrantless arrest and detention.'" *Mareska v. Bernalillo County*, 804 F.3d 1301, 1310 (10th Cir. 2015); *accord, Harris v. City of Saginaw*, 62 F.4th 1028 (6th Cir. 2023) (sustaining a claim that Harris was arrested without probable cause: "The Officers were required to 'consider the totality of the circumstances, recognizing both the inculpatory *and* exculpatory evidence, before determining if [they have] probable cause to make an arrest.'" *Id.* at 1034. "[O]fficers cannot ignore these facts and circumstances to insulate themselves: It is clearly established that probable cause is lacking when officers effect 'hasty, unsubstantiated arrests' without investigation." *Id.* at 1033. "The Officers generally assert that they had probable cause for Harris's arrest based on the . . . statements [of an individual whom Harris had accused of pointing a gun at him], Harris's inconsistent stories, and the security footage. But their assertions are belied by evidence that the Officers had seemingly made up their minds prior to speaking to the clerks, viewing the security footage, or hearing Harris's later clarifications. A reasonable jury could conclude as much, finding that the Officers merely sought out whatever would support their decision after Harris's initial description. In other words, a reasonable jury could conclude that . . . the . . . officers were 'simply turn[ing] a blind eye toward potentially exculpatory evidence' in order to arrest Harris." *Id.* at 1034). *See, e.g., Ross v. City of Jackson, Missouri*, 897 F.3d 916, 922 (8th Cir. 2018) (holding that a claim of arrest without probable cause was sustainable when a suspect was arrested based on an ambiguous facebook comment regarding weapons: "In this case, even a 'minimal further investigation' would have revealed that Ross's post was not a true threat. . . . The officers conducted no investigation into the context of the statement, Ross's history of violence, or Ross's political beliefs about gun ownership or gun control measures. . . . Ross tried to explain what was meant by his comment and provide the officers with more context about the post, but the officers did not give him that opportunity until after he was booked at the police station."); *Sital v. City of New York*, 60 A.D.3d 465, 466, 875 N.Y.S.2d 22, 23 (N.Y. App. Div., 1st Dep't 2009) ("Regarding the false arrest cause of action, the evidence demonstrates that a rational jury could have found that there was no probable cause for plaintiff's arrest because the accusation from an identified citizen, which was the sole basis for the arrest, was not sufficiently reliable, given that the investigating officer had doubts about the witness's credibility The identification of plaintiff was also arguably contradicted by physical evidence from the crime scene that was consistent with a conflicting statement of an independent eyewitness, and the jury heard testimony showing that the investigating officer recognized plaintiff based on a prior arrest, at which time he had referred to plaintiff as 'an

animal.’ Under these circumstances, a rational jury could have determined that the officer’s failure to make further inquiry of potential eyewitnesses was unreasonable under the circumstances, and evidenced a lack of probable cause”); *Abercrombie v. Bean*, 728 Fed. Appx. 918, 926 (11th Cir. 2018) (“Abercrombie has offered evidence that Beam ‘elect[ed] not to obtain easily discoverable facts, such as . . . whether witnesses were available to attest to’ what occurred during the incident. . . . ¶ Not only that, but . . . Beam’s actions could be construed as preventing Abercrombie, Bryant, and Diamond from offering information relevant to the investigation. . . . Beam . . . refused to tell Abercrombie why he was being arrested and instead ‘just told [him] to shut up.’ As for Bryant, Beam likewise told her to ‘shut up’ if she did not want to be arrested . . . In light of evidence that Beam not only failed to interview available witnesses but also actively dissuaded some of them from talking to him, we must conclude that a triable issue exists as to whether Beam conducted an objectively reasonable and unbiased investigation into the alleged assault.”); *Greve v. Bass*, 805 Fed. Appx. 336, 346 (6th Cir. 2020) (“[E]ven if we assume that Bass had reasonable suspicion to detain Greve initially, he never investigated at all the potentially exculpatory evidence or explanation that Greve had explicitly called to his attention, so that suspicion could not mature into probable cause for arrest.”); *Humbert v. Mayor and City Council of Baltimore City*, 866 F.3d 546 (4th Cir. 2017) (“Trial testimony indicates that Humbert closely matched a generic physical description [which a rape victim gave of her assailant] – a 5’7”, African-American male in his late 30s to early 40s who was fairly well-spoken – and a generic looking composite sketch of an African-American male. Humbert was also stopped eight days after the assault in the Charles Village neighborhood, [a location that was within blocks of the victim’s home where the rape occurred but was also] near . . . [Humbert’s] homeless shelter and a couple of miles away from where his family members resided. These facts cannot reasonably support the probable cause needed for his arrest.” *Id.* at 559. “[T]he Officers can find no solace in the victim’s so-called tentative identification, as the evidence demonstrates that the Officers improperly influenced the investigation from its inception. Jones asked the victim multiple times whether her assailant was homeless, and it is undisputed that Humbert was homeless at the time he was stopped. Jones also showed the victim Humbert’s picture and identified him as her attacker a day after the assault occurred, either during or after she completed the composite sketch and only a few days before she saw his photo in the photobook. Again, drawing all reasonable inferences in Humbert’s favor, the evidence indicates that Jones inappropriately affected the victim’s ability to complete the composite sketch and identify her attacker. Such suggestive acts unquestionably nullified the Officers’ ability to rely on the victim’s initial reaction to Humbert’s photo.” *Id.* at 560.). *And see Hurt v. Wise*, 880 F.3d 831 (7th Cir. 2018), *partially overruled on an unrelated point in Lewis v. City of Chicago*, 914 F.3d 472, 475 & n.1, 478-79 (7th Cir. 2019) (arrestees stated a Fourth Amendment false-arrest claim when their arrests rested upon confessions “replete with easily verified and contemporaneous evidence of inaccuracy and unreliability” (*id.* at 837); the arresting officers “insist that there was at least arguable probable cause to arrest . . . based on . . . [the] ‘confessions’ because neither of those confessions was coerced. . . . [T]his argument is misplaced with respect to a Fourth Amendment false-arrest claim. Reliability, not coercion, is the gravamen of probable cause.” (*Id.* at 841.)); *Dean v. Searcy*, 893 F.3d 504 (8th Cir. 2018) (affirming liability for claims of arrest and imprisonment resulting from a reckless investigation, manufactured false evidence, and

coerced confessions). For discussion of some of the factors commonly considered by the courts in assessing whether there was probable cause, see § 23.11 *infra*.

When an arrest is made, with or without a warrant, upon probable cause to believe that a particular individual has committed an offense but the police arrest the wrong individual, their arrest is nonetheless legal if (i) they honestly believe that the person arrested is the individual sought and (ii) they have probable cause for this belief. *Hill v. California*, 401 U.S. 797 (1971). *Cf. Garcia v. City of Riverside*, 817 F.3d 635, 641 (9th Cir. 2016) (“Whether . . . [the police] had to investigate in the face of . . . [an arrested individual’s] protests and complaints that he wasn’t the person described in the outstanding warrant is an important question. No person deserves to be incarcerated without good reason, and incarceration on a warrant without a reasonable investigation of identity, when the circumstances demand it, is subject to review under the Due Process Clause. The issue is whether LASD’s treatment of Plaintiff’s contention that he was not the warrant subject was so superficial, under the circumstances, that it ignored a duty to investigate and offended due process. ¶ . . . [T]he warrant . . . matched only his first and last name and date of birth. Garcia is nine inches taller and forty pounds heavier than the warrant subject. Even a cursory comparison of Garcia to the warrant subject should have led officers to question whether the person described in the warrant was Garcia. Information that raised questions about Garcia’s identity should have prompted the LASD to investigate more deliberately.”); *Cozzi v. City of Birmingham*, 892 F.3d 1288, 1297 (11th Cir. 2018) (“We need not decide whether the evidence Thomas possessed – the statements of two tipsters that Cozzi resembled the perpetrator shown in the *Crime Stoppers* video, confirmation that the informant had accurately provided Cozzi’s address and a description of his vehicle, and a plastic bag with 32 pills found inside Cozzi’s home – was sufficient to establish arguable probable cause because we must also consider the information tending to exculpate Cozzi that was available to Thomas when he made the arrest. Thomas had been told the readily verifiable exculpatory fact that the perpetrator’s multiple tattoos did not match Cozzi’s single tattoo. And setting aside the 32 pills we have already discussed, the search of his residence had failed to turn up even arguable evidence of the robberies. . . . ¶ Despite having been given plainly exculpatory and easily verifiable information, Thomas did not look at Cozzi’s tattoo before arresting him. Under our precedent, this failure was unreasonable.”).

Fourth Amendment restrictions on the amount of physical force that can be used to effect an arrest or other seizure are the subject of a body of case law emanating from *Tennessee v. Garner*, 471 U.S. 1 (1985), and *Graham v. Connor*, 490 U.S. 386 (1989). *See, e.g., Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018); *County of Los Angeles v. Mendez*, 581 U.S. 420, 427-28 (2017); *White v. Pauly*, 580 U.S. 73, 79-80 (2017) (per curiam), *explicated on remand in Pauly v. White*, 874 F.3d 1197 (10th Cir. 2017); *Plumhoff v. Rickard*, 572 U.S. 765 (2014); *Tolan v. Cotton*, 572 U.S. 650 (2014); *Mullenix v. Luna*, 577 U.S. 7, 12-15 (2015) (per curiam); *Franklin v. City of Charlotte*, 64 F.4th 519, 530 (4th Cir. 2023) (“[a]ll claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other “seizure” of a free citizen should be analyzed under the Fourth Amendment and its “reasonableness” standard”); *Franco v. Gunsalus*, 2023 WL 3590102, at *3 (2d Cir. 2023) (“We

have held that a police officer violates a clearly established Fourth Amendment right when he ‘use[s] significant force against an arrestee who is no longer resisting and poses no threat to the safety of officers or others.’”); *Shumate v. City of Adrian, Michigan*, 44 F.4th 427 (6th Cir. 2022) (exhaustively analyzing “the three *Graham* factors” (*id.* at 440) used to determine whether police use of force is reasonable – “(1) the severity of the crime at issue; (2) whether the suspect posed an immediate threat to the officer or others; and (3) whether the suspect was actively resisting arrest or attempting to evade arrest by flight” (*id.*), the Sixth Circuit finds that a police officer employed excessive force by tasing, beating and kneeling an individual who insulted him, cursed at him, and then backed away when the officer tried to handcuff him); *Cobbins v. Sollie*, 2023 WL 4015303, at *6 (5th Cir. 2023) (“precedent makes it clear to all reasonable officers that tasing a subject who is suspected of no more than a misdemeanor, is pinned to the ground, is surrounded by law enforcement officers and unable to escape, is unarmed, and is offering no more than passive resistance, amounts to excessive force in violation of the Fourth Amendment”); *Tenorio v. Pitzer*, 802 F.3d 1160, 1164 (10th Cir. 2015) (“The Fourth Amendment permits an officer to use deadly force only if there is ‘probable cause to believe that there [is] a *threat of serious physical harm to [the officer] or to others*’”); *Callahan v. Wilson*, 863 F.3d 144, 149 (2d Cir. 2017) (“‘the use of force highly likely to have deadly effects is unreasonable unless the officer had probable cause to believe that the suspect posed a significant threat of death or serious physical injury to the officer or to others’”); *Harris v. Pittman*, 927 F.3d 266, 268-69 (4th Cir. 2019) (“even where an initial use of deadly force is reasonable, the repeated use of force may be constitutionally excessive if circumstances change in a material way”); *Longoria v. Pinal County*, 873 F.3d 699, 705 (9th Cir. 2017) (“[t]he ‘most important’ factor is whether . . . [the suspect] posed an *immediate* threat”); *Lewis v. Charter Township of Flint*, 660 Fed. Appx. 339, 343 (6th Cir. 2016) (“It has long been established that ‘[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable.’ . . . Where a person attempts 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,’ but ‘may not use deadly force once the car moves away, leaving the officer and bystanders in a position of safety.’””); *accord, Williams v. Strickland*, 917 F.3d 763 (4th Cir. 2019); *Edwards v. Oliver*, 31 F.4th 925 (5th Cir. 2022); *Newmaker v. City of Fortuna*, 842 F.3d 1108, 1116 (9th Cir. 2016) (“Excessive force claims are analyzed under a Fourth Amendment reasonableness inquiry. . . . In conducting this analysis, a court must balance the severity of the intrusion on the individual’s Fourth Amendment rights against the government’s need to use force.”); *Burwell v. Peyton*, 131 F. Supp. 3d 268, 292 (D. Vt. 2015), *aff’d*, 670 Fed. Appx. 734 (2d Cir. 2016) (“‘In order to establish that the use of force to effect an arrest was unreasonable and therefore a violation of the Fourth Amendment, . . . [claimants] must establish that the government interests at stake were outweighed by “the nature and quality of the intrusion on [plaintiffs’] Fourth Amendment interests”’”); *accord, E.W. v. Dolgos*, 884 F.3d 172, 176, 179-85 (4th Cir. 2018) (dictum) (“a school resource officer’s decision to handcuff a calm, compliant elementary school student for fighting with another student three days prior” constituted excessive force in violation of the Fourth Amendment); *Strickland v. City of Detroit, Michigan*, 995 F.3d 495, 508 (6th Cir. 2021) (confirming that a “right to be free of excessive handcuffing” was clearly established as early as 2014); *Neal v. Ficcadenti*, 895 F.3d 576, 581

(8th Cir. 2018) (a police officer’s use of an arm-bar takedown on an unresisting suspect constituted excessive force in violation of the Fourth Amendment); *Richmond v. Badia*, 47 F.4th 1172 (11th Cir. 2022) (a school resource officer used excessive force in violation of the Fourth Amendment when he used an arm-bar takedown to slam a seventh grader to the floor after the boy, arriving at school with his mother, had pushed her away because she had tried to pull off his hoodie); *Michael v. Trevena*, 899 F.3d 528, 533 (8th Cir. 2018) (Michael “was a nonviolent misdemeanant who neither fled nor actively resisted arrest, and posed no threat to the officers or other members of the public. . . . Under these circumstances, it is objectively unreasonable to make an arrest by grabbing the suspect by the throat . . . or using a baton with sufficient force to break the suspect’s arm”); *Rokusek v. Jansen*, 899 F.3d 544 (8th Cir. 2018) (face-first takedown of an unresisting offender constitutes excessive force in violation of the Fourth Amendment); *Rice v. Morehouse*, 989 F.3d 1112 (9th Cir. 2021) (allegations that after a motorist was stopped for a traffic violation several officers pulled him out of his car, tripped him so that he fell to the ground face first, pinned him down, and handcuffed him, causing long-term physical injuries and emotional distress, state a claim of excessive force in violation of the Fourth Amendment); *Andrews v. City of Henderson*, 35 F.4th 710 (9th Cir. 2022) (“A physical tackle that results in severe injury may constitute a significant use of force. . . . ¶ In this case, the detectives forcibly tackled Andrews to the ground with enough force to fracture his hip. The injury resulted in ‘excruciating pain’ and required two surgeries. Under these circumstances, we conclude that this use of force by the detectives was ‘substantial’ and, therefore, ‘must be justified by the need for the specific level of force employed.’” *Id.* at 716. “Armed robbery is a serious crime that poses an obvious risk of violence, and this factor suggests that the government may have an interest in using force to effect an arrest. . . . But we must consider this fact in the full context that the officers faced, including that Andrews was not engaged in any violent or nonviolent criminal conduct when he was tackled without warning by the detectives. Moreover, taking the evidence in the light most favorable to Andrews, the detectives knew that he was not armed when they tackled him Thus, the risk of violence attributable to Andrews’s suspected crimes was mitigated by the specific circumstances in which the officers chose to act.” *Id.* at 716-17. . . . Given this broader context, the nature of Andrews’s suspected crime does not establish a strong governmental interest in using significant physical force against him.” *Id.* at 717.); *El v. City of Pittsburgh*, 975 F.3d 327 (3d Cir. 2020) (grabbing a suspect by the wrist and neck, slamming him into the wall of building, and taking him to the ground constituted excessive force in violation of the Fourth Amendment although apparently the only damage suffered by the suspect was a contusion to his hip); *Deasey v. Slater*, 789 Fed. Appx. 17 (9th Cir. 2019) (applying asphyxiating pressure to a prone individual by kneeling on his back while hogtying him constituted excessive force in violation of the Fourth Amendment); *Timpa v. Dillard*, 20 F.4th 1020 (5th Cir. 2021) (allegations that officers knelt on the back of a struggling individual for an extended period of time, resulting in his death, stated a claim for violation of the Fourth Amendment: “[t]he risks of asphyxiation in this circumstance should have been familiar to . . . [the officer who applied his body weight for more than fourteen minutes] because he had received training on the use of a prone restraint to control subjects in a state of excited delirium”); *Wright v. City of Euclid*, *supra* (tasing and pepper spraying the driver of an automobile who initially backs away when approached by visibly armed plainclothes officers but

stops the car as soon as one of them displayed a badge constituted excessive force in violation of the Fourth Amendment); *Briceno v. Williams*, 2022 WL 1599254, at *1 (9th Cir. May 20, 2022) (“[p]unching a face-down suspect constitutes significant force”); *State v. White*, 2015-Ohio-492, 142 Ohio St. 3d 277, 280-85, 29 N.E.3d 939, 944-47 (2015); *Wilkins v. City of Tulsa, Oklahoma*, 33 F.4th 1265, 1273 (10th Cir. 2022) (allegations that three police officers pepper-sprayed a man found sleeping in his parked car and whom they arrested for drunk driving stated a viable claim of excessive force in violation of the Fourth Amendment: “In *Graham v. Connor*, the Supreme Court identified three non-exclusive factors to evaluate whether a use of force was excessive: (1) ‘the severity of the crime at issue,’ (2) ‘whether the suspect poses an immediate threat to the safety of the officers or others,’ and (3) ‘whether he is actively resisting arrest or attempting to evade arrest by flight.’ . . . ¶ Under the first factor, a minor offense supports only the use of minimal force.”); and see *Haynes v. Minnehan, supra*, 14 F.4th at 835 (upholding a claim of Fourth Amendment violation in connection with a *Terry* stop (see § 25.4.3): “*Terry* analysis examines whether: (1) the stop began lawfully; and (2) the way officers conducted the stop ‘was reasonably related in scope to the circumstances which justified the interference in the first place.’ . . . ¶ . . . [B]ecause handcuffs constitute ‘greater than a de minimus intrusion,’ their use ‘requires the [officer] to demonstrate that the facts available to the officer would warrant a man of reasonable caution in [believing] that the action taken was appropriate.’ . . . In particular, *Terry* ‘requires some reasonable belief that the suspect is armed and dangerous or that the restraints are necessary for some other legitimate purpose, evaluated on the facts of each case.’ . . . We have already held that handcuffing ‘absent any concern for safety’ violates the second *Terry* prong.”). In some circumstances, violations of these restrictions may require the exclusion of evidence produced by the excessive force. See *Rochin v. California*, 342 U.S. 165 (1952); cf. § 23.14 *infra*, discussing *Winston v. Lee*, 470 U.S. 753 (1985), and cognate cases. And counsel will want to investigate and document a client’s claims of police use of excessive force in connection with his or her arrest even when that abuse produced no evidentiary consequences: well-founded claims of this sort can be a valuable bargaining chip in plea negotiation (see § 14.17 *supra*); they may sometimes persuade a prosecutor to drop charges against a badly abused client; and the client may also want to seek damages in a civil-rights action under 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983 or under state tort law for any injuries s/he suffered.

§ 23.08 SEARCHES INCIDENT TO ARREST

§ 23.08(a) The “Search Incident to Arrest” Doctrine

Warrantless searches of an arrested person’s clothing and body surfaces are routinely permitted incident to a valid arrest. *United States v. Robinson*, 414 U.S. 218 (1973); *Gustafson v. Florida*, 414 U.S. 260 (1973); *Birchfield v. North Dakota*, 579 U.S. 438, 457-61, 471-73 (2016); *United States v. Chadwick*, 433 U.S. 1, 14 (1977) (dictum). “[A] lawful custodial arrest creates a situation which justifies the contemporaneous search without a warrant of the person arrested and of the immediately surrounding area.” *New York v. Belton*, 453 U.S. 454, 457 (1981). The rationale for this exception to the warrant requirement is that “[w]hen a custodial arrest is made, there is always some danger that the person arrested may seek to use a weapon, or that evidence

may be concealed or destroyed. To safeguard himself and others, and to prevent the loss of evidence, it has been held reasonable for the arresting officer to conduct a prompt, warrantless ‘search of the arrestee’s person and the area “within his immediate control” construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.’” *United States v. Chadwick*, 433 U.S. at 14. This rationale has crucial implications for the *scope* of the search permitted incident to arrest (as explained in the following paragraphs) but does not require any case-by-case factual showing of a likelihood that any particular arrestee possesses a weapon or destructible evidence. Rather, what has evolved – in the interest of a bright-line rule – is the treatment of a valid arrest as *generically* posing the requisite likelihoods and *categorically* authorizing a search calculated to address them. “The constitutionality of a search incident to an arrest does not depend on whether there is any indication that the person arrested [actually] possesses weapons or evidence. The fact of a lawful arrest, standing alone, authorizes a search.” *Michigan v. DeFillippo*, 443 U.S. 31, 35 (1979). *See also Birchfield v. North Dakota*, 579 U.S. at 473 (under “the search-incident-to-arrest exception, . . . [the arresting officer’s] authority [to search the arrestee’s person] is categorical. It does not depend on an evaluation of the threat to officer safety or the threat of evidence loss in a particular case.”); *Illinois v. LaFayette*, 462 U.S. 640, 644-45 (1983) (dictum); *Michigan v. Long*, 463 U.S. 1032, 1048, 1049 & n.14 (1983) (dictum). *But see State v. Conn*, 278 Kan. 387, 391-94, 99 P.3d 1108, 1112-13 (2003) (“In Kansas, the permissible circumstances, purposes, and scope of a search incident to arrest are controlled by statute.” Because the statute authorizing search incident to arrest states the permissible “purpose” of such a search as being ““(a) Protecting the officer from attack”; “(b) Preventing the person from escaping”; or “(c) Discovering the fruits, instrumentalities, or evidence of the crime”” . . . this court rejected the view that case law applying the Fourth Amendment . . . meant that a search of an automobile could automatically be conducted when an occupant was arrested.” Because “the trooper in this case did not indicate any concern for safety,” “the search cannot be justified as a search incident to arrest.”). A search incident to arrest may be made either at the site of the arrest, *United States v. Robinson*, 414 U.S. at 224-26, 236, or at the stationhouse to which the arrested person is taken, *United States v. Edwards*, 415 U.S. 800 (1974).

The rule’s rationales do circumscribe it in two principal ways. First, they preclude the extension of the authority for warrantless search to generic situations that are *not* conceived to be akin to arrests from the standpoint of inciting probable armed resistance or evidence destruction. *See, e.g., Knowles v. Iowa*, 525 U.S. 113, 116-19 (1998) (the rationales of the “search incident to arrest” doctrine do not justify a full search of a vehicle when the police stop a motorist for speeding and issue a citation rather than arresting him); *Virginia v. Moore*, 553 U.S. 164, 176-77 (2008) (reaffirming *Knowles*) (dictum); *Sibron v. New York*, 392 U.S. 40, 67 (1968) (“a search incident to a lawful arrest may not precede the arrest”). Second, searches that are innately too intrusive or too expansive to be justified by concerns about armed resistance or evidence destruction cannot be sustained under the search-incident-to-arrest exception to the warrant requirement. *See, e.g., Riley v. California*, 573 U.S. 373, 401 (2014), discussed further in § 23.08(b) *infra* (“when a cell phone is seized incident to arrest,” a search “warrant is generally required before . . . a search” may be made of digital information on the phone); *Commonwealth*

v. Morales, 462 Mass. 334, 335, 344, 968 N.E.2d 403, 405, 411-12 (2012) (a search incident to arrest that resulted in exposure of the defendant’s buttocks to public view on a public street constituted a “strip search” that violated both the federal and state constitutions). *Cf. Birchfield v. North Dakota*, 579 U.S. at 462-63, 474-76 (holding that a motorist who has been arrested for drunk driving can be compelled to submit to a warrantless breath test to determine his or her intoxication level but cannot be compelled to submit to a blood draw because “[b]lood tests are significantly more intrusive, and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test” (*id.* at 474)).

“[T]he search-incident-to-arrest rule actually comprises ‘two distinct propositions’: ‘The first is that a search may be made of the *person* of the arrestee by virtue of the lawful arrest. The second is that a search may be made of the area within the control of the arrestee.’” *Id.* at 460. The limits of the latter proposition have been established by a series of Supreme Court decisions whose upshot is that searches incident to arrest are restricted to “the arrestee’s person and the area ‘within his immediate control’ – construing that phrase to mean the area from within which he might gain possession of a weapon [to attack the arresting officer] or destructible evidence.” *Chimel v. California*, 395 U.S. 752, 763 (1969). *See also United States v. Chadwick*, 433 U.S. 1, 14 (1977); *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326 (1979). “That limitation, which . . . define[s] the boundaries of the exception, ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy. . . . If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply.” *Arizona v. Gant*, 556 U.S. 332, 339 (2009). Police officers could not, for example, predicate their entry and search of a house on the arrest of a respondent outside the house. *See, e.g., Vale v. Louisiana*, 399 U.S. 30 (1970); *Shipley v. California*, 395 U.S. 818 (1969). *See also Arizona v. Gant*, 556 U.S. at 343-44 (narrowing previous rulings in *New York v. Belton* and *Thornton v. United States*, 541 U.S. 615, 617 (2004), to “hold that the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant’s arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search,” but announcing an additional rule, which “does not follow from *Chimel*,” to permit a search incident to arrest in certain “circumstances unique to the vehicle context,” *see* § 23.26 *infra*).

Within the “wingspan” area defined by *Chimel*, a warrantless search incident to arrest is valid if – but only if – the arrest itself is valid under the doctrines summarized in § 23.07 *supra*. *See, e.g., Beck v. Ohio*, 379 U.S. 89 (1964).

§ 23.08(b) Searches of Containers in the Possession of Arrested Persons

An issue that frequently arises in cases of searches incident to arrest or *Terry* frisks is whether these warrantless search powers extend to a closed container that the respondent is carrying, such as a knapsack or gym bag.

In *United States v. Chadwick*, 433 U.S. 1 (1977), the Court implied that large locked receptacles, such as luggage, may be taken from an arrested person as a matter of routine incident to arrest. But the Court also stated explicitly (although in *dictum*) that containers seized in this manner may not thereafter be *opened* without a warrant based upon probable cause. *Id.* at 14-16 & n.10. *See also Horton v. California*, 496 U.S. 128, 142 n.11 (1990) (*dictum*); *United States v. Place*, 462 U.S. 696, 701 n.3 (1983) (*dictum*).

In *New York v. Belton*, 453 U.S. 454 (1981), which the Court later circumscribed in *Arizona v. Gant*, 556 U.S. 332 (2009), the Court appeared to take a contrary position. *Belton* upheld an arresting officer's opening of a zippered pocket in a leather jacket found on the seat of a car following arrest of the car's occupants. In *dictum* the Court in *Belton* stated a very broad rule that the scope of search incident to arrest of a motorist extends to "the contents of any containers found within the passenger compartment," *Belton*, 453 U.S. at 460, including "luggage, boxes, [and] bags," *id.* at 460-61 n.4, "whether [the container] . . . is open or closed," *id.* at 461.

The subsequent opinion in *United States v. Ross*, 456 U.S. 798 (1982), further compounds the confusion. First, the Court in *Ross* gratuitously comments that "[a] container carried at the time of arrest *often* may be searched without a warrant and even without any specific suspicion concerning its contents." *Id.* at 823 (emphasis added). Second, the Court asserts (in the different context of a *Carroll* vehicle search, see § 23.24 *infra*), that "a traveler who carries a toothbrush and a few articles of clothing in a paper bag or knotted scarf [may] claim an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attaché case," *id.* at 822. The latter observation appears to rule out any distinction between "paper bags, locked trunks, lunch buckets, and orange crates," *id.*, so far as the Fourth Amendment privacy interests of the respective possessors of these containers is concerned. Within the framework of the search-incident-to-arrest doctrine, the containers might still be distinguished, allowing search of the paper bag and not the trunk, on the ground that the arrestee's ability to seize weapons or destructible evidence from the former is greater. That distinction is, however, difficult to reconcile with the holding of *United States v. Robinson*, 414 U.S. at 235, that "[t]he authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect." *Belton* not merely quotes this *Robinson* language but draws from it the conclusion that the power of search incident to arrest encompasses "containers [which are] . . . such that they could hold neither a weapon nor evidence of the criminal conduct for which the suspect was arrested." 453 U.S. at 461. Differences in the accessibility of various containers to the arrestee can hardly be thought decisive of the application of a doctrine that permits search of containers that could not hold a weapon or evidence in the first place. *See Thornton v. United States*, 541 U.S. 615, 623 (2004) (*Belton* rule does not "depend[] on differing estimates of what items were or were not within reach of an arrestee at any particular moment"). So *Belton* rests the search-incident-to-arrest power not upon the risk that the arrestee may grab the contents of the container but upon the concept that a

“lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have” in containers within his or her reach. *Id.* But if this is so, the question arises why the search-incident-to-arrest power is restricted to the area within the arrestee’s reach, as *Belton* concedes that it is (*id.* at 457-58, 460), and as *Gant* declares unequivocally that it is (*see Arizona v. Gant*, 556 U.S. at 335 (“a vehicle search incident to a recent occupant’s arrest” is not constitutionally “authorize[d]” “after the arrestee has been secured and cannot access the interior of the vehicle”)). *Chadwick* squarely holds that the privacy interests inhering in “property in the possession of a person arrested in public” (433 U.S. at 14) but outside of his or her reach are *not* dissipated by the fact of a lawful custodial arrest. 433 U.S. at 13-16. And it adds that “[u]nlike searches of the person, *United States v. Robinson*, 414 U.S. 218 (1973) . . . , searches of possessions within an arrestee’s immediate control cannot be justified by any reduced expectations of privacy caused by the arrest.” 433 U.S. at 16 n.10.

This area of Fourth Amendment law was muddied still further when the Court in *California v. Acevedo*, 500 U.S. 565 (1991), revised the rules governing a *Carroll* vehicle search (see § 23.24 *infra*) to eliminate the distinction that *Ross*, in explaining the import of *Chadwick* and *Arkansas v. Sanders*, 442 U.S. 753 (1979), drew between what the police may do when they have probable cause to believe that a seizable object is concealed in a vehicle and what they may do when they have probable cause merely to believe that a seizable object may be contained within some particular receptacle carried in the vehicle. The *Acevedo* decision concerned solely a *Carroll* vehicle search and accordingly did not address the nature and scope of the “search incident to arrest” doctrine.

In *Arizona v. Gant* in 2009, the Court disavowed the lower courts’ “broad reading of *Belton*” as authorizing “a vehicle search . . . incident to every arrest of a recent occupant notwithstanding that in most cases the vehicle’s passenger compartment will not be within the arrestee’s reach at the time of the search.” *Gant*, 556 U.S. at 343. Explaining this curtailment of the lower courts’ expansive applications of *Belton*, the *Gant* Court stated:

“To read *Belton* as authorizing a vehicle search incident to every recent occupant’s arrest would . . . untether the rule from the justifications underlying the *Chimel* exception – a result clearly incompatible with our statement in *Belton* that it “in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests.” 453 U.S., at 460, n. 3. Accordingly, we reject this reading of *Belton* and hold that the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant’s arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.” (*Id.*)

Although the five-Justice majority in *Gant* characterized its decision as merely a “narrow[ing]” of *Belton* (*Gant*, 556 U.S. at 348 n.9), the four dissenting Justices viewed the *Gant* majority opinion as “effectively overrul[ing]” both *Belton* and *Thornton v. United States* (*id.* at 355 (Justice Alito, dissenting, joined in pertinent part by Chief Justice Roberts and Justices Kennedy and Breyer)). *And see People v. Lopez*, 8 Cal. 5th 353, 358, 453 P.3d 150, 153, 255 Cal. Rptr. 3d

526, 530 (2019) (finding a Fourth Amendment violation when police officers who had arrested a motorist for driving without a license and handcuffed her outside the car conducted a search of the car’s cabin for the purpose of obtaining identification documents: “*Gant* held that a vehicle search incident to arrest is justified only if it is reasonable to believe the suspect can gain access to weapons inside the vehicle or that evidence of the offense of arrest might be found inside the vehicle.”). Even by the shoddy standards for clarity and durability that characterize the U.S. Supreme Court’s Fourth Amendment jurisprudence generally (see Justice Frankfurter’s classic statement that “[t]he course of true law pertaining to searches and seizures . . . has not – to put it mildly – run smooth” (*Chapman v. United States*, 365 U.S. 610, 618 (1961) (concurring opinion))), the *Belton-Gant* caselaw is a disaster area. Its unprincipled and unstable quality gives counsel an especially strong argument for urging state high courts to reject it and adopt more protective state constitutional rules to govern this sector, as suggested in § 7.09 *supra*. See, e.g., *State v. Gaskins*, 866 N.W.2d 1, 12-13 (Iowa 2015) (“declining to adopt *Gant*’s broad evidence-gathering purpose as a rationale for warrantless searches of automobiles and their contents incident to arrest under article I, section 8 of the Iowa Constitution” and invalidating a warrantless search of a small portable locked safe found in an automobile following the driver’s arrest for marijuana possession and removal to a squad car; “We now agree with the approach taken by the courts that have rejected the *Belton* rule that authorized warrantless searches of containers without regard to the *Chimel* considerations of officer safety and protecting evidence. ‘When lines need to be drawn in creating rules, they should be drawn thoughtfully along the logical contours of the rationales giving rise to the rules, and not as artificial lines drawn elsewhere that are unrelated to those rationales’ . . . ¶ . . . [W]e decline to adopt *Gant*’s alternative evidence-gathering rationale for warrantless searches incident to arrest under the Iowa Constitution because it would permit the SITA exception to swallow completely the fundamental textual rule in article I, section 8 that searches and seizures should be supported by a warrant. In other words, ‘use of a [SITA] rationale to sanction a warrantless search that has nothing to do with its underlying justification – preventing the arrestee from gaining access to weapons or evidence – is an anomaly.’”).

Even though *Gant* did not address (and had no reason to address) the preexisting rules governing searches of containers incident to the arrest of an individual outside the automobile context, *Gant* throws into question some of the lower court caselaw on this subject because that caselaw was expressly predicated on *Belton*. See, e.g., *State v. Roach*, 234 Neb. 620, 627-30, 452 N.W.2d 262, 267-69 (1990) (concluding that *Belton* applies outside the automobile context and relying on the court’s own and other courts’ broad readings of *Belton* to uphold a search of a closed container in the possession of an individual arrested inside a house). Given *Gant*’s repudiation of a broad reading of *Belton*, counsel can argue that the best source of Supreme Court guidance on the proper handling of container searches incident to arrest is *Chadwick*. In States in which the courts relied on *Belton* to authorize container searches even when the container was not physically accessible to the arrestee at and after the time s/he was seized by the arresting officers, counsel can challenge that rule by invoking *Gant*’s explanation that, in the absence of “circumstances unique to the automobile context” (*Arizona v. Gant*, 556 U.S. at 335), the “search-incident-to-arrest . . . rule does not apply” when “there is no possibility that an arrestee

could reach into the area that law enforcement officers seek to search” (*id.* at 339). *See United States v. Davis*, 997 F.3d 191, 193 (4th Cir. 2021) (the warrantless search of an arrestee’s nearby backpack “while . . . [he] was handcuffed with his hands behind his back and lying on his stomach” violated the Fourth Amendment: “The issue we confront in this appeal is whether the Supreme Court’s holding in *Gant* applies beyond the automobile context to the search of a backpack. We join several sister circuits in answering, yes.”); *United States v. Knapp*, 917 F.3d 1161, 1168 (10th Cir. 2019) (police officer’s warrantless search of a handcuffed defendant’s purse after it had been taken from her and remained out of her reach for a period of time was not justified under the search-incident-to-arrest doctrine or “by either the need to preserve evidence or the need to disarm [her]”); *State v. Burroughs*, 169 Ohio St.3d 79, at 79, 202 N.E.3d 611, 612-13 (2022) (“While executing an arrest warrant, police discovered a closed bookbag with a plastic baggie stuck in its zipper. Without obtaining a search warrant, they opened the bookbag [after the arrestee had been removed from the arrest scene and taken to a squad car] and discovered illegal drugs. The question for us is whether the warrantless search comports with the Fourth Amendment under the ‘single-purpose-container exception’ to the warrant requirement [– an “exception [that] can be traced to a footnote in *Arkansas v. Sanders*, [442 U.S. 753, 764 n. 13 (1979)], a . . . case involving the warrantless search of luggage in a car based on an anonymous tip [and] . . . observ[ing] that ‘some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance’”]. We hold that it does not. The exception applies only when the illegal nature of the contents of a package are readily apparent because of the distinctive characteristics of the package. A bookbag could hold a variety of items – some illegal, some not. ¶ Because there was no valid basis to search the bookbag without a warrant, the trial court erred in failing to grant a motion to suppress the evidence.”); *United States v. Johnson*, 43 F.4th 1100, 1112 (10th Cir. 2022) (an officer’s palpating of a large black, opaque, oblong-shaped bundle inside the backpack belonging to validly arrested individual who had placed it under the seat next to him on a bus constituted an unconstitutional Fourth Amendment search: (“[A]n officer may conduct a warrantless search of a container in plain view if its contents are a foregone conclusion. . . . But the foregone-conclusion standard is high: It requires ‘virtual certainty’ that a container holds contraband. . . . This is ‘a degree of certainty as to the contents . . . equivalent to the plain view of the [contraband] itself’; and the officer’s observations here did not warrant that degree of certainty); *State v. Carrawell*, 481 S.W.3d 833, 837, 845 (Mo. 2016) (dictum) (“It matters not whether this bag was more akin to luggage or more akin to a purse. Neither is part of the person. It matters only whether the bag was within Carrawell’s immediate control. Because it was not, there was not a valid search incident to arrest.”); *see also, e.g., State v. Lamay*, 140 Idaho 835, 839-40, 103 P.3d 448, 452-53 (2004) (pre-*Gant* decision that rejected *Belton* as inapplicable outside the automobile context and held that the customary rules on searches incident to arrest inside a dwelling do not permit the search of an arrestee’s knapsack if the arrestee is handcuffed and the knapsack is “nearly fifteen feet away . . . and located in a different room”); *People v. Gokey*, 60 N.Y.2d 309, 311, 313-14, 457 N.E.2d 723, 724, 725, 469 N.Y.S.2d 618, 619, 620 (1983) (state high court, which had previously rejected *Belton* in favor of a state constitutional rule that resembles the rule the Supreme Court eventually adopted in *Gant*, applies its state constitutional rule to hold that a warrantless search of an arrestee’s duffel bag

was unlawful, even though the bag was “within the immediate control or ‘grabbable area’” of the arrestee “at the time of his arrest” because the “defendant’s hands were handcuffed behind his back and he was surrounded by five police officers and their dog” and thus the circumstances did not “support a reasonable belief that the suspect may gain possession of a weapon or be able to destroy evidence located in the bag”).

In *Riley v. California*, 573 U.S. 373 (2014), the Court addressed the question “whether the police may, without a warrant, search digital information on a cell phone seized from an individual who has been arrested.” *Id.* at 378. Distinguishing between “physical objects” and “digital content on cell phones,” the Court concluded that the two governmental interests underlying “*Robinson*’s categorical rule” for searches of “physical objects” – the risks of “harm to officers and destruction of evidence” – do not have “much force with respect to digital content on cell phones.” *Id.* at 386. Moreover, while “*Robinson* regarded any privacy interests retained by an individual after arrest as significantly diminished by the fact of the arrest itself,” “[c]ell phones . . . place vast quantities of personal information literally in the hands of individuals,” and “[a] search of the information on a cell phone bears little resemblance to the type of brief physical search considered in *Robinson*.” *Id.* See also *id.* at 393 (“Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse.”); *id.* (“Cell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee’s person. The term ‘cell phone’ is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone.”); *id.* at 403 (“Modern cell phones[,] . . . [w]ith all they contain and all they may reveal, . . . hold for many Americans ‘the privacies of life’” (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886))). Accordingly, the Court “decline[d] to extend *Robinson* to searches of data on cell phones, and h[e]ld instead that officers must generally secure a warrant before conducting such a search.” *Riley v. California*, 573 U.S. at 403. See also *id.* at 386 (“even though the search incident to arrest exception does not apply to cell phones, other case-specific exceptions may still justify a warrantless search of a particular phone”); *United States v. Camou*, 773 F.3d 932, 939, 940-41, 943 (9th Cir. 2014) (a Border Patrol agent’s search of an arrestee’s cell phone, which was retrieved from the arrestee’s vehicle, “was not roughly contemporaneous with Camou’s arrest and, therefore, was not incident to arrest,” because “one hour and twenty minutes passed between Camou’s arrest and Agent Walla’s search of the cell phone” and “a string of intervening acts occurred between Camou’s arrest and the search of his cell phone” that “signaled the arrest was over” by the time of the cell phone search; the search also was not justifiable under the exigent circumstances exception because the search “occurred one hour and twenty minutes after [Camou’s] arrest,” and, furthermore, “even if we were to assume that the exigencies of the situation permitted a search of Camou’s cell phone to prevent the loss of cell data, the search’s scope was impermissibly overbroad” in that it “went beyond contacts and call logs to include a search of hundreds of photographs and videos stored on the phone’s internal memory”; the search also was not justifiable under the automobile exception because *Riley*’s reasoning requires that cell phones be classified as “non-containers for purposes of the vehicle exception to the warrant requirement”); *United States v. Lopez-Cruz*, 730 F.3d 803, 805-06, 808 (9th Cir. 2013) (discussed in § 23.15(d) concluding paragraph *infra*); *State*

v. *K.C.*, 207 So.3d 951 (Fla. App. 2016) (discussed in § 23.13 subdivision (d) *infra*); *United States v. Pratt*, 915 F.3d 266, 272-73 (4th Cir. 2019) (condemning the inspection of data on a seized cell phone because the authorities delayed 31 days after seizing the phone before obtaining a warrant to search its files: “Pratt had an undiminished possessory interest in the cellphone – he didn’t consent to the seizure and he wasn’t allowed to retain any of the phone’s files. . . . Given Pratt’s undiminished interest, a 31-day delay violates the Fourth Amendment where the government neither proceeds diligently nor presents an overriding reason for the delay.); *Commonwealth v. Fulton*, 645 Pa. 296, 318-19, 179 A.3d 475, 486, 488-89 (2018) (rejecting the prosecution’s argument that “no search of the phone occurred because police navigated the menus of the [defendant’s] phone only to obtain the phone’s assigned number”; “The act of powering on Fulton’s flip phone constituted a search, i.e., an intrusion upon a constitutionally protected area (Fulton’s cell phone) without Fulton’s explicit or implicit permission. . . . Turning on the phone exposed to view portions of the phone that were previously concealed and not otherwise authorized by a warrant or an exception to the warrant requirement. . . . Powering on the phone is akin to opening the door to a home. It permitted police to obtain and review a host of information on the cell phone, including viewing its wallpaper, reviewing incoming text messages and calls, and accessing all of the data contained in the phone. . . . ¶ Detective Harkins engaged in a second warrantless search when he obtained the phone’s assigned number. After powering on the phone, Detective Harkins navigated through the menus of the flip phone to obtain its number. . . . The act of navigating the menus of a cell phone to obtain the phone’s number is unquestionably a search that required a warrant. . . . ¶ Detective Harkins conducted a third warrantless search of the phone when he monitored incoming calls and text messages. . . . ¶ Contrary to the finding of the trial court and the argument advanced by the Commonwealth before this Court, there is little difference between monitoring the internal and external viewing screens on a cell phone and searching the phone’s call logs. Both result in accessing ‘more than just phone numbers,’ but also ‘any identifying information that an individual might add’ to his or her contacts, including the caller’s photograph, the name assigned to the caller or sender of the text message. . . . Further, and unlike a call log, monitoring a phone’s incoming text messages allows the viewer to see the content of a text message, which indisputably constitutes private data. This is all information that, pursuant to *Riley/Wurie*, cannot be accessed by police without a warrant. ¶ The rule created by *Riley/Wurie* is exceedingly simple: if a member of law enforcement wishes to obtain information from a cell phone, get a warrant.”); *Jones v. United States*, 168 A.3d 703, 713 (D.C. 2017) (police “use of a cell-site simulator to locate . . . [the defendant’s] phone invaded a reasonable expectation of privacy and was thus a search” that violated the Fourth Amendment in the absence of a search warrant); *State v. Terrell*, 372 N.C. 657, 658, 669, 831 S.E.2d 17, 18, 25 (2019) (rejecting the prosecution’s argument that the “private search” doctrine (see § 23.18(c) *infra*) authorized “a law enforcement officer’s warrantless search of defendant’s USB drive, following a prior search of the USB drive by a private individual”: “We cannot agree that the mere opening of a thumb drive and the viewing of as little as one file automatically renders the entirety of the device’s contents ‘now nonprivate information’ no longer afforded any protection by the Fourth Amendment. . . . An individual’s privacy interest in his or her effects is not a liquid that, taking the shape of its container, wholly evaporates merely upon the container’s opening, with no regard for the nature of the effects

concealed therein. This is particularly true in the context of digital storage devices, which can retain massive amounts of various types of information and which organize this information essentially by means of containers within containers. . . . Unlike rifling through the contents of a cardboard box, a foray into one folder of a digital storage device will often expose nothing about the nature or the amount of digital information that is, or may be, stored elsewhere in the device.”); *Commonwealth v. Mauricio*, 477 Mass. 588, 593, 594, 80 N.E.3d 318, 323, 324 (2017) (construing the state constitution to “hold, for the same reasons articulated by the Supreme Court in *Riley* [*v. California, supra*] . . . , that digital cameras may be seized incident to arrest, but that the search of data contained in digital cameras falls outside the scope of the search incident to arrest exception to the warrant requirement”; “Although digital cameras do not allow storage of information as diverse and far ranging as a cell phone, they nevertheless possess the capacity to store enormous quantities of photograph and often video recordings, dating over periods of months and even years, which can reveal intimate details of an individual’s life.”). *And cf. United States v. Saulsberry*, 878 F.3d 946 (10th Cir. 2017) (police who detained a driver on reasonable suspicion that he was smoking marijuana in his parked car could search a bag on the floor of the driver’s seat for marijuana, but the officer’s seizure and examination of a stack of credit cards found in the bag exceeded the justification for the search and violated the Fourth Amendment).

If the police lawfully seize a cellphone and thereafter obtain a search warrant to search the contents of the phone, an issue that may arise is whether the state can obtain a court order compelling the defendant to provide the password for accessing the device. A number of court decisions recognize that the defendant can challenge such an order as violating federal and/or state constitutional protections against self-incrimination, although these courts have employed differing approaches to analyze the issue, with the result that differing challenges are available in different jurisdictions. *Compare Commonwealth v. Davis*, 656 Pa. 213, 217, 239-40, 220 A.3d 534, 537, 551 (2019) (“we hold that the compelled recollection of Appellant’s password [“to allow the Commonwealth access to the defendant’s lawfully-seized, but encrypted, computer”] is testimonial in nature, and, consequently, privileged under the Fifth Amendment to the United States Constitution. Furthermore, until the United States Supreme Court holds otherwise, we construe the foregone conclusion rationale to be one of limited application, and, consistent with its teachings in other decisions, believe the exception to be inapplicable to compel the disclosure of a defendant’s password to assist the Commonwealth in gaining access to a computer.”), *and G.A.Q.L. v. State*, 257 So.3d 1058 (Fla. App. 2018) (same rulings regarding a cellphone), *and Seo v. State*, 148 N.E.3d 952, 953 (Ind. 2020) (“Forcing Seo to unlock her iPhone [which the state sought to do by obtaining a “warrant that ordered Seo to unlock her iPhone,” and then, when “[s]he refused, . . . the trial court held her in contempt”] would violate her Fifth Amendment right against self-incrimination. By unlocking her smartphone, Seo would provide law enforcement with information it does not already know, which the State could then use in its prosecution against her. The Fifth Amendment’s protection from compelled self-incrimination prohibits this result.”), *with Commonwealth v. Jones*, 481 Mass. 540, 117 N.E.3d 702 (2019) (“when the Commonwealth seeks an order . . . compelling a defendant to decrypt an electronic device by entering a password, art. 12 [of the state constitution] requires the Commonwealth to prove that the defendant knows the password beyond a reasonable doubt” in

order to show that “the act of entering the password would not amount to self-incrimination because the defendant’s knowledge of the password was already known to the Commonwealth, and was therefore a ‘foregone conclusion’ under the Fifth Amendment and art. 12” (*id.* at 541-43, 117 N.E.3d at 706-07); [however, the court concludes that “the Commonwealth met its burden in this case” (*id.* at 543, 117 N.E.3d at 707)], and *State v. Pittman*, 367 Or. 498, 479 P.3d 1028 (2021) (“Here, defendant was ordered to unlock the phone using a passcode. . . . [D]efendant’s performance of that act would communicate that she knew the passcode. If the court had ordered defendant to do something different, what would be communicated by compliance with the order may have been different as well. For example, had the phone been one that could be unlocked by placing a finger on the phone, and had the court ordered defendant to place her finger on the phone, then, by performing that act, defendant would communicate only that she knew how to move her finger, not that she knew how to unlock the phone. If, however, the court had ordered defendant to unlock the phone, without specifying the means she should use to do so, then any act that she performed that served to unlock the phone would communicate her knowledge – that she knew how to comply with the court’s order and how to access the phone’s contents. Here, as the state acknowledges, the court’s order was of that ilk. It required defendant to unlock the phone using a passcode, and compliance with that order would communicate that defendant knew that passcode. We conclude that the act of unlocking the phone was an act that would provide incriminating testimonial evidence.” *Id.* at 517-18, 479 P.3d at 1043. “[W]e construe Article I, section 12 [of the state constitution], to permit an order compelling a defendant to unlock a cell phone [only] so long as the state (1) has a valid warrant authorizing it to seize and search the phone; (2) already knows the information that the act of unlocking the phone, by itself, would communicate; and (3) is prohibited from using defendant’s act against defendant, except to obtain access to the contents of the phone.” *Id.* at 525, 479 P.3d at 1047.). A minority view is that the act of producing a cellphone’s passcode is “non-testimonial” (see § 30.04(c) *infra*) and can therefore be compelled without implicating the privilege against self-incrimination. See, e.g., *People v. Sneed*, 2023 IL 127968, 2023 WL 4003913 (Ill. 2023). For discussion of Fifth Amendment doctrines bearing on judicial orders that require putative defendants to disclose various sorts of potentially incriminating material, see § 9.12 *supra*. For discussion of the rules governing the issuance and execution of search warrants, see § 23.17 *infra*.

§ 23.08(c) “Inventory” Search Incident to Incarceration

If an arrested person is to be incarcerated, the police may remove, examine, and inventory everything in his or her possession at the lockup. *Illinois v. LaFayette*, 462 U.S. 640, 646-48 (1983). This “inventory search” power permits the opening, without a warrant, of any container carried by the person, whether or not the police have any reason to suspect its contents and whether or not they could practicably secure the container during the period of the person’s incarceration without opening it up. *Id.* Presumably the rule of *Riley v. California*, 573 U.S. 373 (2014) – which bars the application of the “search incident to arrest” doctrine to the digital content of a cell phone because “[c]ell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee’s person,” *id.* at 393; see also § 23.08(b) *supra*, discussing *Riley* – applies as well in the context of “inventory” searches incident to

incarceration and requires that such a search be authorized either by a search warrant or by some “case-specific exception[]” that “justif[ies] a warrantless search of a particular phone” (*id.* at 401-02). See *Commonwealth v. Mauricio*, 477 Mass. 588, 595, 80 N.E.3d 318, 325 (2017) (police conducting a stationhouse inventory search of an arrestee’s backpack found a digital camera; “suspecting that the camera was stolen, [they] took steps to investigate its ownership by activating the camera and viewing the stored images”; this search “exceeded the bounds of the inventory search exception to the warrant requirement because it was investigatory in nature” and it was therefore impermissible without a warrant under the Massachusetts constitution); see also *State v. Granville*, 423 S.W.3d 399, 402 (Tex. Crim. App. 2014) (pre-*Riley* decision holding that a search warrant was needed for the police to examine the contents of a cell phone that was taken from the defendant “during the booking procedure and placed in the jail property room”: the arrestee, a “high-school student[,] did not lose his legitimate expectation of privacy in his cell phone simply because it was being stored in the jail property room”; the officer “could have seized appellant’s phone and held it while he sought a search warrant, but, even with probable cause, he could not ‘activate and search the contents of an inventoried cellular phone’ without one”). And cf. *United States v. Saulsberry*, 878 F.3d 946 (10th Cir. 2017) (police who detained a driver on reasonable suspicion that he was smoking marijuana in his parked car could search a bag on the floor of the driver’s seat for marijuana, but the officer’s seizure and examination of a stack of credit cards found in the bag exceeded the justification for the search and violated the Fourth Amendment). The inventory-search exception to the warrant requirement is limited to effects that are in the physical possession of an arrestee at the time of the arrest; it does not authorize the arresting officers to seize the arrestee’s belongings from even a nearby location which they have no other constitutional justification to access. *State v. Banks-Harvey*, 2018-Ohio-201, 152 Ohio St. 3d 368, 374, 96 N.E.3d 262, 269-70 (2018) (police stopped a car for speeding and asked the driver to step out of the vehicle; they placed her in the back seat of their patrol cruiser while conducting a warrants check, then arrested her when they learned that she had outstanding arrest warrants for drug offenses; she had left her purse in the vehicle, which was owned by a friend who was present as a passenger; police returned to the vehicle, seized the purse, and searched it pursuant to a policy of conducting “inventory searches” of all arrestees; “Certainly we take no issue with the reasonableness of an administrative policy requiring the search and inventory of personal items that necessarily come into police custody as a result of an arrest. Indeed, . . . [an Ohio statute] requires law-enforcement agencies to keep safe any lawfully seized property that comes into their custody. However, this is not a case in which personal items came into the custody of the police as an incident of lawful police conduct. In this case, the trooper retrieved a personal item belonging to an arrestee from a place that is protected under the Fourth Amendment (the car). At the time the trooper retrieved the appellant’s purse, her identity had already been confirmed and she was handcuffed and under arrest in the trooper’s vehicle. Neither her purse, nor the vehicle that contained her purse, came into police custody as a result of her arrest. On these facts, the state has failed to show that this search fits under the inventory-search exception to the Fourth Amendment’s warrant requirement.”).

Inventory searches must be conducted “in accordance with established inventory procedures.” *Illinois v. LaFayette*, 462 U.S. at 648. See *id.* at 644 (explaining that the validity of

inventory searches is to be determined by the principles of *Delaware v. Prouse*, 440 U.S. 648, 654 (1979), a decision that calls for standardized procedures to control “the discretion of the official in the field,” 440 U.S. at 655); *see also Colorado v. Bertine*, 479 U.S. 367, 372-76 (1987) (analogizing inventory searches of automobiles to inventory searches of arrested individuals and reaffirming that inventory searches of automobiles must be conducted in accordance with “standard criteria”); *Florida v. Wells*, 495 U.S. 1, 4 (1990); *City of Indianapolis v. Edmond*, 531 U.S. 32, 45 (2000).

Jail personnel may also conduct an intrusive visual search of the body – including body cavities – of an individual who is being admitted into the general population of a holding facility, for the purpose of detecting and confiscating any materials that would compromise the facility’s security. *Florence v. Board of Chosen Freeholders of County of Burlington*, 566 U.S. 318 (2012). *But see Hinkle v. Beckham County Board of County Commissioners*, 962 F.3d 1204 (10th Cir. 2020) (“Under *Florence*, the jail could (1) decide that Hinkle ‘will be’ housed in the jail’s general population, and (2) then strip search him before placing him in the general population. . . . Here, the County did not decide that Hinkle ‘will be’ placed in the jail’s general population, in fact just the opposite. By acting as it did, the County set the cart before the horse – it strip searched Hinkle before committing itself to admit him into its jail’s general population.” *Id.* at 1237. “*Florence* does not sanction such a policy – strip searching detainees not destined for the jail’s general population, or even as here, for the jail itself.” *Id.* at 1238. “Before subjecting a detainee to the abject abasement of a body-cavity strip search, jail officials should first conclusively decide whether that detainee will be housed in their jail’s general population.” *Id.* at 1242. “[F]or detainees like Hinkle who will not be housed in the jail’s general population, the County needs far more to justify a body-cavity strip search – probable cause that detainee is secreting evidence of a crime.” *Id.* at 1239.).

§ 23.08(d) Search Prior to the Point of Arrest

The general rule is that “a search incident to a lawful arrest may not precede the arrest.” *Sibron v. New York*, 392 U.S. 40, 67 (1968). However, the Court has recognized two narrow exceptions to this rule.

If the search and the arrest are parts of a single course of events and “the formal arrest followed quickly on the heels of the challenged search,” *Rawlings v. Kentucky*, 448 U.S. 98, 111 (1980), then it is not “particularly important that the search preceded the arrest rather than vice versa.” *Id.* However, the police officer must, of course, have “probable cause to place [the respondent] under arrest” at the time of the search, *id.*, and “[t]he fruits of the search of [the respondent’s] person . . . [cannot be] necessary to support probable cause to arrest.” *Id.* at 111 n.6. *Accord, Sibron v. New York*, 392 U.S. at 63 (“[i]t is axiomatic that an incident search may not precede an arrest and serve as part of its justification”). *See also People v. Reid*, 24 N.Y.3d 615, 617, 619, 620, 26 N.E.3d 237, 238, 239, 240, 2 N.Y.S.3d 409, 410, 411, 412 (2014) (Although a search can precede an arrest as long as “the two events were substantially contemporaneous,” the officer “testified [that], but for the search there would have been no arrest

at all,” notwithstanding that “probable cause to arrest the driver existed before the search,” and “[w]here that is true, to say that the search was incident to the arrest does not make sense.”; “[T]he ‘search incident to arrest’ doctrine, by its nature, requires proof that, at the time of the search, an arrest has already occurred or is about to occur. Where no arrest has yet taken place, the officer must have intended to make one if the ‘search incident’ exception is to be applied.”).

In cases in which the search and the arrest are not a single course of events, a search prior to arrest nevertheless may be valid if it is restricted to the “very limited search necessary to preserve” some evidence of “ready destructibility” that the suspect would otherwise likely destroy. *Cupp v. Murphy*, 412 U.S. 291, 296 (1973). Thus, in *Cupp*, the Court approved the officers’ taking scrapings of what appeared to be dried blood from the fingernails of a suspect, at a point in time when the police already had probable cause to arrest the suspect, even though the formal arrest did not occur until a month later. The Court emphasized that the scope of the search must be strictly limited to the measures needed to “preserve . . . highly evanescent evidence,” *id.* at 296, and that “a full *Chimel* search [the type of extensive search permitted incident to arrest upon probable cause] would [not be] . . . justified . . . without a formal arrest and without a warrant.” *Id.* See the discussion in *Illinois v. McArthur*, 531 U.S. 326, 331-34 (2001), of police authority to prevent alerted suspects from destroying evidence; and see the cases dealing with a similar issue in the context of building searches, discussed in § 23.22(c) *infra*. Note that this authority depends upon the possession by the police of probable cause to believe that seizable evidence exists and is within the capacity of the suspect to destroy. See *Illinois v. McArthur*, 531 U.S. at 334 (“We have found no case in which this Court has held unlawful a temporary seizure *that was supported by probable cause* and was designed to prevent the loss of evidence (emphasis added)); *Knowles v. Iowa*, 525 U.S. 113, 116 (1998) (in cases in which *there is probable cause to arrest a suspect*, “the need to preserve evidence for later use at trial” is one of the justifications for allowing a warrantless search incident to arrest). If the police lack probable cause either (i) to search for seizable evidence or (ii) to arrest a suspect, they have no power to seize evidence in the first place, see, e.g., *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993), so they cannot justify a “preventive” search on the theory that it is necessary to preserve destructible evidence.

§ 23.09 CIRCUMSTANCES JUSTIFYING A *TERRY* STOP

In *Terry v. Ohio*, 392 U.S. 1 (1968), the Supreme Court held that a state could constitutionally authorize its law enforcement officers to conduct a “stop” – a brief on-the-street detention for the purpose of inquiry and observation – under circumstances giving rise to a rational suspicion of criminal activity but not amounting to the probable cause necessary for arrest. *Terry* “created an exception to the requirement of probable cause, an exception whose ‘narrow scope’ . . . [the Supreme] Court ‘has been careful to maintain.’” *Ybarra v. Illinois*, 444 U.S. 85, 93 (1979); see also *Dunaway v. New York*, 442 U.S. 200, 207-10 (1979); *Florida v. Royer*, 460 U.S. 491, 499 (1983) (plurality opinion); *id.* at 509-11 (concurring opinion of Justice Brennan). See also *Kaupp v. Texas*, 538 U.S. 626, 630 (2003).

A *Terry* stop must rest upon specific, identifiable facts that, “judged against an objective standard,” *Terry v. Ohio*, 392 U.S. at 21; see *Delaware v. Prouse*, 440 U.S. 648, 654 (1979), give rise to “a reasonable and articulable suspicion that the person seized is engaged in criminal activity,” *Reid v. Georgia*, 448 U.S. 438, 440 (1980) (per curiam); see *Brown v. Texas*, 443 U.S. 47, 51-53 (1979); *United States v. Curry*, 965 F.3d 313, 324, 325-26 (4th Cir. 2020) (en banc) (rejecting the argument that the “exigent circumstances” doctrine (see § 23.20 *infra*) justifies a *Terry* stop without reasonable suspicion: “There are relatively few cases that purport to extend the exigent circumstances exception to suspicionless, investigatory seizures of a person. But in each of these cases, officers typically have searched for a suspect implicated in a known crime in the immediate aftermath of that crime, and – per that objective – have isolated a geographic area with clear boundaries or a discrete group of people to engage in minimally intrusive searches. ¶ In sum, the exigent circumstances exception may permit suspicionless seizures when officers can narrowly target the seizures based on specific information of a known crime and a controlled geographic area. This reading of the exception does not transform it into individualized suspicion by another name. . . . Nor does it require that officers be virtually certain that one of the individuals they stop is the suspect. But officers must support their ‘objectively reasonable belief’ that there is an emergency with ‘specific articulable facts and reasonable inferences.’ . . . Allowing officers to bypass the individualized suspicion requirement based on the information they had here – the sound of gunfire and the general location where it may have originated – would completely cripple a fundamental Fourth Amendment protection and create a dangerous precedent.”). Considering “the totality of the circumstances,” the “detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.” *United States v. Cortez*, 449 U.S. 411, 417-18 (1981); see also *Arizona v. Johnson*, 555 U.S. 323, 327 (2009); *United States v. Arvizu*, 534 U.S. 266, 273-74 (2002); *Illinois v. Wardlow*, 528 U.S. 119, 123-24 (2000); *Ornelas v. United States*, 517 U.S. 690, 696 (1996); *United States v. Sokolow*, 490 U.S. 1, 7-8 (1989) (dictum); *Kolender v. Lawson*, 461 U.S. 352, 356 n.5 (1983) (dictum); *Thomas v. Dillard*, 818 F.3d 864, 877 (9th Cir. 2016) (dictum) (“Just as a suspicion must be reasonable and individualized, it must be based on the totality of the circumstances known to the officer.”). Conduct or circumstances that “describe a very large category of presumably innocent [persons]” is not sufficient, *Reid v. Georgia*, 448 U.S. at 441; *Brown v. Texas*, 443 U.S. at 52; cf. *Ybarra v. Illinois*, 444 U.S. at 91; compare *United States v. Sokolow*, 490 U.S. at 8-11. See *United States v. Walker*, 965 F.3d 180, 187 (2d Cir. 2020) (finding a *Terry* stop unlawful because the “attributes derived from the photograph” of a suspect which were the basis for the stop of the defendant – “black male, medium-to-dark skin tone, glasses, facial hair, and long hair” – “fit too many people to constitute sufficient articulable facts”); *Commonwealth v. Hicks*, 652 Pa. 353, 401, 208 A.3d 916, 945 (2019) (visual observation of an individual carrying a firearm and concealing it on his person is insufficient to establish reasonable suspicion for a stop; the person may have had a license for the weapon, as in this case he did: “When many people are licensed to do something, and violate no law by doing that thing, common sense dictates that the police officer cannot assume that any given person doing it is breaking the law. Absent some other circumstances giving rise to a suspicion of criminality, a seizure upon that basis alone is unreasonable.”); *United States v. Peters*, 60 F.4th 855, 868 (4th Cir. 2023) (finding no reasonable suspicion for a *Terry* stop, the Fourth Circuit disparages the government’s reliance

upon, *inter alia*, evidence that “confidential sources informed . . . [an officer that] ‘men specifically were wearing skinny jeans drawn tightly with a belt and would wedge a firearm in their waistband[.]’” ¶ . . . A general tip ‘that men specifically were wearing skinny jeans’ to ‘wedge a firearm in their waistband’ does not justify the seizure here, because it is not at all particular to Peters.”); *Reynaga Hernandez v. Skinner*, 969 F.3d 930 (9th Cir. 2020), summarized in § 23.07(d) *supra*; *cf. United States v. Feliciano*, 974 F.3d 519, 523 (4th Cir. 2020) (a Park Police Officer stopped a delivery truck driver on the George Washington Memorial Parkway, where commercial vehicles require permits; the officer asked to see the driver’s permit; the driver had none but did have marijuana; the Fourth Circuit orders the marijuana suppressed because the officer lacked reasonable suspicion for the stop: the officer “did not articulate any reason to suspect that Feliciano did not possess the requisite permit to drive a commercial vehicle on the Parkway. The entire factual basis he offered for conducting the traffic stop was that he saw a vehicle requiring a permit on the Parkway. But that fact by itself is wholly innocent.”); *People v. McCloud*, 2021 WL 1596498, at *4 (Mich. App. 2021) (in connection with a police team’s entry into a social club suspected of selling liquor without a license, two officers were assigned to remove any security personnel from the club so that the rest of the team would not be searched for weapons when they entered undercover to determine whether liquor was being sold on the premises; these officers detained and frisked two men who identified themselves as security and found that both were carrying handguns; the Court of Appeals orders the handguns suppressed because the officers lacked the requisite reasonable belief that the security men “possessed a weapon or intended to commit an assault”; “the mere act of working security at an afterhours club being investigated for the possibility that it was selling liquor without a license did not provide reasonable suspicion for a *Terry* stop.”). Rather, the “particularized suspicion” must be focused upon “the particular individual being stopped,” *United States v. Cortez*, 449 U.S. at 418; *see also, e.g., United States v. Black*, 707 F.3d 531, 540-41 (4th Cir. 2013); *State v. Teamer*, 151 So.3d 421, 427-28 (Fla. 2014) (“The discrepancy between the vehicle registration and the color the deputy observed does present an ambiguous situation, and the Supreme Court has recognized that an officer can detain an individual to resolve an ambiguity regarding suspicious yet lawful or innocent conduct. . . . However, the suspicion still must be a reasonable one. . . . In this case, there simply are not enough facts to demonstrate reasonableness. . . . [T]he color discrepancy here is not ‘inherently suspicious’ or ‘unusual’ enough or so ‘out of the ordinary’ as to provide an officer with a reasonable suspicion of criminal activity, especially given the fact that it is not against the law in Florida to change the color of your vehicle without notifying the DHSMV. ¶ The law allows officers to draw rational inferences, but to find reasonable suspicion based on this single noncriminal factor would be to license investigatory stops on nothing more than an officer’s hunch. Doing so would be akin to finding reasonable suspicion for an officer to stop an individual for walking in a sparsely occupied area after midnight simply because that officer testified that, in his experience, people who walk in such areas after midnight tend to commit robberies. Without more, this one fact may provide a ‘mere suspicion,’ but it does not rise to the level of a reasonable suspicion.”); *Bey v. Falk*, 946 F.3d 304 (6th Cir. 2019) (“McKinley violated Bey’s Fourth Amendment rights by directing a stop without reasonable suspicion. When McKinley directed . . . [another officer] to initiate the stop, he knew only that three young men had driven an old minivan to three different stores [the first and third of which were open for

business] in the early morning [at about 2:30 a.m.], at one time reversing direction on the highway. . . . [A member of McKinley’s surveillance unit] had followed them around the third store and had not observed any criminal, or even suspicious, behavior; in fact, she had watched them stand in line at the cash register, ‘flip[] through some [credit] cards to . . . pick a card,’ and pay for the items in their shopping cart with the card. . . . ¶ McKinley testified that ‘[c]riminals frequently use stolen old vehicles that cannot be traced to them if they flee the scene,’ and points to his testimony that the paper registration on . . . [Bey’s] van’s window did not appear in a records search. He likewise contends that Bey’s reversal on the interstate was ‘consistent with a cleaning maneuver.’ But even taken together, these meager observations are not enough to constitute reasonable suspicion.” *Id.* at 313. In addition, Bey, who is African-American, stated a cognizable claim of racial discrimination; “the district court determined that ‘McKinley’s explanation for why he started following the minivan in the first place,’ his failure to ‘stop the minivan once they learned of the “no record” plates,’ and McKinley’s suggestion that he ‘did not know the race of . . . [Bey] and his friends prior to . . . [their arrival at the third store] created a genuine issue of material fact with respect to McKinley’s intent.” *Id.* at 320.); *United States v. Martinez*, 910 F.3d 1309 (10th Cir. 2018) (a state trooper’s testimony that white Cadillacs are a rare sight on the section of I-40 where he stopped a white Cadillac was insufficient to warrant a reasonable suspicion that the Cadillac he stopped was the one wanted in connection with a bank robbery and which had last been reported sighted 130 miles away from where he made the stop). Information “completely lacking in indicia of reliability would either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized.” *Adams v. Williams*, 407 U.S. 143, 147 (1972) (dictum). *See, e.g., Florida v. J.L.*, 529 U.S. 266, 271 (2000) (an anonymous tip which lacks “moderate indicia of reliability” will not justify a stop, and this is the rule even where the tip contains an “accurate description of a subject’s . . . location and appearance”; “[t]he reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person”; and the *Terry* requirement of “standard pre-search reliability testing” in terms of reasonable suspicion is not relaxed in the cases where the tip asserts that the subject is in possession of an illegal firearm); *United States v. Lopez*, 907 F.3d 472, 480-81 (7th Cir. 2018) (“Tips that come from more trustworthy sources will require less independent corroboration than those obtained from more questionable sources. . . . ¶ In this case, officers knew the informant’s identity but nothing else. Without corroborating any incriminating or predicted information, and without knowing anything about the informant’s reliability, they seized Lopez and deprived him of his liberty. When officers know the bare identity but little else about an informant, they still must conduct and rely upon independent investigation to corroborate a tip before seizing a person. In this case, police corroborated only the name-and-address match for Fausto Lopez – ‘easily obtained facts’ that ‘[a]nyone could have “predicted.”’ . . . They verified no facts that would indicate the tip was ‘reliable in its allegation of illegality,’ as required by *Florida v. J.L.*”); *United States v. Drakeford*, 992 F.3d 255, 263-64 (4th Cir. 2021) (“This court has previously noted, ‘[T]ips fall somewhere on a spectrum of reliability, and under the Fourth Amendment a reviewing court may – indeed must – take into account all the facts surrounding a tip in assessing the totality of the circumstances supporting a stop.’ . . . Here, officers’ testimony on the reliability of the confidential informant is scant. When asked how many cases the informant had assisted with,

Detective Moore testified, ‘Approximately 50.’ . . . However, Detective Moore never opined on the number of convictions the informant aided in, if any, or any other facts that credit the reliability of the informant. ¶ . . . Of note, despite the informant’s ability to communicate with . . . [the suspect], detectives never attempted to confirm the informant’s allegation by setting up a controlled buy between the informant and . . . [the suspect] nor did they seek any predictive information that would lend to her credibility. Thus, the information provided by the informant as to . . . [the suspect’s] alleged illegal activities deserves little weight in the totality of the circumstances.”); *United States v. Brown*, 925 F.3d 1150 (9th Cir. 2019); *United States v. Freeman*, 735 F.3d 92, 97-103 (2d Cir. 2013); *United States v. Brown*, 448 F.3d 239 (3d Cir. 2006); *United States v. Patterson*, 340 F.3d 368 (6th Cir. 2003); *United States v. Mallides*, 473 F.2d 859 (9th Cir. 1973); *Irwin v. Superior Court*, 1 Cal. 3d 423, 462 P.2d 12, 82 Cal. Rptr. 484 (1969), modified in *In re Tony C.*, 21 Cal. 3d 888, 894, 582 P.2d 957, 960, 148 Cal. Rptr. 366, 369 (1978); cf. *Navarette v. California*, 572 U.S. 393, 395, 398-401, 404 (2014); *United States v. Ramsey*, 431 U.S. 606, 612-15 (1977); *Jernigan v. Louisiana*, 446 U.S. 958, 959-60 (1980) (opinion of Justice White, dissenting from denial of *certiorari*). And see Shawn E. Fields, *Stop and Frisk in a Concealed Carry World*, 93 WASH. L. REV. 1675 (2018); *United States v. Willy*, 40 F.4th 1074 (9th Cir. 2022); *United States v. Brown*, *supra*; *Commonwealth v. Hicks*, *supra*. As is the case regarding probable cause to arrest (see § 23.07(d) *supra*), officers making a judgment whether there is reasonable suspicion for a *Terry* stop may not cherry-pick incriminating information and disregard exculpatory information. See *United States v. Drakeford*, 992 F.3d at 258 (“In order to sustain reasonable suspicion, officers must consider the totality of the circumstances and, in doing so, must not overlook facts that tend to dispel reasonable suspicion. . . . [Here the officers overlooked] the facts that the interaction took place in a public space, in broad daylight, outside of the vehicles, and in front of a security camera; and after the interaction, . . . [the suspect] went into a store, rather than immediately leaving the scene. On these facts, we . . . [find] that the officers did not have more than a mere hunch that criminal activity was afoot when they stopped . . . [the suspect]” for a supposed hand-off sale of narcotics).

The power of the police to conduct a *Terry* stop is more limited when the stop is for the purpose of “investigat[ing] past criminal activity . . . rather than . . . to investigate ongoing criminal conduct.” *United States v. Hensley*, 469 U.S. 221, 228 (1985). The *Terry* decision itself and almost all of the caselaw establishing standards for *Terry* stops involved situations in which the “police stopped or seized a person because they suspected he was about to commit a crime . . . or was committing a crime at the moment of the stop.” 469 U.S. at 227. In such situations the stop is justified by the exigencies of crime prevention and the need to avert an imminent threat to public safety. *Id.* at 228. “A stop to investigate an already completed crime does not necessarily promote the interest of crime prevention as directly . . . [and] officers making a stop to investigate past crimes may have a wider range of opportunity to choose the time and circumstances of the stop.” *Id.* at 228-29. To conduct a stop for the purpose of investigating a completed crime, a police officer must “have a reasonable suspicion, grounded in specific and articulable facts, that [the] . . . person . . . was involved in or is wanted in connection with a completed felony.” *Id.* at 229. Moreover, in authorizing such investigatory stops in *United States*

v. Hensley, the Court strongly indicated that these stops may be conducted only in cases in which the police previously “have been unable to locate [the] . . . person,” 469 U.S. at 229, and therefore need to exercise the “stop” power in order to prevent “a person they encounter” (*id.*) from “flee[ing] in the interim and . . . remain[ing] at large.” *Id. See id.* at 234-35 (emphasizing that the defendant was “at large” and that the officers who conducted the stop could reasonably conclude, on the basis of a “wanted flyer,” that “a warrant might have been obtained in the period after the flyer was issued”). It is only the inability to find the defendant or respondent in a fixed location – to fully “choose the time and circumstances of the stop” (*id.* at 228-29) – that creates the exigency necessary to conduct a stop for the purpose of investigating a completed crime. *See id.* at 228-29; *see also Brown v. Texas*, 443 U.S. at 51. Thus, at least arguably, when the police have known the respondent’s address and failed to avail themselves of the opportunity of conducting a purely voluntary “contact” at the respondent’s home (see § 23.04(a) *supra*), they may not use their suspicions about the respondent’s involvement in a completed crime to conduct a *Terry* stop.

For discussion of some of the factors commonly considered by the courts in gauging whether there was an adequate basis for a *Terry* stop, see § 23.11 *infra*.

§ 23.10 CIRCUMSTANCES JUSTIFYING A *TERRY* FRISK; THE PLAIN TOUCH DOCTRINE

In *Terry v. Ohio*, 392 U.S. 1 (1968), the Court ruled that a state could constitutionally authorize not only a “stop” but also, under appropriate circumstances, a “frisk”: – that is, a pat-down for weapons or a similar “self-protective” search. The frisk must be made incidental to a valid accosting or stop. *See, e.g., State v. Serna*, 235 Ariz. 270, 275, 331 P.3d 405, 410 (2014) (a *Terry* frisk could not be conducted during a consensual encounter between a civilian and a police officer even though the civilian admitted to having a gun because “the initial stop was based on consent, not on any asserted suspicion of criminal activity,” and “*Terry* allows a frisk only if two conditions are met: officers must reasonably suspect both that criminal activity is afoot and that the suspect is armed and dangerous”).

A *Terry* frisk cannot be conducted for the purpose of seeking evidence; it can only be conducted for the purpose of discovering weapons that might be used against the officer. *See Sibron v. New York*, 392 U.S. 40, 64-65 (1968); *Ybarra v. Illinois*, 444 U.S. 85, 93-94 (1979); *Michigan v. Long*, 463 U.S. 1032, 1049-52 & n.16 (1983); *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993); *Florida v. J.L.*, 529 U.S. 266, 269-70 (2000). To justify a frisk, the officer needs more than the reasonable suspicion of criminal activity that will justify a stop and needs more than merely a hunch that the suspect might be armed. *See, e.g., United States v. McKinney*, 980 F.3d 485, 496 (5th Cir. 2020) (“[e]ven if the officers had reasonable suspicion to initiate the stop, the pat-down needs its own justification”). The officer must be able to “point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant” the conclusion that the officer “is dealing with an armed and dangerous individual,” *Terry v. Ohio*, 392 U.S. at 21, 27; *see Sibron v. New York*, 392 U.S. at 63-64; *Ybarra v. Illinois*,

444 U.S. at 92-93; *Michigan v. Long*, 463 U.S. at 1049-52 & nn.14, 16; *Minnesota v. Dickerson*, 508 U.S. at 373; *Florida v. J.L.*, 529 U.S. at 269-72; *Arizona v. Johnson*, 555 U.S. 323, 327 (2009); *Dunaway v. New York*, 442 U.S. 200, 209 n.11 (1979) (dictum); *United States v. Howell*, 958 F.3d 589, 600 (7th Cir. 2020) (holding a frisk that followed a valid stop unconstitutional: “Here what matters perhaps most is that the 911 call in no way suggested that the suspect was armed or dangerous. The caller did not so much as hint at violence, injuries, or weapons.”); *United States v. Williams*, 731 F.3d 678, 686-87 (7th Cir. 2013) (“The government asserts that the following facts supported Officer Jesberger’s decision to frisk Mr. Williams: the fact that the group [of eight to ten persons standing in a parking lot], in general, avoided eye contact with the officers and started to move away from the area upon the officers’ arrival; the fact that Mr. Williams, in particular, had his hands in his pocket or near his waistband, avoided eye contact, and began to move away from the area; the fact that this all occurred in a high crime area; and the fact that the police were responding to a 911 call reporting weapons. ¶ None of those facts, alone or together, could have supported a reasonable suspicion that Mr. Williams was armed and dangerous.”); *Thomas v. Dillard*, 818 F.3d 864, 877 (9th Cir. 2016) (dictum) (“Even where certain facts might support reasonable suspicion a suspect is armed and dangerous when viewed initially or in isolation, a frisk is not justified when additional or subsequent facts dispel or negate the suspicion. Just as a suspicion must be reasonable and individualized, it must be based on the totality of the circumstances known to the officer. Officers may not cherry pick facts to justify the serious Fourth Amendment intrusion a frisk imposes.”); *State v. Serna*, 235 Ariz. at 275, 331 P.3d at 410 (“mere knowledge or suspicion that a person is carrying a firearm” will not suffice because *Terry* requires “that a suspect be ‘armed and presently dangerous’”); *Norman v. State*, 452 Md. 373, 424, 156 A.3d 940, 970 (2017) (“that a law enforcement officer must have specific reasons for believing a suspect is armed and dangerous supports the conclusion that the mere odor of marijuana emanating from [a] vehicle with multiple occupants would not give rise to reasonable articulable suspicion that an occupant is armed and dangerous”). *But cf. Samson v. California*, 547 U.S. 843, 846, 851-52 (2006) (a police officer, “who was aware that [Samson] was on parole” and stopped him based on a belief that there was “an outstanding parole warrant” for him but then confirmed that no such warrant had been issued, could nonetheless frisk Samson because Samson’s expectation of privacy was diminished by having signed a statutorily-required agreement to a parole condition of being subject to a “search or seizure by a parole officer or other peace officer . . . with or without cause”); compare *State v. Ochoa*, 792 N.W.2d 260, 291 (Iowa 2010) (“reject[ing] the holding of *Samson* under the Iowa Constitution” and “conclud[ing] that a parolee may not be subjected to broad, warrantless searches by a general law enforcement officer without any particularized suspicion or limitations to the scope of the search”); *United States v. Estrella*, 69 F.4th 958, 961 (9th Cir. 2023) (in a case involving the same parole condition as *Samson*, the Ninth Circuit writes: “It is firmly established that ‘[a] search of a parolee that complies with the terms of a valid search condition will usually be deemed reasonable under the Fourth Amendment.’ . . . As a threshold requirement, we have held that ‘an officer must know of a detainee’s parole status before that person can be detained and searched pursuant to a parole condition.’ However, this Court has yet to specifically address how precise that knowledge must be. ¶ . . . [W]e now hold that a law enforcement officer must have probable cause to believe that a person is on active parole before he may be detained and searched

pursuant to a parole condition. Although a law enforcement officer must have ‘advance knowledge’ that the detainee remains on active parole, . . . the officer need not ‘know to an absolute certainty,’ with precise day-by-day or minute-by-minute information of the detainee’s parole status It is sufficient for the officer to determine, using the well-established rules governing probable cause, that the individual to be detained and searched is on active parole, and that an applicable parole condition authorizes the challenged search or seizure.”).

In addition to limiting the situations in which an officer can make a frisk, the Fourth Amendment also regulates the manner in which frisks may be conducted. A frisk must be “limited to that which is necessary for the discovery of weapons.” *Terry v. Ohio*, 392 U.S. at 26. See *Sibron v. New York*, 392 U.S. at 65-66; *United States v. Brignoni-Ponce*, 422 U.S. 873, 880-82 (1975); *Pennsylvania v. Mimms*, 434 U.S. 106, 111-12 (1977) (per curiam); *Florida v. Royer*, 460 U.S. 491, 500 (1983) (plurality opinion); *id.* at 509-11 (concurring opinion of Justice Brennan). “If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed.” *Minnesota v. Dickerson*, 508 U.S. at 373. Emphasizing that the frisk approved in *Terry* consisted of “a limited patting of the outer clothing of the suspect for concealed objects which might be used as instruments of assault” and that it was only after the discovery of such objects that “the officer in *Terry* place[d] his hands in the pockets of the men he searched,” the Court in *Sibron v. New York* condemned a frisk in which the officer, “with no attempt at an initial limited exploration for arms, . . . thrust his hand into [the defendant’s] pocket.” 392 U.S. at 65. *Accord, United States v. Brown*, 996 F.3d 998 (9th Cir. 2021); and see also *State v. Privott*, 203 N.J. 16, 31-32, 999 A.2d 415, 424-25 (2010) (police officer exceeded the permissible scope of a *Terry* frisk by “lift[ing] defendant’s tee-shirt to expose defendant’s stomach, and in doing so, observ[ing] a plastic bag with suspected drugs in the waistband of defendant’s pants”). In *Minnesota v. Dickerson*, 508 U.S. at 378-79, the Court held that a “police officer . . . overstepped the bounds of the ‘strictly circumscribed’ search for weapons allowed under *Terry*” by “continu[ing] exploration of respondent’s pocket after having concluded that it contained no weapon.” The frisk must be “limited to those areas in which a weapon may be placed or hidden.” *Michigan v. Long*, 463 U.S. at 1049 (during a *Terry* search of the passenger compartment of an automobile, the *Terry* frisk doctrine permits officers to search only those areas that could contain a weapon and were accessible to the suspect). See also *United States v. Baker*, 58 F.4th 1109 (9th Cir. 2023), summarized in § 23.13 *infra*; *United States v. Zavala*, 541 F.3d 562 (5th Cir. 2008); *Harris v. Commonwealth*, 241 Va. 146, 400 S.E.2d 191 (1991); *United States v. Askew*, 529 F.3d 1119, 1123, 1127-44 (D.C. Cir. 2008) (en banc) (police officers’ partial unzipping of the defendant’s outer jacket during a show-up to allow the victim to see whether the defendant’s sweatshirt matched that of the perpetrator exceeded the lawful bounds of a *Terry* frisk).

If, in the course of a *Terry* frisk, “a police officer lawfully pats down a suspect’s outer clothing and feels an object whose contour or mass makes its identity [as contraband] immediately apparent,” the officer may be able to seize the object pursuant to the “plain touch” (sometimes called the “plain feel”) doctrine. *Minnesota v. Dickerson*, 508 U.S. at 373, 375-76. For the “plain touch” doctrine to justify a seizure, “the officer who conducted the search . . . [had

to have been] acting within the lawful bounds marked by *Terry*” at the time s/he discovered the contraband (*id.* at 377); the “incriminating character of the object . . . [had to have been] immediately apparent” to the officer without, for example, engaging in “squeezing, sliding and otherwise manipulating the contents of the defendant’s pocket” after it was already apparent that the “pocket . . . contained no weapon” (*id.* at 378-79); the officer’s recognition of the contraband nature of the object must reach the level of “probable cause” (*id.* at 377); and it must be evident from the circumstances that the officer was not exploiting an authorized *Terry* frisk for weapons to engage in “the sort of evidentiary search that *Terry* expressly refused to authorize . . . and that [the Court has] . . . condemned in subsequent cases” (*id.* at 378); and *see United States v. Crutchfield*, 2023 WL 3317992, at *1 (D. Minn. 2023) (ordering suppression of a cell phone seized during a traffic stop because the officer who seized it in order to “preserve evidence” lacked “a ‘reasonable, articulable suspicion, premised on objective facts, that [Crutchfield’s phone] . . . contain[ed] contraband or evidence of a crime’”). *But cf. People v. Diaz*, 81 N.Y.2d 106, 110-12 & n.2, 612 N.E.2d 298, 301-02 & n.2, 595 N.Y.S.2d 940, 943-44 & n.2 (1993) (rejecting the “plain touch” doctrine altogether on state constitutional grounds).

§ 23.11 FACTORS COMMONLY RELIED ON BY THE POLICE TO JUSTIFY AN ARREST OR A *TERRY* STOP OR FRISK

Invariably, the police invoke the same general factors in case after case to justify their decisions to arrest or to conduct a *Terry* stop and frisk. In part, this may be due to police experience that these factors are reliable indicators of criminal conduct. In part, it may be because police officers have learned the proper formulaic responses necessary in order to obtain judicial ratification of their actions. The following subsections discuss some of the more controversial factors in the standard litany. In addressing these factors, counsel should be alert to the reality that they are heavily skewed by racial stereotypes and often constitute vestiges of *de jure* race discrimination, and to the possibility that some judges can be convinced to discredit or discount them for that reason. *See* Daniel S. Harawa, *Lemonade: A Racial Justice Reframing of The Roberts Court’s Criminal Jurisprudence*, 110 CAL. L. REV. 681 (2022); and *see, e.g., United States v. Black*, 707 F.3d 531, 542 (4th Cir. 2013); *Commonwealth v. Warren*, 475 Mass. 530, 58 N.E.3d 333 (2016); *United States v. Brinkley*, 980 F.3d 377, 391 (4th Cir. 2020); *State v. Sum*, 199 Wash. 2d 627, 511 P.3d 92 (2022).

§ 23.11(a) “High Crime Neighborhood”

Police routinely cite the high crime rate in a neighborhood to justify a stop or an arrest. Although the prevalence of crime in a certain area may be of some relevance in determining probable cause or articulable suspicion, *see Carroll v. United States*, 267 U.S. 132, 159-60 (1925); *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000); *United States v. Darrell*, 945 F.3d 929 (5th Cir. 2019), the Supreme Court has indicated that this factor should be given little weight as a predicate for either an arrest or a *Terry* stop. In *Brown v. Texas*, 443 U.S. 47 (1979), the Court invalidated a *Terry* stop that was based in part on the crime-prone character of the neighborhood, saying: “The fact that appellant was in a neighborhood frequented by drug users, standing alone,

is not a basis for concluding that appellant himself was engaged in criminal conduct.” *Id.* at 52. *Accord, Illinois v. Wardlow*, 528 U.S. at 124 (“An individual’s presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime.” (citing *Brown v. Texas*, *supra*)); *United States v. Hurtt*, 31 F.4th 152, 160 (3d Cir. 2022) (“mere presence in a high-crime area obviously does not, without more, justify an otherwise unconstitutional intrusion”); *United States v. Blair*, 524 F.3d 740, 750 (6th Cir. 2008) (“[t]hat a given locale is well known for criminal activity will not by itself justify a Terry stop, although it may be taken into account with other factors”); *United States v. McKinney*, 980 F.3d 485, 488, 492 (5th Cir. 2020) (patrol officers accosted, stopped and frisked a group of four persons who were standing at 9:00 p.m. “on a sidewalk near a gas station . . . [that] had in recent days been the location of [“multiple gang-related”] drive-by shootings, one as recent as 4:00 a.m. that day”; the court holds the stop unsupportable under *Terry*: “a person’s ‘presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime.’”); *United States v. Massenburg*, 654 F.3d 480, 488 (4th Cir. 2011) (“The fact that this was a ‘high-drug, high-crime area’ adds little to the anonymous tip [even though “the city police ‘usually get complaints . . . [for] random gunfire’ in this area” and had, on the present occasion, received an anonymous report of eight gunshots in the general vicinity] This counts among the totality of the circumstances we consider, but it does little to support the claimed particularized suspicion as to Massenburg.”); *accord, Wingate v. Fulford*, 987 F.3d 299, 306 (4th Cir. 2021) (“simply being in an area where crime is prevalent is minimally probative in the reasonable suspicion analysis”); *United States v. Black*, 707 F.3d 531, 542 (4th Cir. 2013) (“In our present society, the demographics of those who reside in high crime neighborhoods often consist of racial minorities and individuals disadvantaged by their social and economic circumstances. To conclude that mere presence in a high crime area at night is sufficient justification for detention by law enforcement is to accept *carte blanche* the implicit assertion that Fourth Amendment protections are reserved only for a certain race or class of people. We denounce such an assertion.”); *People v. Shabaz*, 424 Mich. 42, 60-61, 378 N.W.2d 451, 459 (1985); *People v. Holmes*, 81 N.Y.2d 1056, 1058, 619 N.E.2d 396, 398, 601 N.Y.S.2d 459, 461 (1993) (suspect’s presence in a “known narcotics location,” even when combined with his flight from the police and a “bulge in the pocket of his jacket,” did not provide the requisite basis for a *Terry* stop: “Given the unfortunate reality of crime in today’s society, many areas of New York City, at one time or another, have probably been described by the police as ‘high crime neighborhoods’ or ‘narcotics-prone locations.’”); *Commonwealth v. Cost*, 224 A.3d 641 (Pa. 2020), summarized in § 23.04(b) *supra*. Mere presence in a crime-ridden locale also cannot supply the predicate for a *Terry* frisk. *See Ybarra v. Illinois*, 444 U.S. 85, 93-96 (1979) (holding that the defendant’s presence in a sparsely occupied one-room bar “at a time when the police had reason to believe that the bartender would have heroin for sale,” 444 U.S. at 91, did not justify a reasonable belief that the defendant was armed and dangerous); *Perez Cruz v. Barr*, 926 F.3d 1128, 1138 (9th Cir. 2019) (the detention of a worker on factory premises which Immigration and Customs Enforcement agents suspected of employing undocumented aliens violated the Fourth Amendment in the absence of probable cause to believe that the worker himself was undocumented: “That ICE suspected . . . [the factory] was employing undocumented workers did not provide reasonable

suspicion that Perez Cruz himself was undocumented.”); *cf. United States v. Segoviano*, 30 F.4th 613, 623 (7th Cir. 2022) (“[U]nder well-established Fourth Amendment jurisprudence, it was not enough for Segoviano to merely be present in a building in which the agents believed that . . . [a person for whom they had an arrest warrant charging the shooting of a federal agent] could be located; the mere propinquity to . . . [the assailant’s girlfriend] or to a place in which . . . [the assailant] might be located was insufficient to provide reasonable suspicion to detain Segoviano, whose only connection to the facts known to the agents was his residence in the building. The Fourth Amendment at its core protects the sanctity of the home – whether that is an apartment connected to other homes by common hallways or houses connected to other homes by yards and sidewalks. Apartments within a building are individual homes entitled to the same protection as homes on a street, and a suspicion that a person may be in the area is not a justification to seize residents of all of the apartments in a building – just as it would be insufficient to seize the residents of all the homes on a street if . . . [the assailant’s girlfriend] was seen in the area of those homes and . . . [the assailant’s] cell phone had been detected there.”); *and see United States v. Rickmon*, 952 F.3d 876 (7th Cir. 2020) (discussing the weight that should be accorded to proximity to a location identified by ShotSpotter technology as the site of gunfire).

§ 23.11(b) Failure to Respond to Police Inquiry; Flight; Hassling the Police

Frequently the police detain or arrest an individual because the individual refused to answer questions or because s/he walked or ran away when the police attempted to question him or her.

When suspects choose to answer the questions of the police, “the responses they give to [the] officers’ questions” can be considered in the calculus of probable cause or articulable suspicion. *United States v. Ortiz*, 422 U.S. 891, 897 (1975). *See United States v. Bowman*, 884 F.3d 200 (4th Cir. 2018) (reasonable suspicion was not warranted by driver’s claim that he did not recall the address at which he had picked up a passenger 30 minutes earlier but that the address would be found in the car’s on-board GPS). It is not clear, however, whether (and, if so, to what extent) a refusal to answer inquiries may be given weight in justifying a stop or arrest. In a number of cases, a majority or plurality of the Supreme Court or an individual Justice has stated that a suspect’s refusal to answer police questions cannot provide a predicate for satisfaction of the Fourth Amendment criteria for a *Terry* stop or an arrest. *See Illinois v. Wardlow*, 528 U.S. 119, 125 (2000) (“when an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore the police and go about his business”; an individual has the “right to . . . remain silent in the face of police questioning”); *Florida v. Bostick*, 501 U.S. 429, 437 (1991) (a suspect’s “refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure”); *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984) (a “detainee is not obliged to respond” to a police officer’s questions); *Kolender v. Lawson*, 461 U.S. 352, 365 (1983) (Justice Brennan, concurring) (a *Terry* suspect “must be free . . . to decline to answer the questions put to him”); *Florida v. Royer*, 460 U.S. 491, 498 (1983) (plurality opinion) (a suspect’s “refusal to listen [to police questions] or answer does not, without more, furnish . . . grounds” for a *Terry* stop); *Terry*

v. Ohio, 392 U.S. at 34 (Justice White, concurring) (a suspect’s “refusal to answer furnishes no basis for an arrest”). Similar statements can be found in lower court opinions. *See, e.g., Moya v. United States*, 761 F.2d 322, 325 (7th Cir. 1985); *People v. Howard*, 50 N.Y.2d 583, 591-92, 408 N.E.2d 908, 914, 430 N.Y.S.2d 578, 584 (1980). In *Hiibel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177 (2004), however, the Court rejected a Fourth Amendment challenge to a “stop and identify” statute that allowed an officer to detain a person to “ascertain his identity” if the “circumstances . . . reasonably indicate that the person has committed, is committing or is about to commit a crime” and that permitted the suspect’s failure to give the officer his or her name under these circumstances to be punished criminally as “obstruct[ing] and delay[ing] . . . a public officer in attempting to discharge his duty.” *Id.* at 181-82. In upholding the statute, the Court stated that “[t]he principles of *Terry* permit a State to require a suspect to disclose his name in the course of a *Terry* stop,” as long as the “statute does not alter the nature of the stop itself . . . [-] does not change its duration . . . or its location” (*id.* at 187-88, 189). The *Hiibel* ruling is expressly limited to situations (and, thus, jurisdictions) in which a statute authorizes an arrest of an individual for refusing to divulge his or her name during a *Terry* stop. *See id.* at 187-88 (explaining that prior Court statements, such as those quoted above, regarding a suspect’s right to refuse to answer questions concern the nature and import of Fourth Amendment protections while the *Hiibel* “case concerns a different issue, . . . [in that] the source of the legal obligation arises from Nevada state law, not the Fourth Amendment”). *See also, e.g., City of Topeka v. Grabauskas*, 33 Kan. App. 2d 210, 222, 99 P.3d 1125, 1134 (2004) (rejecting the prosecution’s *Hiibel* argument because “[u]nlike the State of Nevada, we have no statute requiring persons to identify themselves . . . [and thus] *Hiibel* is clearly distinguishable from this case”). Moreover, even in jurisdictions possessing a statute such as the one upheld in *Hiibel*, “the statutory obligation does not go beyond answering an officer’s request to disclose a name” (*Hiibel*, 542 U.S. at 187), and thus a suspect’s failure to answer police questions about other matters presumably cannot be factored into the calculus of probable cause or articulable suspicion. *See id.* at 185 (explaining that “the Nevada Supreme Court . . . [had] interpreted . . . [the applicable statute] to require only that a suspect disclose his name. . . . ‘The suspect is not required to provide private details about his background, but merely to state his name to an officer when reasonable suspicion exists’ As we understand it, the statute does not require a suspect to give the officer a driver’s license or any other document. Provided that the suspect either states his name or communicates it to the officer by other means – a choice, we assume, that the suspect may make – the statute is satisfied and no violation occurs.”); *and see id.* at 187-88 (explaining that a state statutory requirement that “a suspect . . . disclose his name in the course of a valid *Terry* stop is consistent with” “the purpose, rationale, and practical demands of a *Terry* stop” and “does not alter the nature of the stop itself”). Finally, even under a statute such as the one upheld in *Hiibel*, the initial stop that prompts the question about identity must be “based on reasonable suspicion, satisfying the Fourth Amendment requirements” for *Terry* stops (*id.* at 184; *see id.* at 188; *see also, e.g., Commonwealth v. Ickes*, 582 Pa. 561, 873 A.2d 698 (2005) (striking down a “stop and identify” statute that, unlike the one in *Hiibel*, failed to require a valid *Terry* stop as a predicate for the request for identification)); “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*, 542 U.S. at 188); and it must be apparent from the

circumstances that “[t]he officer’s request [for identification] was . . . not an effort to obtain an arrest for failure to identify after a *Terry* stop yielded insufficient evidence” (*id.* at 189); *Johnson v. Thibodeaux City*, 887 F.3d 726, 733 (5th Cir. 2018) (“According to the officers, they had probable cause to arrest Johnson for failing to provide identification, an alleged violation of Louisiana Revised Statute 14:108. That statute requires an ‘arrested or detained party’ to provide identification only when the officer is making ‘a lawful arrest’ or a ‘lawful detention.’ ¶ The statute could not extend more broadly. Under the Fourth Amendment, police officers may not require identification absent an otherwise lawful detention or arrest based on reasonable suspicion or probable cause. . . . ¶ . . . Thus, under both Louisiana law and the Constitution, Johnson was required to provide identification only if she was otherwise lawfully stopped. The officers would have no probable cause to arrest if the request for identification came during an illegal seizure.”); *Wingate v. Fulford*, 987 F.3d 299, 310 (4th Cir. 2021) (“Read together, *Brown v. Texas*, 443 U.S. 47 (1979)], and *Hiibel* illustrate that a valid investigatory stop, supported by *Terry*-level suspicion, is a constitutional prerequisite to enforcing stop and identify statutes. Necessarily so. The prevailing seizure jurisprudence flows from the idea that, short of an investigatory stop, a person is ‘free to disregard the police and go about his business.’ *Cf. California v. Hodari D.*, 499 U.S. 621, 628 (1991); *Brendlin v. California*, 551 U.S. 249, 254–55 (2007)”).

Flight may be relevant to the determination of probable cause or articulable suspicion, *see Illinois v. Wardlow*, 528 U.S. at 124-25; *Sibron v. New York*, 392 U.S. 40, 66-67 (1968); *United States v. Darrell*, *supra*, but it is not dispositive and cannot, in and of itself, supply the basis for an arrest or a stop. *See, e.g., Illinois v. Wardlow*, 528 U.S. at 124 (“flight,” although “suggestive” of “wrongdoing,” “is not necessarily indicative of wrongdoing”); *United States v. Brown*, 925 F.3d 1150 (9th Cir. 2019); *United States v. Green*, 670 F.2d 1148, 1152 (D.C. Cir. 1981); *People v. Holmes*, 81 N.Y.2d 1056, 1058, 619 N.E.2d 396, 398, 601 N.Y.S.2d 459, 461 (1993) (suspect’s flight from the police, even when combined with his presence in a “known narcotics location” and a “bulge in the pocket of his jacket,” did not provide the requisite basis for a *Terry* stop). Moreover, unless the flight occurs under circumstances in which it is reasonable to infer guilty knowledge, the flight cannot be considered at all. *See, e.g., Wong Sun v. United States*, 371 U.S. 471, 482-83 (1963) (“when an officer insufficiently or unclearly identifies his office or his mission, the occupant’s flight . . . must be regarded as ambiguous conduct [and] . . . afford[s] no sure . . . inference of guilty knowledge”); *People v. Shabaz*, 424 Mich. at 64, 378 N.W.2d at 461; *Commonwealth v. Warren*, 475 Mass. 530, 58 N.E.3d 333 (2016) (“Although flight is relevant to the reasonable suspicion analysis in appropriate circumstances, we add two cautionary notes regarding the weight to be given this factor. ¶ First, we perceive a factual irony in the consideration of flight as a factor in the reasonable suspicion calculus. Unless reasonable suspicion for a threshold inquiry already exists, our law guards a person’s freedom to speak or not to speak to a police officer. A person also may choose to walk away, avoiding altogether any contact with police. . . . Where a suspect is under no obligation to respond to a police officer’s inquiry, we are of the view that flight to avoid that contact should be given little, if any, weight as a factor probative of reasonable suspicion. Otherwise, our long-standing jurisprudence establishing the boundary between consensual and obligatory police encounters will be seriously

undermined. . . . ¶ Second, . . . where the suspect is a black male stopped by the police on the streets of Boston, the analysis of flight as a factor in the reasonable suspicion calculus cannot be divorced from the findings in a recent Boston Police Department (department) report documenting a pattern of racial profiling of black males in the city of Boston. . . . According to the study, based on FIO [Field Interrogation and Observation] data collected by the department, . . . black men in the city of Boston were more likely to be targeted for police-civilian encounters such as stops, frisks, searches, observations, and interrogations. . . . Black men were also disproportionately targeted for repeat police encounters. . . . We do not eliminate flight as a factor in the reasonable suspicion analysis whenever a black male is the subject of an investigatory stop. However, in such circumstances, flight is not necessarily probative of a suspect’s state of mind or consciousness of guilt. Rather, the finding that black males in Boston are disproportionately and repeatedly targeted for FIO encounters suggests a reason for flight totally unrelated to consciousness of guilt. Such an individual, when approached by the police, might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled as by the desire to hide criminal activity. Given this reality for black males in the city of Boston, a judge should, in appropriate cases, consider the report’s findings in weighing flight as a factor in the reasonable suspicion calculus.” (*id.* at 539-40, 58 N.E.3d at 341-42). “[I]n the circumstances of this case, the [defendant’s] flight from [officer] Anjos during the initial encounter added nothing to the reasonable suspicion calculus” (*id.* at 539, 58 N.E.3d at 342) because the police, who “were handicapped from the start with only a vague description of the perpetrators,” had “far too little information to support an individualized suspicion that the defendant had committed the breaking and entering,” and therefore, “[u]ntil the point when [officer] Carr seized the defendant, the investigation failed to transform the defendant from a random black male in dark clothing traveling the streets of Roxbury on a cold December night into a suspect in the crime of breaking and entering.” (*Id.* at 540, 58 N.E.3d at 342-43.); *Miles v. United States*, 181 A.3d 633, 641-42, 645 (D.C. 2016) (“Mr. Miles’s flight was too equivocal to reasonably corroborate the anonymous tip that the man had a gun” and thus “the police lacked reasonable suspicion to subject Mr. Miles to a *Terry* stop”: “There are myriad reasons an innocent person might run away from the police. In *In re D.J.* [532 A.2d 138, 142 n.4 (D.C. 1987)], we explained that ‘[a]n individual may be motivated to avoid the police by a natural fear or dislike of authority, a distaste for police officers based upon past experience, an exaggerated fear of police brutality or harassment, a fear of being apprehended as the guilty party, or other legitimate personal reasons.’ . . . As to this ‘fear of police brutality,’ Mr. Miles states in his brief that ‘the proliferation of visually documented police shootings of African-Americans that has generated the Black Lives Matter protests’ suggests that the court was misinformed in *In re D.J.* when it characterized such fear as ‘exaggerated.’ . . . In any event, an investigatory stop and frisk is not a ‘petty indignity’– ‘[i]t is a serious intrusion upon the sanctity of the person,’ *Terry*, 392 U.S. at 16–17 – and though we lack adequate empirical grounds for fathoming the extent to which innocent people might flee to avoid being subjected to one, it seems safe to say that the number is not insignificant.”). *See also Illinois v. Wardlow*, 528 U.S. at 128-29, 131-35 (Justice Stevens, concurring in part and dissenting in part, joined by Justices Souter, Ginsburg, and Breyer) (identifying a variety of “instances in which a person runs for entirely innocent reasons” and scenarios in which “[f]light to escape police detection . . . may have an entirely innocent motivation”). *Compare id.* at 124

(majority opinion) (*Terry* stop was justified by the totality of circumstances, including the suspect’s “unprovoked,” “[h]eadlong flight” “upon noticing the police”), *with Miles v. United States*, 181 A.3d at 643-44 (“The *Wardlow* defendant’s flight was probative of guilt because it was ‘unprovoked.’ . . . Mr. Miles fled after Officer Sanchez pulled his police cruiser in front of Mr. Miles as he was walking, blocking off his path. . . . Officer Sanchez then got out of the vehicle and told Mr. Miles to ‘stop’; before that, Officer James was walking behind Mr. Miles. . . . [T]he experience of being followed by a police officer on foot, blocked by a police cruiser, and then told to ‘stop’ would be startling and possibly frightening to many reasonable people. There was thus a reason other than consciousness of guilt for Mr. Miles to have fled. . . . ¶ Moreover, . . . there was nothing about the character of Mr. Miles’s flight that seemed particularly incriminating.”), *and Banks v. Commonwealth*, 2015 WL 3533197 (Ky. App. 2016), summarized in § 23.11(c) *infra*.

Police will often invoke charges of disorderly conduct and similar public-order misdemeanors or petty offenses to justify arresting persons who berate or verbally hassle them. These arrests will seldom pass constitutional muster. *See, e.g., Villarreal v. City of Laredo, Texas*, 44 F.4th 363, 367 (5th Cir. 2022) (“If the First Amendment means anything, it surely means that a citizen journalist has the right to ask a public official a question, without fear of being imprisoned. Yet that is exactly what happened here: Priscilla Villarreal was put in jail for asking a police officer a question. ¶ If that is not an obvious violation of the Constitution, it’s hard to imagine what would be.”); *Croland v. City of Atlanta*, 782 Fed. Appx. 753, 757 (11th Cir. 2019) (“On this record, no objective officer under the same circumstances and possessing Officer Camille’s knowledge could have believed reasonably that probable cause existed to arrest Plaintiff. Plaintiff’s conduct consisted of yelling at Officer Camille in front of a group of people. Plaintiff made no physical gestures with her hands and took no steps toward Officer Camille, who was then about 11 steps away.”); *Friend v. Gasparino*, 61 F.4th 77 (2d Cir. 2023) (the plaintiff in this civil-rights action stood on a public sidewalk and displayed a sign reading “Cops Ahead” two blocks before a checkpoint at which the police were ticketing drivers for using cellphones while driving; an officer confiscated plaintiff’s sign and arrested him for interfering with the officers; the Second Circuit holds that on these facts the plaintiff’s First Amendment right to free speech was violated and that the arrest also violated his Fourth Amendment right against arrest without probable cause because the interfering-with-an-officer statute, as a matter of law, prohibited only physical interference and “fighting words” tending to produce a breach of the peace); *Garcia v. City of New Hope*, 984 F.3d 655 (8th Cir. 2021) (allegations that a police officer arrested a motorist for disorderly conduct and a license-plate violation in retaliation for his flipping the bird at her state a claim of violation of the First Amendment); *Cruise-Gulyas v. Minard*, 918 F.3d 494 (6th Cir. 2019) (an officer ticketed a driver for a minor traffic violation; as she left the scene, the driver flipped the bird at the officer; he stopped her vehicle a second time and amended the ticket to charge a more severe offense; allegation of these facts stated a claim that the second stop constituted a violation of the Fourth and First Amendments); *Wood v. Eubanks*, 25 F.4th 414, 418 (6th Cir. 2022) (“Michael Wood wore a shirt bearing the words ‘Fuck the Police’ to the county fair. According to Wood, the defendant police officers ordered him to leave and escorted him from the fairgrounds because of his shirt. While leaving, Wood

made his displeasure known through numerous coarse insults levied at the police and the fairground’s administrator. The defendants then arrested Wood for disorderly conduct. After the charges were dismissed, Wood filed this § 1983 action against the officers, alleging false arrest and retaliation. The district court granted summary judgment to the defendants. We reverse because Wood’s speech was protected by the First Amendment.”); *Ballentine v. Tucker*, 28 F.4th 54 (9th Cir. 2022) (allegations that a police officer arrested the activists in retaliation for their chalking anti-police slogans on a sidewalk state a First Amendment violation); *Alston v. Swarbrick*, 954 F.3d 1312, 1319 (11th Cir. 2020) (allegations that a police officer arrested a homeowner for disorderly conduct when, in the course of a police investigation of a reported domestic dispute, the homeowner refused to answer the officer’s questions and said “Fuck you” stated a claim for violation of the Fourth Amendment: ““by 2011, it was clearly established that words alone cannot support probable cause for disorderly conduct – including profanity regarding police officers.”); see also *Chestnut v. Wallace*, 947 F.3d 1085, 1090 (8th Cir. 2020) (police approached a jogger who had stopped to watch an officer make two traffic stops; when asked for identification, he provided his name and the last four digits of his social security number but refuse to provide the whole number; he was then detained and handcuffed; allegation of these facts stated a claim that the detention was unsupported by reasonable suspicion and violated the Fourth Amendment: “Every circuit court to have considered the question has held that a person has the right to record police activity in public.”); *Quraishi v. St. Charles County, Missouri*, 986 F.3d 831, 839 (8th Cir. 2021) (“it is clearly established that using an arrest (that lacks arguable probable cause) to interfere with First Amendment activity is a constitutional violation”); *Watkins v. Bigwood*, 797 Fed. Appx. 438 (11th Cir. 2019); Anthony G. Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like*, 3 (No. 4) CRIM. L. BULLETIN 205 (1967); Anthony G. Amsterdam, *A Selective Survey of Supreme Court Decisions in Criminal Law and Procedure*, 9 (No. 5) CRIM. L. BULLETIN 389, 390-96 (1973).

§ 23.11(c) Furtive Gestures; Nervousness

Frequently, a “furtive gesture” of the respondent’s will be the impetus for a stop or an arrest. Although “deliberately furtive actions” may be considered, *Sibron v. New York*, 392 U.S. at 66, the purported furtiveness of the gestures must be carefully scrutinized to determine whether they could be equally consistent with innocent behavior. See, e.g., *Reid v. Georgia*, 448 U.S. 438, 441 (1980) (per curiam) (invalidating a *Terry* stop because the allegedly furtive “manner in which the petitioner and his companion walked through the airport” was “too slender a reed to support the seizure”); *Brown v. Texas*, 443 U.S. at 52 (striking down a *Terry* stop that was based on the defendant’s ““look[ing] suspicious”” and seemingly walking away from a companion upon the arrival of the police, while in a ““high drug problem area”” (*id.* at 49); compare *Florida v. Rodriguez*, 469 U.S. 1 (1984) (per curiam). If the officer’s assertions about “furtive gestures” are vague, defense counsel should consider pinning the officer down on precisely which gestures s/he viewed as suspicious, in order to be able to argue that these actions are consistent with innocent conduct. See, e.g., *Thomas v. Dillard*, 818 F.3d 864, 884 (9th Cir. 2016) (“As one additional reason to believe [that defendant] Thomas was armed, [police officer]

Dillard points to Thomas’ demeanor, suggesting Thomas appeared ‘startled and fidgety.’ We do not see how either of these observations support even minimally the inference that Thomas was armed, however. Although Dillard testified Thomas and [his companion] Husky may have appeared ‘a little startled’ when he first confronted them, he also explained that this was ‘a common reaction . . . when a police officer arrives on the scene.’ By fidgety, Dillard meant only that Thomas and Husky exhibited normal hand movements, noting that it is not natural for people to stand in a perfectly still, statuesque form. Thomas and Husky, in other words, behaved normally.”); *Banks v. Commonwealth*, 2015 WL 3533197, at *3 (Ky. App. 2016) (although the arresting officer “viewed Banks’s act of walking away [from a crowd that “peacefully dispersed” upon the officers’ emergence from their vehicle] as suspicious behavior,” and the officer “explained that people with something to conceal often might step away from a group,” the court of appeals rejects this reasoning and states: “in this case, the group *dispersed*; there was no longer a group from which to separate. We are not persuaded that peacefully walking away from a gathering is unusual conduct – or at least conduct so noteworthy as to justify a stop and search.”). However, if counsel knows from interviews with the respondent or witnesses that the respondent’s actions really were suspicious, counsel should refrain from giving the officer an opportunity to clarify a vague account.

“[A] driver’s nervousness is not a particularly good indicator of criminal activity, because most everyone is nervous when interacting with the police.’ . . . [M]ere nervousness ‘is of limited value to reasonable suspicion analyses’ . . .” *United States v. Bowman*, 884 F.3d 200, 214 (4th Cir. 2018) (dismissing an officer’s contentions that the driver and passenger of a stopped car “appeared to be nervous. . . . [The driver,] Bowman’s hands were shaking as he handed over his vehicle registration and driver’s license after the initial stop; . . . when . . . [the officer] initially approached the car, [the passenger,] Alvarez stared straight ahead instead of looking him in the eye; . . . in both men ‘the carotid artery was beating very hard and rapidly,’ . . . signaling an increased heart rate and nervousness; . . . Bowman ‘couldn’t sit still’ in the patrol vehicle while . . . [the officer] was processing his license and registration”); *United States v. Massenburg*, 654 F.3d 480, 489 (4th Cir. 2011) (here “nervous behavior” was . . . [the officer’s] characterization of Massenburg’s repeated refusal to consent to a voluntary pat-down”: “The evidence . . . [the officer] cites for Massenburg’s nervousness is slight: Massenburg was standing a foot or two from the other three, who were lined up shoulder-to-shoulder, and ‘[l]ooked down’ or failed to make eye contact as . . . [the officer] repeatedly asked him if he would consent to a search.”). *See also United States v. Howell*, 958 F.3d 589, 600 (7th Cir. 2020) (“Nervousness alone, at least not as a categorical matter, does not create reasonable suspicion that a suspect is armed and dangerous. *See [United States v.] Williams*, 731 F.3d [678] at 687 [(7th Cir. 2013)] (recognizing that ‘[m]ost people, when confronted by a police officer, are likely to act nervous, avoid eye contact, and even potentially shift their bodies as if to move away from the area’.”); *Clinton v. Garrett*, 49 F.4th 1132, 1143 (8th Cir. 2022) (affirming summary judgment on a Fourth Amendment claim in favor of a driver whose car was stopped by police officers who asserted that they were unable to make out any writing on the temporary vehicle tag on the car’s rear window: “The officers argue that there is no clearly established right to drive with a nervous passenger through a high crime neighborhood with a temporary tag that is unable to be read by

officers following the vehicle. . . . Clinton’s nervous passenger and the area where he was driving . . . , in isolation, do not support a conclusion that Clinton’s vehicle was connected to unlawful activity in general, much less to the specific kind of unlawful activity for which the officers pulled him over – a possible temporary tag violation. Nor can a driver rightly be held responsible for ambient conditions that render a tag illegible.”); *Klaver v. Hamilton County, Tennessee*, 2022 WL 16647970 (6th Cir. 2022) (“[D]eputy sheriffs from Hamilton County, Tennessee, stopped William Klaver for a tinted-window violation. They eventually requested a drug-sniffing dog because Klaver was shaking and refusing to say why. After the dog ‘alerted,’ the deputies searched Klaver’s vehicle but found nothing illegal.” *Id.* at *1. The Sixth Circuit holds that on these facts, “the deputies violated clearly established Fourth Amendment law” (*id.*): “We have a mountain of caselaw indicating that heightened nerves represent weak evidence of wrongdoing and cannot be the primary justification for a stop.” *Id.* at *7.); *United States v. Brinkley*, 980 F.3d 377, 391 (4th Cir. 2020) (discounting police observations of nervousness on the part of a homeowner who had answered a knock at her door: she “could have been nervous at the prospect of exposing any number of people – for example, an elderly parent or a young child [as distinguished from the person sought by the police] – to five armed policemen. . . . [She] might also have feared for herself. Recent events have underscored how quickly police encounters with Black Americans may escalate, at times fatally.”).

§ 23.11(d) Arrests and Terry Stops Based on Tips from Informants

Frequently, a police officer’s decision to make an arrest or a *Terry* stop is based on information obtained from a third party – either an ordinary citizen or a covert police informer. The standards regulating police reliance on such information are the same in these cases as in other contexts, such as automobile searches (see § 23.24 *infra*) and “hot pursuit” or “exigent circumstances” entries into premises (see §§ 23.19-23.20 *infra*) and are discussed in § 23.32 *infra*. See also *United States v. Peters*, 60 F.4th 855, 865 (4th Cir. 2023) (“Peters’s criminal history as outlined in the police records does not justify Officer Butler’s suspicion that he was trespassing. . . ¶ In [*United States v.*] *Powell*, [666 F.3d 180, 186 (4th Cir. 2011)], we evaluated the usefulness of similar police database information, labeled ‘caution data,’ and ultimately found that it could not provide the police officer with grounds for reasonable suspicion without additional facts. . . . (noting that ‘caution data’ – information indicating the defendant had ‘priors’ and a suspended license – lacked specificity, because there was no information as to when the data was collected or if it resulted in a conviction). Likewise, the record here is silent as to what led the officers to create the alerts, whether doing so led to further action, and whether the information had been updated since collected. Therefore, without more specific facts, these alerts do not heighten any suspicion that Peters was engaged in crime.); *United States v. Sprinkle*, 106 F.3d 613, 617 (4th Cir. 1997) (finding that an individual ‘recently finish[ing] a sentence’ and having a criminal record alone cannot show reasonable suspicion).

§ 23.12 POLICE SEIZURES OF OBJECTS FROM THE RESPONDENT’S PERSON; POLICE DEMANDS THAT A RESPONDENT HAND OVER AN OBJECT IN HIS OR HER POSSESSION

Any activity by a police officer or other state agent that is “designed to obtain information . . . by physically intruding on a subject’s body . . . [is] a Fourth Amendment search.” *Grady v. North Carolina*, 575 U.S. 306, 310 (2015) (per curiam). Frequently, in the course of an on-the-street encounter between a juvenile respondent and the police, a police officer will seize an object from the respondent. Such “a seizure of personal property [is] . . . *per se* unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant . . . [or is justified by] some . . . recognized exception to the warrant requirement.” *United States v. Place*, 462 U.S. 696, 701 (1983). See, e.g., *Beck v. Ohio*, 379 U.S. 89 (1964); *Torres v. Puerto Rico*, 442 U.S. 465 (1979). Objects may be seized from the respondent’s person and may be searched without a warrant pursuant to the doctrine of “search incident to arrest” if all of the requirements of that doctrine, including probable cause to arrest, are satisfied. See § 23.08(b) *supra*. And if the respondent is carrying an object that is visibly contraband, in plain view of the officer, then the seizure and search of that object may be justifiable under the “plain view” doctrine. See § 23.22(b) *infra*. But if the object is a closed container, the power to seize it does not include the power to search inside it – or to manipulate it physically in order to detect its contents – without a search warrant. *Bond v. United States*, 529 U.S. 334 (2000); *United States v. Johnson*, 43 F.4th 1100 (10th Cir. 2022), quoted in § 23.08(b) *supra*.

Under certain narrowly defined exigent circumstances, for example, when “the seizure is minimally intrusive and operational necessities render it the only practicable means of detecting certain types of crime,” *Arizona v. Hicks*, 480 U.S. 321, 327 (1987), the police may be able to conduct a “*Terry*-type investigative . . . [detention]” of an object. *United States v. Place*, 462 U.S. at 709. However, this limited extension of the *Terry* doctrine has thus far been applied only in cases of “investigative detention of [a] vehicle suspected to be transporting illegal aliens,” *Arizona v. Hicks*, 480 U.S. at 327 (citing *United States v. Cortez*, 449 U.S. 411 (1981), and *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975)) and a case involving a “seizure of [a] suspected drug dealer’s luggage at [an] airport to permit exposure to [a] specially trained dog,” *Arizona v. Hicks*, 480 U.S. at 327 (citing *United States v. Place, supra*). In each of the cited cases, the Court demanded “reasonable suspicion” of the criminal nature of the object seized, in the ordinary sense of the *Terry* doctrine (see § 23.09 *supra*), as a necessary precondition of the seizure.

The police cannot avoid these constitutional restrictions upon seizures by simply ordering the respondent to turn over the object rather than physically taking it from the respondent’s possession. See, e.g., *Kelley v. United States*, 298 F.2d 310, 312 (D.C. Cir. 1961) (police officers’ demand that “appellant systematically disclose the contents of his clothing, first one pocket, then another, and then another, was no less a search . . . than if the police had themselves reached into the appellant’s pockets”); *United States v. Hallman*, 365 F.2d 289, 291-92 (3d Cir. 1966); *In the Matter of Bernard G.*, 247 A.D.2d 91, 94, 679 N.Y.S.2d 104, 105 (N.Y. App. Div., 1st Dep’t 1998) (police officers’ “ask[ing] . . . [a juvenile] to empty his pockets . . . was the equivalent of searching his pockets themselves”); *M.J. v. State*, 399 So.2d 996, 997 (Fla. App. 1981) (“a demand to disclose or produce a concealed object is treated as a search”). In cases in which the

police officers frame their demand in the form of a request and purportedly obtain the respondent's consent to the officers' taking control of the object or searching it, the constitutionality of their actions will ordinarily turn on whether there was a valid, voluntary "consent" under the principles set forth in § 23.18(a) *infra*. See, e.g., *Florida v. Royer*, 460 U.S. 491 (1983); *People v. Gonzalez*, 115 A.D.2d 73, 499 N.Y.S.2d 400 (N.Y. App. Div., 1st Dep't 1986), *aff'd*, 68 N.Y.2d 950, 502 N.E.2d 1001, 510 N.Y.S.2d 86 (1986); *United States v. Butler*, 2023 WL 3719025 (11th Cir. 2023), summarized in § 23.18 *infra*. But when the sole justification for the encounter is a *Terry*-type investigative detention, a request for consent to conduct a search of the respondent's person or possessions which is unrelated to that justification has been held impermissible, tainting the ensuing consent and a search pursuant to it. *State v. Smith*, 286 Kan. 402, 184 P.3d 890 (2008).

§ 23.13 THE RESPONDENT'S ALLEGED ABANDONMENT OF CONTRABAND UPON THE ARRIVAL OF THE POLICE: THE "DROPSIE" PROBLEM

Police officers frequently testify that, when approached or accosted, the respondent threw away an incriminating object, which was then picked up by the officer, or that the respondent disclosed the object to their sight in an attempt to hide it somewhere away from his or her person. This testimony is calculated to invoke the doctrines that the observation of objects "placed . . . in plain view" is not a search, *Rawlings v. Kentucky*, 448 U.S. 98, 106 (1980) (dictum); see, e.g., *Rios v. United States*, 364 U.S. 253, 262 (1960), and that it is neither a search nor a seizure to pick up "abandoned" objects (see, e.g., *United States v. Thomas*, 864 F.2d 843 (D.C. Cir. 1989); *United States v. Ferebee*, 957 F.3d 406 (4th Cir. 2020)) thrown on a public road, *California v. Greenwood*, 486 U.S. 35 (1988); *California v. Hodari D.*, 499 U.S. 621, 624 (1991); see, e.g., *Lee v. United States*, 221 F.2d 29 (D.C. Cir. 1954).

In these "dropsie" or "throw-away" cases, the defense can prevail by showing that:

(a) The alleged abandonment of the property was itself the product of unlawful police action. Thus abandonment will not be found if (i) the respondent was illegally arrested or illegally detained prior to the time of the alleged "drop" (see *Reid v. Georgia*, 448 U.S. 438 (1980) (per curiam); *United States v. Beck*, 602 F.2d 726 (5th Cir. 1979); *Commonwealth v. Harris*, 491 Pa. 402, 421 A.2d 199 (1980); *State v. Bennett*, 430 A.2d 424 (R.I. 1981)); (ii) the police were engaged in an unlawful search prior to the time of the alleged "drop" (see *United States v. Newman*, 490 F.2d 993 (10th Cir. 1974); *State v. Dineen*, 296 N.W.2d 421 (Minn. 1980)); or (iii) the police were in the course of unlawfully pursuing the respondent at the time of the alleged "drop." (Prior to the decision in *California v. Hodari D.*, *supra*, there were a number of state high court decisions holding that if police officers initiated visible pursuit of an individual without the requisite justification for an arrest or a *Terry* stop (see §§ 23.07, 23.09 *supra*) and if the individual responded by fleeing and tossing away an incriminating object, an unconstitutional "seizure" of the individual had occurred at the time when the pursuit became manifest (because, for example, the police activated a flasher or a siren or called to the individual to stand still), and the discarded object was tainted by this illegality and therefore subject to

suppression. *See, e.g., People v. Shabaz*, 424 Mich. 42, 378 N.W.2d 451 (1985); *People v. Torres*, 115 A.D.2d 93, 499 N.Y.S.2d 730 (N.Y. App. Div., 1st Dep’t 1986); *Commonwealth v. Barnett*, 484 Pa. 211, 398 A.2d 1019 (1979). As a matter of federal constitutional law, those decisions have been cast in doubt by the holding in *Hodari D.* that an individual who flees when accosted by police is not “seized” for Fourth Amendment purposes until s/he is caught and physically restrained (see § 23.04(b) first paragraph *supra*). However, the pre-*Hodari* caselaw should continue to obtain in jurisdictions where (A) state law requires a justification for the initial accosting, and that justification is lacking (*see, e.g., People v. Holmes*, 81 N.Y.2d 1056, 619 N.E.2d 396, 601 N.Y.S.2d 459 (1993)) or (B) the state courts have rejected *Hodari* as a matter of state law and continue to hold that a “seizure of the person” occurs at the point of initiation of a manifest police pursuit (*see, e.g., State v. Oquendo*, 223 Conn. 635, 613 A.2d 1300 (1992); *Commonwealth v. Stoute*, 422 Mass. 782, 665 N.E.2d 93 (1996); *Commonwealth v. Barros*, 435 Mass. 171, 755 N.E.2d 740 (2001)). *See State v. Quino*, 74 Hawai’i 161, 840 P.2d 358 (1992).

(b) The “dropped” object fell into a constitutionally protected area. *See, e.g., Rios v. United States*, 364 U.S. at 262 n.6 (taxicab “passenger who lets a package drop to the floor of the taxicab in which he is riding can hardly be said to have ‘abandoned’ it”); *United States v. Ramirez*, 67 F.4th 693 (5th Cir. 2023) (finding no abandonment where the defendant tossed his jacket – later found to contain a handgun – over a fence so that it landed on top of a trash bin in the yard of his mother’s home); *Work v. United States*, 243 F.2d 660, 662-63 (D.C. Cir. 1957) (the trash receptacle into which defendant placed phial of narcotics upon police officers’ entry into a house was within the constitutionally protected “curtilage” of the home); *Commonwealth v. Straw*, 422 Mass. 756, 665 N.E.2d 80 (1996); *Commonwealth v. Ousley*, 393 S.W.3d 15, 18, 26-29, 33 (Ky. 2013) (police officers’ search of “closed trash containers,” which were near the defendant’s home, was unlawful because “[t]he containers had not been put out on the street for trash collection” and were within the “curtilage” of the home). (Section 23.15(c) *infra* discusses the concept of “curtilage” in detail.)

(c) The police “dropsie” story is a fabrication, as it often is. *See, e.g., People v. Quinones*, 61 A.D.2d 765, 766, 402 N.Y.S.2d 196, 198 (N.Y. App. Div. 1st Dep’t 1978). In seeking to show that the police officers are fabricating, defense counsel should cross-examine the officers on what they did prior to the “drop” that caused the respondent to disclose to them incriminating matters that were otherwise well-concealed. If plainclothes police are involved, this fact, together with the fact that the respondent had not previously encountered the officers, should be brought out. Even the habitual credulity of judges with regard to police testimony is sometimes shaken by accounts of a respondent’s tossing away incriminating (and often highly valuable) objects at the approach of unannounced, unknown, and unidentifiable police.

(d) The object seized was a repository of information enjoying special Fourth Amendment protection because of its peculiarly private nature and its owner’s efforts to preserve that privacy interest. *See State v. K.C.*, 207 So.3d 951 (Fla. App. 2016) (police chased a speeding car; it pulled into a shopping plaza and stopped; its two occupants fled; the pursuing officers

seized several cell phones left in the vehicle; a detective later retrieved the contents of one of the phones, which was password-protected; “[h]e did not obtain a search warrant because he believed that the phone was abandoned.” *Id.* at 952. “The State . . . claims that it could search the cell phone without a warrant under the abandonment exception.” *Id.* at 955. “While we acknowledge that the physical cell phone in this case was left in the stolen vehicle by the individual, and it was not claimed by anyone at the police station, its contents were still protected by a password, clearly indicating an intention to protect the privacy of all of the digital material on the cell phone or able to be accessed by it. Indeed, the password protection that most cell phone users place on their devices is designed specifically to prevent unauthorized access to the vast store of personal information which a cell phone can hold when the phone is out of the owner’s possession.” *Id.* “As the Supreme Court held [in *Riley v. California*, 573 U.S. 373 (2014), discussed in § 23.08(b) *supra*] that a categorical rule permitting a warrantless search incident to arrest of a cell phone contravenes the Fourth Amendment protection against unreasonable searches and seizures, we hold that a categorical rule permitting warrantless searches of abandoned cell phones, the contents of which are password protected, is likewise unconstitutional.” *Id.* at 956.). *See also State v. Worsham*, 227 So.3d 602 (Fla. App. 2017), summarized in § 23.25 *infra*.

(e) The police activity producing the material that the respondent contends should be suppressed involved the handling of some object belonging to the respondent which the respondent did not intentionally discard, or the invasion of some interest of the respondent that s/he did not intentionally relinquish. *See United States v. Baker*, 58 F.4th 1109 (9th Cir. 2023) (After a *Terry* frisk turned up no evidence of any weapon, an officer seized an auto key fob from the defendant’s belt; the officer asked whether the defendant had a car, and the defendant said that he did not; the officer activated the key fob, causing a car in a nearby parking to flash its lights; the officer then searched the car and seized a handgun from it. The Ninth Circuit holds that the seizure of the key fob exceeded the scope of a permissible frisk because it occurred after the officer had determined that the defendant was carrying no weapon, then rejects the government’s argument that the defendant “abandoned” the car by disclaiming that he had one: “The Government’s . . . argument fails to persuade because Baker’s statements concerning the car did not constitute abandonment of a possessory interest in the key hanging from his belt. Because abandonment is ‘a question of intent,’ we must consider the totality of the circumstances to determine whether an individual, by their words, actions, or other objective circumstances, so relinquished their interest in the property that they no longer retain a reasonable expectation of privacy in it at the time of its search or seizure. . . . ‘[N]one of our “abandonment” cases has held that mere disavowal of ownership, without more, constitutes abandonment of a person’s reasonable expectation of privacy in that property.’ . . . ¶ Based on the totality of the circumstances, we conclude that Baker did not objectively demonstrate his intent to abandon the car key. Baker never disclaimed any ownership or possessory interest in the key itself, nor did he voluntarily relinquish possession or control over the key.” *Id.* at 1118.); *and see Smith v. Ohio*, 494 U.S. 541, 543-44 (1990) (per curiam) (“a citizen who attempts to protect his private property from inspection, after throwing it on a car to respond to a police officer’s inquiry, clearly has not abandoned that property”); *United States v. Perea*, 986 F.2d 633 (2d Cir. 1993), *and* 848 F. Supp.

1101 (E.D. N.Y. 1994); *Commonwealth v. Straw*, 422 Mass. 756, 759, 665 N.E.2d 80, 83 (1996) (after the police had knocked on the door of the defendant’s home and announced that they had an arrest warrant for him, he threw a briefcase out of a second floor window into the back yard; the Massachusetts Supreme Judicial Court holds that there was no abandonment for Fourth Amendment purposes: “[T]he briefcase and its contents would be abandoned for Fourth Amendment purposes only if the defendant had voluntarily surrendered all control over the briefcase in a way which demonstrated that he had relinquished any continued expectation of privacy. . . . ¶ We conclude that the defendant intended to protect his property from any public scrutiny because he placed the property in a closed and locked briefcase and disposed of the briefcase by throwing it into the fenced-in curtilage of his family’s home, an area enjoying full Fourth Amendment protection from search by the authorities.”).

§ 23.14 POST-ARREST CUSTODIAL TREATMENT OF THE RESPONDENT

The post-arrest treatment of persons in custody is regulated by statute or caselaw in virtually all jurisdictions. The typical post-arrest procedures are described in some detail in §§ 3.03-3.12 *supra*. Counsel should be alert to the possibility that an arresting officer’s failure to follow a constitutionally or statutorily required procedure rendered the post-arrest confinement unlawful and supplies a basis for suppressing evidence obtained during the postarrest period. For example, if the police keep the respondent at the stationhouse for an undue length of time instead of bringing him or her to court expeditiously for arraignment, this will almost certainly violate local statutory requirements and may also fall afoul of the constitutional protections in this area (see § 4.28(a) *supra*), thereby tainting evidence such as confessions or lineup identifications obtained during the period of undue delay. See § 24.15 *infra*; *cf.* § 23.07 *infra*. Similarly, if the police fail to follow local statutory requirements for notifying the respondent’s parent and arranging the parent’s presence during interrogation, these omissions may render the respondent’s confessions suppressible. See § 24.14 *infra*. Police brutality during the post-arrest period (see, e.g., *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015); *Shuford v. Conway*, 666 Fed. Appx. 811 (11th Cir. 2016)) may render any subsequent confessions or consents to searches unlawful, see § 24.04(a) *infra*.

The postarrest period is often the stage at which the police conduct physical examinations, extractions of body fluids, hair, and so forth. An individual’s body is protected by the Fourth and Fourteenth Amendments’ prohibition of unreasonable searches of the person, including any procedure that is “designed to obtain information” and that involves “physically intruding on a subject’s body.” *Grady v. North Carolina*, 575 U.S. 306, 310 (2015) (per curiam). See *Birchfield v. North Dakota*, 579 U.S. 438, 455 (2016) (“our cases establish that the taking of a blood sample or the administration of a breath test is a search” for Fourth Amendment purposes). Searches that intrude into the body or breach the body wall – and perhaps other intimate personal examinations – are governed by a set of constitutional principles articulated in *Schmerber v. California*, 384 U.S. 757 (1966), and *Winston v. Lee*, 470 U.S. 753 (1985). The “individual’s interests in privacy and security are weighed against society’s interests in conducting the [search] procedure . . . [in order to determine] whether the community’s need for

evidence outweighs the substantial privacy interests at stake.” *Winston v. Lee*, 470 U.S. at 760. Compare, e.g., *Florence v. Board of Chosen Freeholders of County of Burlington*, 566 U.S. 318, 322, 330, 339 (2012) (jail’s policy of requiring that “every detainee who will be admitted to the general population . . . undergo a close visual inspection while undressed,” notwithstanding the absence of “reasonable suspicion of a concealed weapon or other contraband,” did not violate the Fourth Amendment, given the “undoubted security imperatives involved in jail supervision” and the “reasonable balance [that had been struck] between inmate privacy and the needs of the institution[]”), with *United States v. Fowlkes*, 804 F.3d 954, 958, 966 (9th Cir. 2015) (“the forcible removal of an unidentified item of unknown size from Fowlkes’ rectum [during processing at jail after a strip search] by officers without medical training or a warrant violated his Fourth Amendment rights”; “the record is devoid of any evidence from which the officers reasonably might have inferred that evidence would be destroyed if they took the time to secure a warrant and summon medical personnel. . . . ¶ Similarly, the record contains no evidence that a medical emergency existed. . . . Thus, there was time to take steps – potentially including, *inter alia*, securing medical personnel, a warrant, or both – to mitigate the risk that the seizure would cause physical and emotional trauma.”), and *People v. Hall*, 10 N.Y.3d 303, 312-13, 886 N.E.2d 162, 169, 856 N.Y.S.2d 540, 547 (2008) (“manual body cavity search” of a suspect at the police station to remove contraband observed during a lawfully conducted strip search violated the Fourth Amendment because there were no exigent circumstances preventing the police from obtaining a warrant). In the application of this balancing test, the following factors are central to an assessment of the “reasonableness,” and thereby of the constitutionality, of the search:

(a) Whether the police officers obtained a search warrant; or, if they failed to obtain a warrant, whether their failure to obtain a warrant was justified because the imminence of disappearance of the evidence made it impracticable to obtain a warrant. *Schmerber*, 384 U.S. at 770; *Winston v. Lee*, 470 U.S. at 761. See, e.g., *Missouri v. McNeely*, 569 U.S. 141, 156, 165 (2013) (“in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant”; “while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in *Schmerber*, it does not do so categorically”). Compare *Birchfield v. North Dakota*, 579 U.S. at 456, discussed in subdivision (d) of this section, with *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019) (plurality opinion) (“in . . . [the] narrow but important category of cases . . . in which the driver is unconscious and therefore cannot be given a breath test. . . , the exigent-circumstances rule almost always permits a blood test without a warrant” (*id.* at 2531) but “[w]e do not rule out the possibility that in an unusual case a defendant would be able to show that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties” (*id.* at 2539)); and see *People v. Schaufele*, 2014 CO 43, 325 P.3d 1060, 1068 (Colo. 2014) (“the trial court properly adhered to *McNeely* in suppressing evidence of Schaufele’s blood draw” because *McNeely* holds “that the Fourth Amendment requires officers in drunk-driving investigations to obtain a warrant before drawing a blood sample when they can do so without significantly undermining the efficacy of the search”); *McGuire v. State*, 493 S.W.3d 177, 197-98 (Tex. App. 2016) (“Fort Bend County had a

process in place to assist officers in obtaining warrants. It had assistant district attorneys on call at all hours. Officers, or the assistant district attorneys, could fax transmissions to any of “about 20” Fort Bend County judges at their homes to process a warrant or the officers could take a warrant request to the judges personally. Nonetheless, no effort was made to obtain a warrant by any of the seven officers at the scene. . . . ¶ . . . The State argues that it may have proven difficult to locate a judge to sign a warrant, but, without any effort to do so, the testimony is only speculation. ¶ Having examined the totality of the circumstances, we conclude that the State failed to demonstrate an exigency to excuse the requirement of a warrant.”); *Commonwealth v. Jones-Williams*, 279 A.3d 508, 518 (Pa. 2022) (holding that the Fourth Amendment was violated when police obtained a sample of an unconscious defendant’s blood from the hospital where he had been taken after a traffic accident: the blood had been drawn and preserved by hospital personnel before the arrival of the police; there was no danger of dissipation of any alcohol it may have contained, so “it is [that] clear exigent circumstances did not exist to justify the warrantless seizure of . . . [the defendant’s] blood”; the Pennsylvania Supreme Court relies in part upon its decision in *Commonwealth v. Trahey*, 658 Pa. 340, 228 A.3d 520 (Pa. 2020), which it summarizes as “applying *Mitchell* and *Birchfield* to hold that there were no exigent circumstances for a warrantless seizure of blood where a breath test could have been taken to test for the presence of alcohol and there was time to secure a warrant to test blood for controlled substances” (*id.* at 518).

(b) Whether the search was justified by a “clear indication” that incriminating evidence would be found. *Schmerber*, 384 U.S. at 770; *see Winston v. Lee*, 470 U.S. at 762 (quoting the *Schmerber* “clear indication” standard). The Court in *United States v. Montoya de Hernandez*, 473 U.S. 531, 540 (1985), subsequently glossed the “clear indication” standard as requiring nothing more than probable cause, but there remains room to argue that a particularly exacting judicial review of the probable-cause determination is appropriate in cases of physical intrusion on the body because the degree of justification required for a search always depends upon the extent of “the invasion which the search entails” (*Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967); *see, e.g., Terry v. Ohio*, 392 U.S. 1, 21 (1968); *Tennessee v. Garner*, 471 U.S. 1, 7-9 (1985)), and “intrusions into the human body” . . . perhaps implicate[] . . . [the] most personal and deep-rooted expectations of privacy” (*Winston v. Lee*, 470 U.S. at 760). *Compare Sloley v. VanBramer*, 945 F.3d 30, 33 (2d Cir. 2019) (holding that “visual body cavity searches must be justified by specific, articulable facts supporting reasonable suspicion that an arrestee is secreting contraband inside the body cavity to be searched” (emphasis added)).

(c) “[T]he extent to which the procedure may threaten the safety or health of the individual.” *Winston v. Lee*, 470 U.S. at 761. With respect to this factor it is particularly relevant to consider whether: “all reasonable medical precautions were taken”; any “unusual or untested procedures were employed”; and “the procedure was performed ‘by a physician in a hospital environment according to accepted medical practices.’” *Id.*; *Schmerber v. California*, 384 U.S. at 771-72.

(d) “[T]he extent of intrusion upon the individual’s dignitary interests in personal privacy

and bodily integrity.” *Winston v. Lee*, 470 U.S. at 761. With regard to this consideration, it is relevant to examine whether the procedure involved any “trauma, or pain” or violated “the individual’s interest in ‘human dignity.’” *Id.* at 762 n.5. *See, e.g., Maryland v. King*, 569 U.S. 435, 446, 465 (2013) (“DNA identification of arrestees is a reasonable search that can be considered part of a routine booking procedure . . . [w]hen officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody”; the Court observes that “[a] buccal swab [to obtain a DNA sample] is a far more gentle process than a venipuncture to draw blood . . . [; it] involves but a light touch on the inside of the cheek . . . [and] no ‘surgical intrusions beneath the skin’”; and there are “significant state interests in identifying . . . [the arrestee] not only so that the proper name can be attached to his charges but also so that the criminal justice system can make informed decisions concerning pretrial custody”); *compare Birchfield v. North Dakota, supra* (upholding state implied-consent laws requiring that drunk-driving arrestees submit to breath tests without a warrant because “breath tests do not ‘implicat[e] significant privacy concerns . . .’”; “the physical intrusion is almost negligible,” in that “[b]reath tests ‘do not require piercing the skin’ and entail ‘a minimum of inconvenience. . .’”; the “effort is no more demanding than blowing up a party balloon”; “there is nothing painful or strange about . . . [the procedure of taking a tube into one’s mouth, which is akin to] use of a straw to drink beverages”; “the process [does not] put into the possession of law enforcement authorities a sample from which a wealth of additional, highly personal information could potentially be obtained”; it “results in a BAC [blood alcohol concentration] reading on a machine, nothing more”; and “participation in a breath test is not an experience that is likely to cause any great enhancement in the embarrassment that is inherent in any arrest” (579 U.S. at 461-63), *with id.* (“[b]lood tests are a different matter” (*id.* at 463) and cannot be compelled without a warrant under “the search incident to arrest doctrine” (*id.* at 476) because “[t]hey ‘require piercing the skin’ and extract a part of the subject’s body”; “for many [people], the process [of having blood drawn, even for medical diagnostic purposes] is not one they relish”; and “a blood test, unlike a breath test, places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading. Even if the law enforcement agency is precluded from testing the blood for any purpose other than to measure BAC, the potential remains and may result in anxiety for the person tested.”) (*id.* at 463-64)). *See also State v. Thompson*, 886 N.W.2d 224 (Minn. 2016) (applying the *Birchfield* analysis to invalidate a statute providing that driving a vehicle constitutes implied consent to urine testing); *Mann v. City of San Diego*, 907 F.3d 1154, 1165-66 (9th Cir. 2018) (invalidating a county practice of subjecting children who are the suspected victims of abuse to physical examinations at a children’s center without a warrant or parental consent: These “medical examinations are significantly intrusive, as children are subjected to visual and tactile inspections of their external genitalia, hymen, and rectum, as well as potentially painful tuberculosis and blood tests. . . . Children are forced to undress and are inspected, by strangers, in their most intimate, private areas. . . . The County’s argument that the examinations are ‘minimally intrusive’ because they are ‘adjusted to the children’s comfort level,’ ignores that the County routinely subjects children to these objectively intimate and potentially upsetting procedures. And while the County argues that the test results ‘were used only for health-related rather than law enforcement purposes,’ the dual purposes of the search

necessarily mean that the examinations could result in the disclosure of information to law enforcement, which would further intrude on the children’s privacy.”). A prime example of a deprivation of dignity sufficient to violate the Due Process Clause occurred in *Rochin v. California*, 342 U.S. 165 (1952), when “police officers broke into a suspect’s room, attempted to extract narcotics capsules he had put into his mouth, took him to a hospital, and directed that an emetic be administered to induce vomiting.” *Winston v. Lee*, 470 U.S. at 762 n.5. *See also Sims v. Labowitz*, 885 F.3d 254, 261 (4th Cir. 2018) (having obtained a search warrant authorizing the photographing of a sexting suspect’s penis, a detective instructed the suspect to masturbate in order to raise an erection; “Although the intrusion suffered by Sims was neither physically invasive nor put him at risk of direct physical harm, the search nonetheless was exceptionally intrusive” and therefore violated the Fourth Amendment.); *United States v. Booker*, 728 F.3d 535, 537 (6th Cir. 2013) (applying the Fourth Amendment to suppress contraband that was removed from the defendant’s rectum by an emergency-room doctor to whom the police brought the defendant, “reasonably suspecting that Booker had contraband hidden in his rectum” and who “intubated Booker for about an hour, rendered him unconscious for twenty to thirty minutes, and paralyzed him for seven to eight minutes”; “Even though the doctor may have acted for entirely medical reasons, the unconsented procedure while Booker was under the control of the police officers must, in the circumstances of this case, be attributed to the state for Fourth Amendment purposes. The unconsented procedure, moreover, shocks the conscience at least as much as the stomach pumping that the Supreme Court long ago held to violate due process.”); *State v. Brown*, 932 N.W.2d 283, 296 (Minn. 2019) (holding that although officers have obtained a search warrant based upon probable cause and authorizing a physician to remove a baggie from a defendant’s rectum, “forcing . . . [him] to undergo an anoscopy against his will and under sedation in the presence of nonmedical personnel is a serious invasion of . . . [his] dignitary interests in personal privacy and bodily integrity that outweighs the State’s need to retrieve relevant evidence of drug possession”); *Ioane v. Hodges*, 939 F.3d 945, 949, 957 (9th Cir. 2019) (federal agents obtained a search warrant to investigate tax-fraud charges against a homeowner; during the lawful execution of the warrant, a female IRS agent insisted on escorting the homeowner’s wife to the bathroom and monitored her while she relieved herself; this conduct violated the wife’s “Fourth Amendment right to bodily privacy,” and “a reasonable officer in . . . [the agent’s] position would have known that such a significant intrusion into bodily privacy, in the absence of legitimate government justification, is unlawful.”); *Robinson v. Hawkins*, 937 F.3d 1128 (8th Cir. 2019) (finding that a clear Fourth Amendment violation is stated by allegations that a female police officer conducted strip and body-cavity searches of a female marijuana-possession suspect in a public parking lot within the view of male officers). “[D]ue process concerns could be involved if the police initiate[] physical violence while administering the [blood alcohol] test, refuse[] to respect a reasonable request to undergo a different form of testing, or respond[] to resistance with inappropriate force.” *South Dakota v. Neville*, 459 U.S. 553, 559 n.9 (1983) (dictum); *see also id.* at 563. *Cf. Kingsley v. Hendrickson*, 576 U.S. 389 (2015) (recognizing that the use of “excessive force” against a pretrial detainee violates Due Process).

(e) Whether there is a “compelling need” (*Winston v. Lee*, 470 U.S. at 766) for the

intrusion or examination because it represents the most accurate and effective method for detecting facts critical to the issue of guilt or innocence. Thus a blood test was approved in *Schmerber* because the test is “a highly effective means of determining the degree to which a person is under the influence of alcohol” and “the difficulty of proving drunkenness by other means . . . [rendered the] results of the blood test . . . of vital importance if the State were to enforce its drunken driving laws” (*Winston v. Lee*, 470 U.S. at 762-63 (explaining the holding in *Schmerber*)). Conversely, the Court concluded in *Winston v. Lee* that the state had not shown a “compelling need” for the surgical removal of a bullet from the defendant’s body, since the state possessed “substantial” alternative evidence of guilt (*see id.* at 765-66).

Certain types of physical examinations conducted by law enforcement investigators or consultants may run afoul of other constitutional prohibitions. Tests and examinations that involve the eliciting of “communications” from the accused (such as polygraph tests or the use of “truth serums”) – and perhaps others that require his or her willed cooperation – are impermissible in the absence of a valid waiver of the privilege against self-incrimination. *See Estelle v. Smith*, 451 U.S. 454 (1981) (psychiatric examination); *Schmerber v. California*, 384 U.S. at 764 (dictum) (“lie detector tests”); *South Dakota v. Neville*, 459 U.S. at 561 n.12 (dictum) (same); see § 12.15(a) *supra*. A physical examination that is extremely abusive, degrading, or unfair may violate the Due Process Clause of the Fourteenth Amendment. *See Rochin v. California*, 342 U.S. 165 (1952); *Taglavore v. United States*, 291 F.2d 262 (9th Cir. 1961) (alternative ground); *United States v. Townsend*, 151 F. Supp. 378 (D. D.C. 1957). *See also Kingsley v. Hendrickson*, 576 U.S. 389, 391-92 (2015) (clarifying that when “an individual detained in a jail prior to trial” brings a claim under 42 U.S.C. § 1983 against “jail officers, alleging that they used excessive force against him, in violation of the Fourteenth Amendment’s Due Process Clause,” the detainee needs not show that “the officers were *subjectively* aware that their use of force was unreasonable,” and instead needs show “only that the officers’ use of that force was *objectively* unreasonable”). Finally, to an extent that is not yet clear, tests and examinations whose reliability depends upon careful administration are impermissible if conducted in the absence of counsel and without a valid waiver of the right to counsel, following the initiation of adversary judicial proceedings. *See Winston v. Lee*, 470 U.S. at 763 n.6 (reserving the question). *Compare United States v. Wade*, 388 U.S. 218 (1967), and *Moore v. Illinois*, 434 U.S. 220 (1977), with *Gilbert v. California*, 388 U.S. 263, 267 (1967); and see §§ 24.13, 25.06 *infra*.

Part C. Police Entry and Search of Dwellings or Other Premises

§ 23.15 THE THRESHOLD ISSUE: RESPONDENT’S EXPECTATION OF PRIVACY

§ 23.15(a) Introduction to the Concept of Constitutionally Protected Interests and “Standing” To Raise Fourth Amendment Claims

In the preceding discussion of arrests and *Terry* stops, it was unnecessary to deal with the question whether the police conduct adversely affected any constitutionally protected interest of

the respondent. A respondent always has a sufficient interest in the privacy and security of his or her own body to provide a basis for challenging a seizure of the person in the form of an arrest or a *Terry* stop or to challenge a search of the person incident to an arrest or stop. *See, e.g., People v. Burton*, 6 N.Y.3d 584, 588, 848 N.E.2d 454, 457, 815 N.Y.S.2d 7, 10 (2006). When addressing issues raised by searches of dwellings or other premises, however, it becomes necessary to inquire whether the respondent has the kind of relationship to the premises that permits him or her to complain if the Constitution is violated in searching them.

Prior to *Rakas v. Illinois*, 439 U.S. 128 (1978), this inquiry was framed in terms of whether a criminal defendant or juvenile respondent had “standing” to challenge the violation. *Rakas* changed the terminology to “whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect.” *Id.* at 140. *See also United States v. Payner*, 447 U.S. 727, 731-32 (1980); *United States v. Salvucci*, 448 U.S. 83, 95 (1980); *Rawlings v. Kentucky*, 448 U.S. 98, 104-06 (1980); *United States v. Ross*, 963 F.3d 1056, 1062 (11th Cir. 2020) (en banc); *United States v. Waddell*, 840 Fed. Appx. 421, 430 (11th Cir. 2020) (reviewing the federal caselaw regarding the standing of a corporate executive to challenge a government agent’s electronic search of the publicly inaccessible areas of a website owned by the corporation: “[a]sking whether a defendant has standing to challenge a search is another way of asking whether the defendant had a ‘legitimate expectation of privacy’ in the searched website”); *Commonwealth v. DeJesus*, 489 Mass. 292, 295-96, 182 N.E.3d 280, 284 (2022) (dictum)] (under traditional standing rules that require a defendant to have a possessory interest in the place or thing searched or seized or to be present at the time of a search or seizure, a defendant whose encrypted text message was acquired from the receiving device by law enforcement officers would likely be unable to challenge the search of that device, but under *Rakas* this defendant’s reasonable expectation of privacy will enable him or her to contest the search and seizure). But *Rakas* also recognized that this terminological change would seldom affect either the nature of the traditional inquiry or its result, 439 U.S. at 138-39; and the term “standing” continues to be used in some jurisdictions as a convenient label for the *Rakas* determination that a particular respondent “is entitled to contest the legality of [the law enforcement conduct which s/he challenges as the basis for invoking the exclusionary rule],” *Rakas*, 439 U.S. at 140. *See United States v. Payner*, 447 U.S. at 731; *Byrd v. United States*, 138 S. Ct. 1518, 1530 (2018) (“The concept of standing in Fourth Amendment cases can be a useful shorthand for capturing the idea that a person must have a cognizable Fourth Amendment interest in the place searched before seeking relief for an unconstitutional search”); *Warick v. Commonwealth*, 592 S.W.3d 276 (Ky. 2019).

The historical starting point for contemporary understanding of what kinds of “interest” can claim Fourth Amendment protection is *Katz v. United States*, 389 U.S. 347 (1967). Dealing with electronic surveillance conducted by attaching a monitoring device to the outside of a public telephone booth, *Katz* famously said that “electronically listening to and recording . . . words [spoken in an area of] . . . privacy upon which [a person] . . . justifiably relied . . . constituted a ‘search and seizure’ within the meaning of the Fourth Amendment” (389 U.S. at 353). That formulation established the mantra that dominates post-*Katz* Fourth Amendment analysis: “A

‘search’ occurs when an expectation of privacy that society is prepared to consider reasonable is infringed.” (*United States v. Jacobsen*, 466 U.S. 109, 113 (1984)). See, e.g., *United States v. Karo*, 468 U.S. 705, 714 (1984); *Kyllo v. United States*, 533 U.S. 27, 32-33 (2001).

“ . . . Expectations of privacy protected by the Fourth Amendment . . . need not be based on a common-law interest in real or personal property, or on the invasion of such an interest.’ . . . Still, ‘property concepts’ are instructive in ‘determining the presence or absence of the privacy interests protected by that Amendment.’ . . . ¶ Indeed, more recent Fourth Amendment cases have clarified that the test most often associated with legitimate expectations of privacy, which was derived from the second Justice Harlan’s concurrence in *Katz v. United States*, 389 U. S. 347 (1967), supplements, rather than displaces, ‘the traditional property-based understanding of the Fourth Amendment.’” (*Byrd v. United States*, 138 S. Ct. at 1526.)

“Although the Court has not set forth a single metric or exhaustive list of considerations to resolve the circumstances in which a person can be said to have a reasonable expectation of privacy, it has explained that ‘[l]egitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.’ . . . The two concepts . . . are often linked. ‘One of the main rights attaching to property is the right to exclude others,’ and, in the main, ‘one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of the right to exclude.’” (*Id.* at 1527.)

Compare *United States v. Dixon*, 984 F.3d 814, 816, 820 (9th Cir. 2020) (holding that “the insertion of a car key into a lock on the vehicle’s door for the sole purpose of aiding the police in ascertaining its ownership or control is a ‘search’ within the meaning of the Fourth Amendment”), with *United States v. Beaudion*, 979 F.3d 1092 (5th Cir. 2020), summarized in § 23.15(d) *infra*.

But “privacy” interests not linked to the possession of any “property” are also protected. “[W]hile property rights are often informative, our cases by no means suggest that such an interest is ‘fundamental’ or ‘dispositive’ in determining which expectations of privacy are legitimate.” *Carpenter v. United States*, 138 S. Ct. 2206, 2214 n.1 (2018). After repeating that “no single rubric definitively resolves which expectations of privacy are entitled to protection” (*id.* at 2213-14), the Court in *Carpenter* observed that:

“the analysis is informed by historical understandings ‘of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted.’ . . . On this score, our cases have recognized some basic guideposts. First, that the Amendment seeks to secure ‘the privacies of life’ against ‘arbitrary power.’ . . . Second, and relatedly, that a central aim of the Framers was ‘to place obstacles in the way of a too permeating police surveillance.’” (*Id.* at 2214.)

Applying these concepts, *Carpenter* held that “the Government conducts a search under the Fourth Amendment when it accesses historical cell phone records that provide a comprehensive chronicle of the user’s past movements” (*id.* at 2211).

§ 23.15(b) Expectation of Privacy; Areas in Which a Respondent Will Ordinarily Be Deemed To Have the Requisite Expectation

In the context of searches of premises, a juvenile respondent’s “standing” will almost always depend upon showing that s/he had a legitimate expectation of privacy in the premises. This is so because the two principal kinds of constitutionally protected interests that anyone can have in real property are privacy interests and possessory interests; and a juvenile will seldom be the legal possessor of real property. Thus, as a practical matter, the test of a respondent’s right to base a suppression claim upon an unconstitutional search of premises is whether the respondent “had an interest in connection with the searched premises that gave rise to ‘a reasonable expectation [on his or her part] of freedom from governmental intrusion’ upon those premises.” *Combs v. United States*, 408 U.S. 224, 227 (1972); *Sgaggio v. Suthers*, 2023 WL 3055572, at *2-*3 (10th Cir. 2023). An individual may have “a legitimate expectation of privacy in the premises he was using and therefore . . . claim the protection of the Fourth Amendment with respect to a governmental invasion of those premises, even though his ‘interest’ in those premises might not have been a recognized property interest at common law.” *Rakas v. Illinois*, 439 U.S. at 143 (dictum). When the respondent’s relationship to searched premises is such that s/he “could legitimately expect privacy in the areas which were the subject of the search and seizure [that s/he seeks] . . . to contest,” s/he is entitled to challenge the legality of the search and seizure. *Id.* at 149 (dictum).

All of the following are examples of premises for which the respondent can claim the requisite expectation of privacy:

(i) The respondent’s home. *See, e.g., Kyllo v. United States*, 533 U.S. 27, 31 (2001) (“‘At the very core’ of the Fourth Amendment ‘stands the right of a man to retreat into his home and there be free from unreasonable governmental intrusion.’”); *Wilson v. Layne*, 526 U.S. 603, 610 (1999) (“The Fourth Amendment embodies th[e] centuries-old principle of respect for the privacy of the home”); *United States v. Karo*, 468 U.S. 705, 714 (1984) (“[a]t the risk of belaboring the obvious, private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable”); *United States v. Johnson*, 457 U.S. 537, 552 n.13 (1982) (“the Fourth Amendment accords special protection to the home”); *Collins v. Virginia*, 138 S. Ct. 1663, 1670 (2018); *Payton v. New York*, 445 U.S. 573, 589-90 (1980); *Minnesota v. Carter*, 525 U.S. 83, 99 (1998) (Justice Kennedy, concurring) (“it is beyond dispute that the home is entitled to special protection as the center of the private lives of our people”); *Commonwealth v. Porter P.*, 456 Mass. 254, 260-61 & n.5, 923 N.E.2d 36, 44-45 & n.5 (2010) (juvenile had a reasonable expectation of privacy in, and standing to challenge a search of, the “room that the juvenile and his mother shared at the shelter,” which was “their

home” even though it was “a transitional living space,” and even though “he did not own the room,” “he was limited in his use of the room,” and “shelter staff members had a master key and could enter the room for ‘professional business purposes’”; *cf. United States v. Segoviano*, 30 F.4th 613, 623 (7th Cir. 2022), quoted more fully in § 23.11(a) *supra* (“[a]partments within a building are individual homes entitled to the same protection as homes on a street”). *See also State v. Brown*, 216 N.J. 508, 517, 529, 535-36, 83 A.3d 45, 50, 57, 61 (2014) (“in determining whether a defendant has a possessory or proprietary interest in a building or residence and therefore standing to object to a warrantless search” under the New Jersey Constitution when the state asserts that “the building was abandoned or, alternatively, . . . [that the defendant was a] trespasser[],” “the focus must be whether, in light of the totality of the circumstances, a police officer had an objectively reasonable basis to conclude that a building was abandoned or a defendant was a trespasser before the officer entered or searched the home”; “the record supports the trial court’s finding that the State did not meet its burden of . . . establish[ing] that the property [“a dilapidated row house in the City of Camden”], although in decrepit condition [“with one or more windows broken, the interior in disarray, the front door padlocked, and the back door off its hinges but propped closed”], was abandoned or that defendants were trespassers”; “The constitutional protections afforded to the home make no distinction between a manor estate in an affluent town and a ramshackle hovel in an impoverished city.”). *Compare United States v. Knights*, 534 U.S. 112, 114, 119-20, 121 (2001) (an individual who was placed on probation pursuant to a California statute that establishes a probation condition that the probationer will “[s]ubmit his . . . person, property, place of residence, vehicle, personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer,” and who signed a probation order agreeing to abide by this condition, had a “significantly diminished . . . reasonable expectation of privacy” in his home and was subject to a search of the home based on “reasonable suspicion that [the] probationer . . . is engaged in criminal activity”), *with United States v. Dixon*, 984 F.3d 814, 818, 822 (9th Cir. 2020) (when a parolee is “subject to a warrantless, suspicionless search condition” this “authority is not limitless”; “to conduct a search of property pursuant to this condition, the individual subject to it must ‘exhibit[] a sufficiently strong connection to [the property in question] to demonstrate “control” over it.’ . . . ¶ We hold that before conducting a warrantless search of a vehicle pursuant to a supervised release condition, law enforcement must have probable cause to believe that the supervisee owns or controls the vehicle to be searched.”), *and Jones v. State*, 282 Ga. 784, 787-88, 653 S.E.2d 456, 459 (2007) (*Knights* rule is inapplicable because the state has not identified any “valid law, legally authorized regulation, or sentencing order” that limited the defendant’s “right not to have his home searched without a warrant” as a result of his probationary status and that provided him with adequate “notice of that deprivation of rights”), *and Brennan v. Dawson*, 752 Fed. Appx. 276, 284 (6th Cir. 2018) (dictum) (“Brennan was subject to at least some warrantless intrusions because his probation required him to take randomly administered breath tests on demand. But that condition did not expose his home to warrantless searches [A] court may subject a probationer to warrantless searches of his home if it so chooses, yet Brennan’s probation contains no such condition. We infer from the lack of such condition that Brennan was not subject to warrantless searches of his home. Indeed, Brennan was as secure in his home as a non-probationer.”), *and United States v. Lara*, 815 F.3d

605, 607, 611-12 (9th Cir. 2016) (the probation agreement that the defendant signed, authorizing the state to search his “person and property, including any residence, premises, [or] container,” did not authorize the probation officers’ “warrantless, suspicionless searches of his cell phone” during a search of his home; the defendant’s “privacy interest in his cell phone and the data it contained . . . was substantial in light of the broad amount of data contained in, or accessible through, his cell phone,” and the probation agreement did not “clear[ly] and unequivocal[ly] . . . authoriz[e] . . . cell phone searches”), and *White v. Commonwealth*, 2005 WL 2807242, at *4 (Ky. App. 2005) (“the record is void of any evidence suggesting the police officer was aware of the consent form [executed by White as a condition of his participation in a drug court program and allowing any law enforcement agency to search his person, automobile, or residence pursuant to drug-court procedures] prior to the search. . . . ¶ . . . [W]e now hold that a search condition cannot justify an otherwise unlawful search if a law enforcement officer was unaware of the condition at the time the search was conducted. Accordingly, we are of the opinion the search of appellant’s trunk was unlawful and the circuit court erred by denying appellant’s motion to suppress the evidence seized therefrom.”), and *People v. Johns*, 342 Ill. App. 3d 297, 301-03, 795 N.E.2d 433, 438-39, 277 Ill. Dec. 66, 71-72 (2003) (“It is implicit in the Court’s statements in *Knights* and *Griffin* that probation searches are limited by some reasonable and legally protectible privacy interest. . . . ¶ By mandating that we balance the government’s interests against the privacy interests of a probationer, and by declaring the individual’s privacy interests to be diminished, but not extinguished, the Supreme Court has made it clear that in the case of searches pursuant to probation conditions, the ordinary search requirements are to be relaxed but not eliminated. ¶ Unlike in every suspicionless search [case in which the search was] approved . . . , law enforcement authorities [here] entered an individual’s home. We have considered the totality of the circumstances, balancing the degree to which the search intruded upon defendant’s privacy and the degree to which the intrusion is needed for the promotion of legitimate governmental interests. Based upon the unique facts and circumstances of this case, and given the holdings in *Knights* and *Griffin*, we find that some reasonable suspicion was required to justify the search of the dresser drawer in defendant’s bedroom.”), and *State v. Bennett*, 288 Kan. 86, 98, 200 P.3d 455, 462-63 (2009) (“The Kansas Legislature has not authorized suspicionless searches of probationers or parolees. Kansas’ procedures for parole supervision specifically inform parolees that they have an expectation that searches will not be conducted unless an officer has a (reasonable) suspicion that such a search is necessary to enforce the conditions of parole. Put another way, parolees in Kansas have an expectation that they will not be subjected to suspicionless searches. ¶ It logically follows from this conclusion that because probationers have a greater expectation of privacy than parolees, searches of probationers in Kansas must also be based on a reasonable suspicion. Thus, the condition of Bennett’s probation subjecting him to random, nonconsensual, suspicionless searches violates his rights under the Fourth Amendment and Kansas Constitution Bill of Rights.”), and *State v. Ochoa*, 792 N.W.2d 260, 291 (Iowa 2010) (relying on the state constitution to hold that a parolee had an undiminished privacy right to challenge a police search of his motel room).

(ii) An unleased room that is occupied from time to time by the respondent, in rental property owned by the respondent’s parents. *Murray v. United States*, 380 U.S. 527 (1965) (per

curiam), *vacating* 333 F.2d 409 (10th Cir. 1964); *People v. Hill*, 153 A.D.3d 413, 416, 60 N.Y.S.3d 23, 27 (N.Y. App. Div., 1st Dep’t 2017) (the defendant had standing to challenge a police search of his uncle’s “apartment and surrounding curtilage” because the defendant “had stayed with his [uncle’s] family ‘on and off’ since he was five years old,” and, “although [the] defendant did not have his own room in the apartment and slept on the couch, he stored all of his clothes in the living room, and received mail at the apartment”). *See also United States v. Murphy*, 516 F.3d 1117, 1124 (9th Cir. 2008), *superseded on another issue by Fernandez v. California*, 571 U.S. 292 (2014) (the rent-paying lessee of various storage units “testified that he allowed Murphy to stay in the storage units [rent-free] . . . and gave him a key that opened all of the units”; “Murphy’s living situation was unconventional, but the record shows that the storage units were the closest thing that he had to a residence. He was sleeping in unit 14 and storing his belongings in unit 17. For the purposes of the Fourth Amendment, this is sufficient to create an expectation of privacy and thus the authority to refuse a search.”).

(iii) A home that the respondent is visiting as a social guest at the invitation of the homeowner or another resident. *See Minnesota v. Carter*, 525 U.S. at 109 n.2 (Justice Ginsburg, dissenting) (explaining that although the Court majority ruled that there was no reasonable expectation of privacy under the facts of the case, it is “noteworthy that five Members of the Court [one of whom joined the majority opinion and also issued a concurring opinion, one of whom concurred in the judgment, and three of whom dissented] would place under the Fourth Amendment’s shield, at least, ‘almost all social guests’” (quoting *id.* at 99 (Justice Kennedy, concurring))); *In the Matter of Welfare of B.R.K.*, 658 N.W.2d 565, 572-78 (Minn. 2003) (a juvenile who was one of fourteen participants in a post-graduation evening drinking party at the home of a friend was “was a short-term social guest” entitled to Fourth Amendment protection even though he “does not contend that he was an overnight guest” and although the party was not authorized by the friend’s parents); *State v. Talkington*, 301 Kan. 453, 483, 345 P.3d 258, 278-79 (2015) (defendant had “a reasonable expectation of privacy as a social guest in his host’s residence,” which extended to “standing to assert a reasonable, subjective expectation of privacy in the backyard, *i.e.*, curtilage, of his host’s residence”). *See also Minnesota v. Olson*, 495 U.S. 91, 98 (1990) (accused had a reasonable expectation of privacy in a friend’s duplex in which he was “[s]taying overnight” as a “houseguest”); *Jones v. United States*, 362 U.S. 257 (1960), as explained in *Rakas v. Illinois*, 439 U.S. at 141, and *Minnesota v. Carter*, 525 U.S. at 89-90 (majority opinion). *Cf. id.* at 102 (Justice Kennedy, concurring) (although, “as a general rule, social guests will have an expectation of privacy in their host’s home,” “[t]hat is not the case before us” in that “respondents have established nothing more than a fleeting and insubstantial connection with . . . [the] home,” they were using the “house simply as a convenient processing station” for packaging cocaine, they had never “engaged in confidential communications with [the homeowner] . . . about their transaction,” they “had not been to . . . [the] apartment before, and [they]. . . left it even before their arrest”).

(iv) A hotel room in which the respondent is staying, however temporarily or sporadically. *Stoner v. California*, 376 U.S. 483 (1964); *United States v. Jeffers*, 342 U.S. 48 (1951) (hotel room rented by defendant’s aunts, who had given defendant a key and permission

to use the room at will; he “often entered the room for various purposes” (*id.* at 50)). *See also United States v. Ramos*, 12 F.3d 1019 (11th Cir. 1994) (the lessee of a condominium had an expectation of privacy in his condo unit even after the check-out time for moving to another unit had passed; a briefcase which he left in the old unit and which was collected together with his other belongings by cleaners in anticipation of occupancy by a new lessee was not “abandoned” but remained protected by the Fourth Amendment against warrantless search by state police); *State v. M.B.W.*, 276 So.3d 501 (Fla. App. 2019) (a male juvenile who accompanied a female juvenile while she rented a hotel room under an alias and who accompanied her into it had an expectation of privacy in the room); *State v. Leonard*, 943 N.W.2d 149, 152, 157-58 (Minn. 2020) (“We hold that the law enforcement officers conducted a search under Article I, Section 10 of the Minnesota Constitution when they examined the [hotel’s] guest registry. We hold further that law enforcement officers must have at least a reasonable, articulable suspicion to search a guest registry.”; “In *State v. Jorden*, [160 Wash.2d 121, 156 P.3d 893 (2007)], the Supreme Court of Washington held that the Washington Constitution afforded individuals a reasonable expectation of privacy in their guest registry information because ‘an individual’s very presence in a motel or hotel may in itself be a sensitive piece of information.’ . . . The court noted that the anonymity of hotels may provide necessary space for people engaged in consensual – but deeply private – relationships or confidential business negotiations, for celebrities, and for people experiencing domestic violence who hope to ‘remain[] hidden from an abuser.’ . . . ¶ We find the reasoning in *Jorden* persuasive. . . . The particular role that hotels play in society makes a guest’s presence at that location sensitive information that warrants privacy protections. To conclude otherwise would deprive Minnesotans of rights that we have the duty to safeguard.”).

(v) In the case of respondents who are employed, their office or work area, even if it is shared with other employees, *O’Connor v. Ortega*, 480 U.S. 709, 714-19 (1987) (public employee’s office); *United States v. Lefkowitz*, 285 U.S. 452 (1932) (business office); *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 311-15 (1978) (employees’ work areas in factory building); *Tidwell v. State*, 285 Ga. 103, 674 S.E.2d 272 (2009) (a wooden locker maintained by a livestock auction employee just outside his workplace sleeping quarters); *Serpas v. Schmidt*, 1983 WL 2192 (N.D. Ill. 1983) (grooms’ living quarters at a public racetrack); *Mancusi v. DeForte*, 392 U.S. 364 (1968) (union office shared by defendant and other union officials); *Villano v. United States*, 310 F.2d 680 (10th Cir. 1962), *limited on an unrelated point, United States v. Price*, 925 F.2d 1268 (10th Cir. 1991) (employee’s desk in retail store); *United States v. Blok*, 188 F.2d 1019 (D.C. Cir. 1951) (employee’s desk in government office); *United States v. Shelton*, 997 F.3d 749, 764 (7th Cir. 2021) (the desk and office of the administrative assistant to a township trustee; this office was the antechamber “to the inner sanctum of the Trustee herself, on the top floor of a secure building that largely contained administrative offices. Only four employees worked on that floor. Although she could not exclude [the] Trustee . . . from her office, . . . the assistant had a door that she could and did close to other employees She kept personal items in her office, and turned down papers on her desk when she wished to keep them private from visitors entering the space.”).

(vi) “Public” places in which it is customary to allow temporary exclusive occupancy

with a measure of privacy, such as taxicabs, *Rios v. United States*, 364 U.S. 253, 262 n.6 (1960); *but cf. Rakas v. Illinois*, 439 U.S. at 149 n.16 (dictum), pay telephone booths, *Katz v. United States*, 389 U.S. 347 (1967), public lavatory cabinets, *Bielicki v. Superior Court*, 57 Cal. 2d 602, 371 P.2d 288, 21 Cal. Rptr. 552 (1962); *People v. Mercado*, 68 N.Y.2d 874, 501 N.E.2d 27, 508 N.Y.S.2d 419 (1986); *People v. Vinson*, 161 A.D.3d 493, 77 N.Y.S.3d 26 (N.Y. App. Div., 1st Dep’t 2018), and rented lockers in commercial storage facilities, *United States v. Karo*, 468 U.S. at 720 n.6 (dictum). *Compare Hudson v. Palmer*, 468 U.S. 517 (1984); *Bell v. Wolfish*, 441 U.S. 520, 556-58 (1979).

For discussion of privacy rights in the interior of automobiles, see § 23.23 *infra*.

§ 23.15(c) “Curtilage” and “Open Fields”; Multifamily Apartment Complexes

The “curtilage” of a home – that is, “the area immediately surrounding a dwelling house,” *United States v. Dunn*, 480 U.S. 294, 300 (1987) – is treated as “part of the home itself for Fourth Amendment purposes,” *Oliver v. United States*, 466 U.S. 170, 180 (1984), and thus receives the same “Fourth Amendment protections,” *id. Accord, Florida v. Jardines*, 569 U.S. 1, 6 (2013) (“the curtilage of the house . . . enjoys protection as part of the home itself”); *United States v. Banks*, 60 F.4th 386, 387 (7th Cir. 2023) (“[A] front porch – part of a home’s so-called curtilage – receives the same protection as the home itself. And no exception to the warrant requirement saves the officers’ actions here [in making a warrantless entry onto the porch to arrest the homeowner with probable cause to believe that he was a felon in possession of a gun]. We therefore reverse the district court’s denial of Banks’s motion to suppress.”); *State v. Kruse*, 306 S.W.3d 603 (Mo. App. 2010).

In determining whether any particular area is or is not within the curtilage, “the extent of the curtilage is determined by factors that bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself. . . . [C]urtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by. . . . [T]hese factors are useful analytic tools . . . to the degree that, in any given case, they bear upon the centrally relevant consideration – whether the area in question is so intimately tied to the home itself that it should be placed under the home’s ‘umbrella’ of Fourth Amendment protection.” *United States v. Dunn*, 480 U.S. at 300-01. Applying this four-part analysis in *Dunn*, the Court concluded that “the area near a barn, located approximately 50 yards from a fence surrounding a ranch house” (*id.* at 296) and “60 yards from the house itself” (*id.* at 302) “lay outside the curtilage of the ranch house” (*id.* at 301) and was not entitled to Fourth Amendment protection because (i) “the substantial distance” from not only the house but also the fence surrounding the house “supports no inference that the barn should be treated as an adjunct of the house,” *id.* at 302; (ii) “[v]iewing the physical layout of respondent’s ranch in its entirety, . . . it is plain that the fence surrounding the residence serves to demark a specific area of land immediately adjacent to the house that is readily identifiable as part and

parcel of the house,” and the area in question “stands out as a distinct portion of respondent’s ranch, quite separate from the residence” (*id.*); (iii) “the law enforcement officials possessed objective data indicating . . . that the use to which the barn was being put could not fairly be characterized as so associated with the activities and privacies of domestic life that the officers should have deemed the barn as part of respondent’s home” (*id.* at 302-03); and (iv) “[r]espondent did little to protect the barn area from observation by those standing in the open fields . . . [since] the fences were designed and constructed to corral livestock, not to prevent persons from observing what lay inside the enclosed areas,” *id.* at 303. Compare *Collins v. Virginia*, 138 S. Ct. 1663 (2018) (holding that a police officer made a warrantless and hence unconstitutional entry into the curtilage of a home when he walked down the driveway adjacent to a residence and inspected a tarp-covered motorcycle which he had reason to believe was stolen and had outrun police in two traffic-violation incidents; the location is described by the Court as follows: “[T]he driveway runs alongside the front lawn and up a few yards past the front perimeter of the house. The top portion of the driveway that sits behind the front perimeter of the house is enclosed on two sides by a brick wall about the height of a car and on a third side by the house. A side door provides direct access between this partially enclosed section of the driveway and the house. . . . [T]he motorcycle . . . was parked inside this partially enclosed top portion of the driveway that abuts the house.” *Id.* at 1670-71. “[T]he Fourth Amendment’s protection of curtilage has long been black letter law.’ . . . [T]he Court considers curtilage – ‘the area “immediately surrounding and associated with the home” – to be “part of the home itself for Fourth Amendment purposes.”’ . . . ¶ When a law enforcement officer physically intrudes on the curtilage to gather evidence, a search within the meaning of the Fourth Amendment has occurred. . . . Such conduct thus is presumptively unreasonable absent a warrant.” *Id.* at 1670.). Cf. *United States v. Jones*, 893 F.3d 66 (2d Cir. 2018), distinguishing *Collins* and upholding a warrantless search of a truck parked in a multi-family parking lot: “The lot was a common area accessible to other tenants of 232 Westland Street and to tenants of a multi-family building next door, and therefore Jones could not reasonably expect that it should be treated as part of his private home.” *Id.* at 72.

In the urban context, application of the four-part test of *United States v. Dunn* will ordinarily produce the result that “curtilage” is coextensive with a fenced yard. See *Oliver v. United States*, 466 U.S. at 182 n.12 (“for most homes, the boundaries of the curtilage will be clearly marked”); *California v. Ciraolo*, 476 U.S. 207, 212-13 (1986) (treating the area within a fenced yard as curtilage under an analysis that anticipates *Dunn*’s); *Estate of Smith v. Marasco*, 430 F.3d 140, 156-58 (3d Cir. 2005); *Lucibella v. Town of Oak Ridge*, 2023 WL 2822126 (11th Cir. 2023); *People v. Morris*, 126 A.D.3d 813, 814, 4 N.Y.S.3d 305, 307 (N.Y. App. Div., 2d Dep’t 2015); *People v. Theodore*, 114 A.D.3d 814, 816-17, 980 N.Y.S.2d 148, 151 (N.Y. App. Div., 2d Dep’t 2014). This is consistent with pre-*Dunn* caselaw. See, e.g., *Weaver v. United States*, 295 F.2d 360 (5th Cir 1961); *Hobson v. United States*, 226 F.2d 890 (8th Cir. 1955); *State v. Parker*, 399 So.2d 24 (Fla. App. 1981), *review denied*, 408 So.2d 1095 (Fla. 1981); *People v. Pakula*, 89 Ill. App. 3d 789, 411 N.E.2d 1385, 44 Ill. Dec. 919 (1980). Separate closed structures on residential property – garages, for example – are generally held protected by the Fourth Amendment without reference to the ordinary indicia of “curtilage,” such as fencing in. *Taylor v.*

United States, 286 U.S. 1 (1932); *see, e.g., Mendez v. County of Los Angeles*, 815 F.3d 1178, 1187 (9th Cir. 2016), *aff'd after remand*, 897 F.3d 1067 (9th Cir. 2019); *State v. Daugherty*, 94 Wash. 2d 263, 616 P.2d 649 (1980). When properties are unfenced or only partially fenced, the rule of thumb is that police may enter walkways leading to a front door but not into side- and backyard areas. *See, e.g., Morgan v. Fairfield County*, 903 F.3d 553, 563 (6th Cir. 2018) (“[T]he officers’ right to enter the property like any other visitor comes with the same limits of that ‘traditional invitation’: ‘typically . . . approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave.’ . . . Certainly, ‘[a] visitor cannot traipse through the garden, meander into the backyard, or take other circuitous detours that veer from the pathway that a visitor would customarily use.’ . . . Neither can the police.”); *Florida v. Jardines*, 569 U.S. 1 (2013) (the activity of the police in bringing a narcotics-sniffing dog onto the front porch of a residence constitutes a search within the curtilage and, in the absence of a warrant, violates the Fourth Amendment); *Bovat v. Vermont*, 141 S. Ct. 22, 22 (2020) (statement of Justice Gorsuch respecting the denial of certiorari) (“*Jardines* acknowledged that a doorbell or knocker on the front door often signals a homeowner’s consent allowing visitors to ‘approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave.’ . . . The Court recognized, too, that law enforcement agents, like everyone else, may take up this ‘implied license’ to approach. But, the Court stressed, officers may not abuse the limited scope of this license by snooping around the premises on their way to the front door. Whether done by a private person or a law enforcement agent, that kind of conduct is an unlawful trespass – and, when conducted by the government, it amounts to an unreasonable search in violation of the Fourth Amendment.”); *State v. Chute*, 908 N.W.2d 578, 586-87 (Minn. 2018) (“In this case, the district court found that Chute had given members of the public an implied license to access his land to seek ‘a back door entrance to the house and garage’ by using the driveway and turnaround area on which the camper was parked. The court supported this factual finding by noting that the driveway was a ‘well-worn dirt area’ that exhibited a ‘definable pathway,’ and that two other vehicles were parked near the camper. . . . ¶ Because Chute had impliedly granted the public access to his backyard to seek ‘a back door entrance to the house and garage,’ we must next consider whether the officer acted within the scope of this implied license while on the property. The scope of the implied license ‘is limited not only to a particular area but also to a specific purpose.’ . . . The license, therefore, has a spatial limitation and a purpose limitation. . . . ¶ Viewed objectively, the evidence demonstrates that the officer’s purpose for entering the curtilage was to conduct a search. . . . [T]he camper was parked at the end of Chute’s driveway, past the house, in the back corner of Chute’s backyard. To inspect the camper, the officer had to deviate substantially from the route that would take him to the back door of the house or to the garage. The officer walked directly to the camper, inspected it thoroughly, both inside and out, and only turned back toward the house when he was satisfied that the camper was stolen. Anyone observing the officer’s actions objectively would conclude that his purpose was not to question the resident of the house, but to inspect the camper, ‘which is not what anyone would think he had license to do.’ . . . ¶ . . . ¶ In sum, under *Jardines*, the officer’s implied license to enter Chute’s property was limited to what ‘any private citizen might do’ when visiting another’s property. . . . Just as a private citizen would not be impliedly invited to explore Chute’s backyard and snoop in a parked camper, the

officer had no right to inspect the camper without attempting to contact Chute first.”); *French v. Merrill*, 15 F.4th 116 (1st Cir. 2021) (Officers having probable cause to arrest French went to the front door of his rooming house at 5:00 a.m. and knocked; no one answered; an officer walked down the next-door neighbor’s driveway and shined a flashlight into a basement window of the rooming house, whereupon someone inside covered the window and turned off the basement lights; the officer returned to the front door and knocked again, then observed that “more lights were quickly being turned off in the residence. Window coverings which looked like blankets were drawn over the open windows as well.” *Id.* at 129. “Instead of honoring the clear signals that the occupants of the home did not wish to receive visitors, . . . [one officer] walked back onto the property and, peering through a drawn window covering, saw that a light remained on in the kitchen.” *Id.* He and another officer next “walked through the curtilage along the narrow strip of grass and located what they had reason to believe was French’s bedroom window. They knocked forcefully on the window frame and yelled for French to come out and talk. . . . [One officer] also shined his light into the bedroom. At the same time, . . . [a third officer] returned to the front porch, knocked on the front door, and told French to come outside.” *Id.* A divided Court of Appeals holds that these repeated entries of the curtilage of the rooming house violated the clearly established “principle at the heart of *Jardines*: the scope of the knock and talk exception to the warrant requirement is controlled by the implied license to enter the curtilage.” *Id.* at 133.); *Brennan v. Dawson*, 752 Fed. Appx. 276, 283 (6th Cir. 2018) (dictum) (“[a] police officer simply cannot linger and continue to search the curtilage of the home if his knocking at the front door goes unanswered”); *People v. Frederick*, 500 Mich. 228, 895 N.W.2d 541 (2017) (Narcotics enforcement officers knocked at the front doors of two homes at 4:00 a.m. and 5:00 a.m. respectively and asked the homeowners about marijuana butter that the officers suspected the homeowners possessed. After *Miranda* warnings, each homeowner consented to a search of the residence, which turned up marijuana. These activities amounted to a Fourth Amendment search and invalidated the resulting seizures, unless the consents were found to be attenuated from the warrantless searches. “We believe, as the Supreme Court suggested in *Jardines*, that the scope of the implied license to approach a house and knock is time-sensitive. . . . 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. . . . [A] knock and talk is not considered a governmental intrusion precisely because its contours are defined by what *anyone* may do. . . . When the officers stray beyond what any private citizen might do, they have strayed beyond the bounds of a permissible knock and talk; in other words, the officers are trespassing. That is what happened here.” *Id.* at 238-39, 895 N.W.2d at 546. “[W]e next turn to whether the police were seeking ‘to find something or to obtain information,’ such that the Fourth Amendment is implicated. . . . A police officer walking through a neighborhood who takes a shortcut across the corner of a homeowner’s lawn has trespassed. Yet that officer has not violated the Fourth Amendment because, without some information-gathering, no search has occurred. . . . In these cases, however, the police were seeking information; therefore, their conduct implicated the Fourth Amendment. . . . The officers approached each house to obtain information about the marijuana butter they suspected each defendant possessed. . . . *Id.* at 240-41, 895 N.W.2d at 547. “That the officers intended to get permission to search for the marijuana butter does not alter our analysis. . . . ¶ What matters is

that they sought to gather information by way of a trespass on Fourth-Amendment-protected property.” *Id.* at 241-42, 895 N.W.2d at 547-48.); *Commonwealth v. Ousley*, 393 S.W.3d 15, 27-29 (Ky. 2013) (trash cans, which were “sitting on the driveway very near the home,” were within the “curtilage” even though “the area in question” was not “enclosed by a fence”: “The home was in an urban area that does not lend itself to enclosures” and a resident’s decision to forego fencing “(for example, because the lot on which his home sits is small) cannot deprive him of having curtilage surrounding his home”); *United States v. Alexander*, 888 F.3d 628 (2d Cir. 2018) (backyard area in front of a shed a few steps from the back door of defendant’s residence, accessible from the street by traversing defendant’s driveway, which he used for parking, barbecues and relaxation is Fourth-Amendment protected curtilage); *State v. Chute*, 908 N.W.2d at 585 (applying the four-part test of *United States v. Dunn*, *supra*, to conclude that “the area of Chute’s backyard on which the [stolen] camper [trailer] was parked” was within the curtilage of Chute’s home because “[t]he part of Chute’s dirt driveway on which the trailer was parked is in close proximity to his suburban home”; “[a]erial photographs admitted at trial show that the backyard and dirt driveway are bordered on three sides by a tall, opaque fence on the east side, quite close to where the trailer was parked, a wooded area with a pond to the south, and trees to the west side”; “the driveway and turnaround were ‘regularly used by cars carrying persons seeking a back door entrance to the house and garage,’” and “Chute stored scrap materials near the turnaround,” and “in the center of th[e] turnaround was a fire pit with a horizontal log upon which persons could sit to enjoy a fire,” and “[t]hese activities are closely related to the home and associated with the privacies of life”; and, although “the dirt driveway where the camper was parked is visible from County Road D if an observer stands at its northern end and looks directly down it[,] . . . [t]he curtilage of a home . . . need not be completely shielded from public view”); *State v. Kruse*, 306 S.W.3d 603, 611-12 (Mo. App. 2010) (“The State argues that Kruse did not have an expectation of privacy in his backyard. The State notes that there were no gates or objects to hinder entrance into the backyard. Nothing obstructed a person’s view into the back yard except the buildings. There appears to be a well-travelled route from the driveway to the rear of the property, marked by large pieces of wood resembling railroad ties. The two ‘no trespassing’ signs were posted on doors, which the State says implies that access was denied to the interior of the residence or shed without permission. ¶ We cannot agree that there was no expectation of privacy in the backyard. The officers arrived at the Kruse residence after midnight. No exterior lights were on to welcome the public to come on the premises. The entrance to the residence is in the front yard. The ‘no trespassing’ signs would ordinarily be understood to assert a privacy interest on the entire property. The back yard could not be seen from the road and was not in plain view. The back yard and backdoor were enclosed by trees on three sides and the home on the fourth side. ¶ By entering into the back yard, the police were entering onto property as to which there was a privacy interest protected by the Fourth Amendment”). *Cf. State v. Kuuttila*, 965 N.W.2d 484, 486-87 (Iowa 2021) (applying *State v. Wright*, 961 N.W.2d 396 (Iowa 2021), in which “we held law enforcement officers conducted an unreasonable and thus unconstitutional seizure and search in violation of article I, section 8 of the Iowa Constitution when they seized and searched garbage bags left out for collection without first obtaining a warrant”; municipal ordinances applicable in both cases “prohibited any person, other than an authorized trash collector, from taking or collecting trash left out for collection,” and these

ordinances, “like similar municipal ordinances, . . . [are] positive evidence of a societal expectation that trash left out shall remain private and not disturbed by anyone other than an authorized collector”; a police officer is “not a licensed [waste] collector,” and therefore the officer in each case “violated this expectation of privacy in seizing and searching . . . [the defendant’s] trash without a warrant”).

With respect to tenants living in multifamily apartment complexes, some courts have viewed their “curtilage” as very limited. *See, e.g., Commonwealth v. Thomas*, 358 Mass. 771, 774-75, 267 N.E.2d 489, 491 (1971). However, if the building is secured against entry by the general public, then any of the tenants may be able to rely upon the collective expectation of privacy in the corridors and hallways (*e.g., United States v. Heath*, 259 F.3d 522 (6th Cir. 2001); *United States v. Carriger*, 541 F.2d 545, 549-52 (6th Cir. 1976); *United States v. Booth*, 455 A.2d 1351 (D.C. 1983); *see also Hicks v. Scott*, 958 F.3d 421, 432 (6th Cir. 2020) (officers’ warrantless entry into the separate foyer, stairwell and upstairs hallway of a duplex residence consisting of two units, upstairs and downstairs, provides the basis for a Fourth Amendment claim of illegal entry: “[T]here is no documentary or testimonial evidence to support the view that these areas were anything other than interior portions of the rear apartment unit. ¶ The layout of the duplex further evidences that the . . . [officers] entered a constitutionally protected area. The only kitchen and bathroom associated with the rear unit are located on the second floor and are connected to the third-floor bedroom via the landing. It would be anomalous to find – let alone at summary judgment – that the conduit between these core living spaces is a public corridor, especially when there is evidence that the foyer, stairwell, and landing were controlled and used by only one person: . . . [the upstairs resident]. Moreover, even if the foyer and stairwell could be described as distinct from the core living spaces, they are still ‘intimately tied’ to the apartment’s interior.”); *United States v. Whitaker*, 820 F.3d 849, 853-54 (7th Cir. 2016) (although the defendant, who lived in a multi-apartment building with “closed hallways,” did not have “a reasonable expectation of complete privacy in the hallway,” this “does not also mean that he had no reasonable expectation of privacy against persons in the hallway snooping into his apartment using sensitive devices not available to the general public”; accordingly, the “police engaged in a warrantless search within the meaning of the Fourth Amendment when they had a drug-sniffing dog come to the door of the apartment and search for the scent of illegal drugs”); *accord, People v. Bonilla*, 2018 IL 122484, 120 N.E.3d 930 (2018)), and the basement (*e.g., Garrison v. State*, 28 Md. App. 257, 345 A.2d 86 (1975)). *Compare McDonald v. United States*, 335 U.S. 451 (1948), with *United States v. Dunn*, 480 U.S. 294 (1987). Similarly, if the back yard to the building is not accessible to the general public, and particularly if it is surrounded by a fence, the back yard area may be “sufficiently removed and private in character that [a tenant] . . . could reasonably expect privacy,” *Fixel v. Wainwright*, 492 F.2d 480, 484 (5th Cir. 1974). *See also State v. Howard*, 169 Idaho 379, 381, 496 P.3d 865, 867 (2021) (“Howard appeals from the denial of a motion to suppress evidence obtained after a police drug-sniffing dog put its nose through the open window of a car Howard had been driving. Howard argues the intrusion of the dog into the physical space of the car was a trespass, and therefore, an unlawful search under the common law trespassory test articulated in *United States v. Jones*, 565 U.S. 400 (2012). We agree . . . [and] reverse the denial of Howard’s motion to suppress.” [Jones is summarized in the

following paragraph of this manual.]); *United States v. Burston*, 806 F.3d 1123, 1125, 1127-28 (8th Cir. 2015) (even though the defendant lived in an “eight-unit apartment building,” and even though the lawn in front of his apartment window “was not in an enclosed area” and “the public [was not] physically prevented from entering or looking at that area other than by the physical obstruction of . . . [a] bush,” the court nonetheless classifies the area as curtilage under the four-part analysis of *United States v. Dunn*, *supra*, because the area “was in close proximity to Burston’s apartment – six to ten inches”; “Burston made personal use of the area by setting up a cooking grill between the door and his window”; and “[o]ne function of the bush,” which was “planted in the area in front of the window, [and] which partially covered the window,” “was likely to prevent close inspection of Burston’s window by passersby”). Counsel urging these results can argue that, in light of the established principle that “the Fourth Amendment accords special protection to the home,” *United States v. Johnson*, 457 U.S. 537, 552 n.13 (1982); *see, e.g., Groh v. Ramirez*, 540 U.S. 551, 559 (2004); *Kyllo v. United States*, 533 U.S. 27, 31 (2001); *Wilson v. Layne*, 526 U.S. 603, 610 (1999); *Welsh v. Wisconsin*, 466 U.S. 740, 748 (1984); *Florida v. Jardines*, 569 U.S. at 6; *Minnesota v. Carter*, 525 U.S. 83, 99 (1998) (Justice Kennedy, concurring), it would be anomalous to deny at least as much protection to shared residential facilities as is given to shared workplace facilities (see § 23.15(b) subdivision (v) *supra*).

The Fourth Amendment’s protection of the home and its “curtilage” does not extend to “the open fields.” *United States v. Dunn*, 480 U.S. at 300; *Oliver v. United States*, 466 U.S. at 180; *Hester v. United States*, 265 U.S. 57 (1924). “[O]pen fields do not provide the setting for those intimate activities that the [Fourth] Amendment is intended to shelter from government interference or surveillance. There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields. Moreover, as a practical matter these lands usually are accessible to the public and the police in ways that a home, an office, or commercial structure would not be. It is not generally true that fences or ‘No Trespassing’ signs effectively bar the public from viewing open fields in rural areas.” *Oliver v. United States*, 466 U.S. at 179.

Moreover, if a police officer, while situated in an “open field” – or in any area accessible to the general public – engages in “naked-eye observation of the curtilage” (*California v. Ciraolo*, 476 U.S. 207, 213 (1986)), that observation is not treated as a “search” subject to Fourth Amendment restrictions. See §§ 23.16, 23.22(b) *infra*.

§ 23.15(d) Police Search or Seizure of an Object Belonging to the Respondent from Premises in Which the Respondent Has No Privacy Interest

Even if the respondent does not have a privacy interest in any premises searched by the police, s/he may nevertheless challenge a police examination or seizure of an object during a police search of the premises if the respondent is the owner of that object. As the Court observed in *United States v. Jacobsen*, 466 U.S. 109, 113 (1984), “an individual’s possessory interests in [a certain piece of] . . . property” confers upon that individual a Fourth Amendment right to

challenge a police officer’s “meaningful interference with [his or her] . . . possessory interests in that property.” *Id.* See, e.g., *United States v. Johnson*, 43 F.4th 1100 (10th Cir. 2022). Thus, in *Jacobsen*, the Court concluded that the defendant had the requisite privacy interest to challenge government agents’ assertion of control over, and search of, a package which the defendant had consigned to a private freight carrier, even though the defendant obviously had no privacy interest in the Federal Express office where the search took place. *Id.* at 114-15. See also, e.g., *Safford Unified School District # 1 v. Redding*, 557 U.S. 364, 374 n.3 (2009); *Bond v. United States*, 529 U.S. 334, 336-37, 338-39 (2000); *Walter v. United States*, 447 U.S. 649 (1980); *Recchia v. City of Los Angeles Department of Animal Services*, 889 F.3d 553 (9th Cir. 2018) (a homeless person stated a valid claim of Fourth Amendment violation when animal control officers without a warrant seized twenty pet birds which he kept in covered cardboard boxes and cages on the public sidewalk); *Garcia v. City of Los Angeles*, 11 F.4th 1113 (9th Cir. 2021) (homeless persons stated a valid claim of Fourth Amendment violation when their bulky property such as crates, sleeping pallets, and storage bins was seized and destroyed by city sanitation workers); *United States v. Barber*, 777 F.3d 1303, 1305 (11th Cir. 2015) (a passenger in a car stopped by the police had standing to challenge the search of the bag at his feet, “even if he lacked standing to contest the search of the car,” because it was “his bag” and he “had a reasonable expectation of privacy in his bag”); *State v. Crane*, 2014-NMSC-026, 329 P.3d 689, 694-95 (N.M. 2014) (construing the state constitution to hold that a motel occupant had a reasonable expectation of privacy in garbage that was placed in “opaque garbage bags,” which were “sealed from plain view . . . [and] placed directly in the dumpster, rather than being left in the motel room for disposal by the housekeeping staff”); *State v. Lien*, 364 Or. 750, 763-64, 441 P.3d 185, 193 (2019) (“Based on social and legal norms, . . . we conclude that, for purposes of Article I, section 9 [of the Oregon Constitution], defendants in this case had privacy interests in their garbage that had been placed within a closed, opaque container and put out at curbside for collection by the sanitation company. . . . [W]e recognize, given the realities of living in modern society, which is experiencing . . . significant social and technological changes, that privacy norms exist notwithstanding some limited public exposure of information, in this case, putting out garbage in a closed bin for pickup by the sanitation company at curbside, an area accessible to members of the public other than the sanitation company.”). *But see United States v. Rose*, 3 F.4th 722 (4th Cir. 2021) (acknowledging that “[b]oth senders and recipients of letters and other sealed packages ordinarily have a legitimate expectation of privacy in those items even after they have been placed in the mail” (*id.* at 728), but holding that a cocaine-distribution defendant who arranged for FedEx shipments of packages addressed to a friend’s deceased brother at the friend’s residence where the defendant picked them up, paying the friend for his participation in this scheme, had no standing to contest the search of the packages at a FedEx processing facility).

The individual’s privacy interest in objects that s/he owns extends to “[l]etters and other sealed packages [since these objects] are in the general class of effects in which the public at large has a legitimate expectation of privacy.” *United States v. Jacobsen*, 466 U.S. at 114. See also *Love v. State*, 543 S.W.3d 835, 844-45 (Tex. Crim. App. 2016) (“appellant had a reasonable expectation of privacy in the contents of the text messages he sent,” and “[c]onsequently, the State was prohibited from compelling Metro PCS to turn over appellant’s content-based

communications without first obtaining a warrant supported by probable cause”; “Text messages are analogous to regular mail and email communications. Like regular mail and email, a text message has an ‘outside address “visible” to the third-party carriers that transmit it to its intended location, and also a package of content that the sender presumes will be read only by the intended recipient.’”). This is the case as well for the contents of a cell phone. *See Riley v. California*, 573 U.S. 373, 403 (2014) (discussed in § 23.08(b) *supra*) (“Modern cell phones[,] . . . [w]ith all they contain and all they may reveal, . . . hold for many Americans ‘the privacies of life’” (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886))); *United States v. Pratt*, 915 F.3d 266 (4th Cir. 2019), summarized in § 23.08(b) *supra*; *United States v. Lopez-Cruz*, 730 F.3d 803, 805-06, 808 (9th Cir. 2013) (pre-*Riley* decision holding that the defendant, whose car was stopped by border patrol agents and who agreed to the agents’ request to inspect and search two cell phones that the defendant identified as belonging to a friend of his, “had a reasonable expectation of privacy in the phones” and could challenge an agent’s actions in accepting an incoming call and “passing himself as Lopez” and thereby obtaining information that incriminated Lopez: “Lopez had possession of the phones and was using them. He certainly had the right to exclude others from using the phones. He also had a reasonable expectation of privacy in incoming calls and a reasonable expectation that the contents of those calls ‘would remain free from governmental intrusion.’”); *State v. Peoples*, 240 Ariz. 244, 246, 248-49, 378 P.3d 421, 423, 425-26 (2016) (“an overnight guest who left his cell phone in his host’s apartment . . . did not lose his expectation of privacy in his phone” by leaving “his cell phone behind when he ran from the apartment to direct paramedics” even though ““numerous other individuals were present [in the apartment], including police officers,”” and this privacy expectation also was not diluted on the ground that “no passcode was required to activate” the phone since “personal belongings need not be locked for a legitimate expectation of privacy to exist” and “[c]ell phones are intrinsically private, and the failure to password protect access to them is not an invitation for others to snoop”); *State v. K.C.*, 207 So.3d 951 (Fla. App. 2016) (discussed in § 23.13 subdivision (d) *supra*).

§ 23.15(e) “Automatic Standing”

In some States, criminal defendants and juvenile respondents have “automatic standing” to challenge seizures of contraband whenever they are charged with possession of that contraband; they need not show any proprietary interest or expectation of privacy in the place from which the contraband was seized. This “automatic standing” rule was the law of the Fourth Amendment before *United States v. Salvucci*, 448 U.S. 83 (1980). When the Supreme Court abolished it in *Salvucci*, some state courts responded by reinstating the rule as a matter of state constitutional law. *E.g.*, *State v. Shaw*, 237 N.J. 588, 611, 207 A.3d 229, 242 (2019) (“The New Jersey Constitution provides greater protections from warrantless searches and seizures than the Fourth Amendment of the Constitution of the United States. . . . ¶ Our standard both incorporates the legitimate expectation of privacy standard and offers broader protections that advance three important State interests. . . . The first is the State’s interest in protecting defendants from having to admit possession to vindicate their constitutional right against unreasonable searches and seizures. . . . The second is to prevent the State from arguing a defendant should be subject to

criminal liability for possessing contraband, while asserting the same defendant had no privacy interest in the area from which police obtained the contraband without a warrant. . . . Our third aim is to increase privacy protections for our citizens and to promote respect for our Constitution by discouraging law enforcement from carrying out warrantless searches and seizures where unnecessary.”); *State v. Settle*, 122 N.H. 214, 447 A.2d 1284 (1982); *Commonwealth v. Porter P.*, 456 Mass. 254, 261 n.5, 923 N.E.2d 36, 45 n.5 (2010); *Commonwealth v. Sell*, 504 Pa. 46, 470 A.2d 457 (1983); *State v. Simpson*, 95 Wash. 2d 170, 622 P.2d 1199 (1980); *see also People v. Millan*, 69 N.Y.2d 514, 508 N.E.2d 903, 516 N.Y.S.2d 168 (1987) (adopting a version of automatic standing that grants standing whenever a charge of criminal possession is based upon a statutory presumption of constructive possession); *Commonwealth v. DeJesus*, 489 Mass. 292, 296-97, 182 N.E.3d 280, 285 (2022) (dictum) (“In one limited situation, . . . a defendant may rely on another’s reasonable expectation of privacy: where the defendant has been charged with possessing contraband at the time of the search and, also at the time of the search, the property was in the actual possession of a codefendant or in a place where the codefendant had a reasonable expectation of privacy, the defendant may assert the same reasonable expectation of privacy as the codefendant. . . . [O]therwise the person who carried the contraband might go free (because of suppression of the evidence) and the defendant confederate would not.”). In States that have not reconsidered the “automatic standing” issue since *Salvucci*, counsel should draw upon the reasoning of these decisions to urge the state courts to restore “automatic standing.” See § 7.09 *supra*.

§ 23.16 POLICE SEARCHES OF PREMISES

§ 23.16(a) General Principles

An entry into a building is a “search” within the Fourth Amendment. *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 325 (1979). *See Sause v. Bauer*, 138 S. Ct. 2561, 2563 (2018) (per curiam); *Mendez v. County of Los Angeles*, 815 F.3d 1178, 1187 (9th Cir. 2016), *aff’d after remand*, 897 F.3d 1067 (9th Cir. 2019); *Commonwealth v. Martin*, 2021 PA Super 128, 253 A.3d 1225 (Pa. Super. 2021) (police officers responded to a call from Holiday Inn staff who reported that they smelled marijuana smoke emanating from a particular room; the officers approached the room and confirmed the odor; one officer knocked on the door without announcing that he was a policeman; a woman opened the door and the officer leaned in; with his body half-way through the door, he saw the defendant reach over a chair; fearing that the defendant was reaching for a weapon, the officer entered, gun drawn, and ordered the defendant to put his hands on his head; the officer then observed a bulge in the defendant’s pants pocket which, in a pat-down search, proved to be a gun; the Superior Court holds that the officer’s entry half-way into the room was a search for Fourth Amendment purposes and was unconstitutional in the absence of a warrant or consent; the subsequent discovery and seizure of the gun were tainted by the unconstitutional entry and were required to be suppressed). To be constitutional, any police entry of a building must either: (i) be authorized by a search warrant, see § 23.17 *infra*; or (ii) “fall[] within one of the narrow and well-delineated exceptions to the warrant requirement” (*Flippo v. West Virginia*, 528 U.S. 11, 13 (1999) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967))), see §§ 23.18-

23.20 *infra*. E.g., *Groh v. Ramirez*, 540 U.S. 551, 559 (2004) (“Because “the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion” stands “[a]t the very core” of the Fourth Amendment, . . . , our cases have firmly established the “basic principle of Fourth Amendment law” that searches and seizures inside a home without a warrant are presumptively unreasonable” (quoting *Payton v. New York*, 445 U.S. 573, 586 (1980)); *id.* at 590 (“the Fourth Amendment has drawn a firm line at the entrance to the house”); *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (“With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no.”); *United States v. Karo*, 468 U.S. 705, 714-15 (1984) (“[s]earches and seizures inside a home without a warrant are presumptively unreasonable absent exigent circumstances”); *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984) (a “presumption of unreasonableness . . . attaches to all warrantless home entries”); *Florida v. Jardines*, 569 U.S. 1, 6 (2013) (“when it comes to the Fourth Amendment, the home is first among equals”); *accord*, *Lange v. California*, 141 S. Ct. 2011, 2018 (2021); *Caniglia v. Strom*, 141 S. Ct. 1596 (2021) (holding that the doctrine permitting certain vehicle searches to be made without a warrant when the police are exercising “community caretaking functions” (such as dealing with disabled automobiles on a public road or investigating accidents) does not apply to home entries); *accord*, *State v. Gill*, 2008 ND 152, 755 N.W.2d 454, 459-60 (N.D. 2008) (citing and agreeing with similar holdings by four federal circuits). *See also* *State v. Jackson*, 742 N.W.2d 163, 177 (Minn. 2007) (“in order to be constitutionally reasonable, nighttime searches [of the home] require additional justification beyond the probable cause required for a daytime search”); *United States v. Bute*, 43 F.3d 531, 535 (10th Cir. 1994) (finding a Fourth Amendment violation when a police officer, seeing the garage door of an old cinderblock building – formerly a honey manufacturing plant – standing open, entered without a warrant for the stated purpose of determining whether the building had been burglarized or vandalized: the court refuses to extend the so-called “community caretaking exception” of *Cady v. Dombrowski*, 413 U.S. 433 (1973) (see § 23.25 subdivision (iii) *infra*), from automobile-search cases to a building search; it “decline[s] to recognize the security check exception to the warrant requirement of the Fourth Amendment and conclude[s] that the protection of property exception is inapplicable under the facts of this case.”).

If a police entry of a building violates the applicable Fourth Amendment rules, all observations made by the police within the building and all objects seized by the entering officers are excludable. *Johnson v. United States*, 333 U.S. 10 (1948); *Chapman v. United States*, 365 U.S. 610 (1961); *Work v. United States*, 243 F.2d 660 (D.C. Cir. 1957); *United States v. Merritt*, 293 F.2d 742 (3d Cir. 1961). *Cf.* *United States v. Shrum*, 908 F.3d 1219 (10th Cir. 2018) (a homeowner phoned 911 to report his wife’s sudden illness; EMS responded and took the couple to a hospital, where she died; police, with no reason to believe the death suspicious, secured the perimeter of the house and refused the homeowner reentry; he was interrogated and gave consent to search the house for his wife’s prescription drugs, to determine her cause of death; during the search, an officer saw ammunition which he reported to federal ATF agents who used this information to obtain a search warrant; the search disclosed firearms; on these facts, the home was “seized” for Fourth Amendment purpose; this warrantless seizure was unconstitutional; the search warrant was tainted, and the firearms were required to be suppressed.). Evidence derived

from these observations or things is also excludable. See § 23.37 *infra*.

§ 23.16(b) “Administrative” Searches of Commercial Premises

Entries and inspections of commercial premises are the subject of specialized canons of Fourth Amendment doctrine usually identified by the rubrics “searches of licensed dealers in regulated industries” and “administrative searches.” Warrantless entries and inspections are permissible in the case of a few “‘pervasively regulated business[es],’ . . . and . . . ‘closely regulated’ industries ‘long subject to close supervision and inspection,’” *Marshall v. Barlow’s Inc.*, 436 U.S. 307, 313 (1978), but this category is a narrow one. See *City of Los Angeles v. Patel*, 576 U.S. 409, 424 (2015) (“Over the past 45 years, the Court has identified only four industries that ‘have such a history of government oversight that no reasonable expectation of privacy . . . could exist for a proprietor over the stock of such an enterprise,’ *Barlow’s, Inc.*, 436 U.S., at 313 Simply listing these industries refutes petitioner’s argument that hotels should be counted among them. Unlike liquor sales, *Colonnade Catering Corp. v. United States*, 397 U.S. 72 . . . (1970), firearms dealing, *United States v. Biswell*, 406 U.S. 311. . . (1972), mining, *Donovan v. Dewey*, 452 U.S. 594 . . . (1981), or running an automobile junkyard, *New York v. Burger*, 482 U.S. 691 . . . (1987), nothing inherent in the operation of hotels poses a clear and significant risk to the public welfare. ¶ Moreover, ‘[t]he clear import of our cases is that the closely regulated industry . . . is the exception.’”). For a detailed discussion of the regulated-industries doctrine and its limits, see *Liberty Coins, LLC v. Goodman*, 880 F.3d 274 (6th Cir. 2018); *EZ Pawn Corp. v. City of New York*, 90 F. Supp. 3d 403 (E.D.N.Y. 2019). Compare *Calzone v. Olson*, 931 F.3d 722 (8th Cir. 2019), and *Owner-Operator Independent Drivers Association, Inc. v. United States Department of Transportation*, 840 F.3d 679 (7th Cir. 2016), and *In the Matter of Owner Operator Independent Drivers Association, Inc., v. New York State Department of Transportation*, 2023 WL 3956619 (N.Y. Ct. App. 2023) (commercial trucking is a closely regulated industry), and *Killgore v. City of South El Monte*, 3 F.4th 1186 (9th Cir. 2021) (massage parlors are a closely regulated industry), with *Zadeh v. Robinson*, 928 F.3d 457, 466 (5th Cir. 2019) (dictum) (“the medical industry as a whole is not a closely regulated industry”), and *Cotropia v. Chapman*, 978 F.3d 282, 287 (5th Cir. 2020) (dictum) (same). And see *Verdun v. City of San Diego*, 51 F.4th 1033 (9th Cir. 2022) (chalking tires comes within the administrative search exception to the warrant requirement).

For “administrative” searches and inspections of other sorts of business premises and commercial enterprises, a search warrant or subpoena is required but may be issued without an individualized showing of cause. *Camara v. Municipal Court*, 387 U.S. 523 (1967); *See v. City of Seattle*, 387 U.S. 541 (1967). What is required in these latter cases, “in order for an administrative search to be constitutional, [is that] the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker.” *City of Los Angeles v. Patel*, 576 U.S. at 420. See, e.g., *Michigan v. Tyler*, 436 U.S. 499, 507-08 (1978) (“To secure a warrant to investigate the cause of a fire, an official must show more than the bare fact that a fire has occurred. The magistrate’s duty is to assure that the proposed search will be reasonable, a determination that requires inquiry into the need for the intrusion on the one hand, and the threat

of disruption to the occupant on the other. For routine building inspections, a reasonable balance between these competing concerns is usually achieved by broad legislative or administrative guidelines specifying the purpose, frequency, scope, and manner of conducting the inspections. In the context of investigatory fire searches, which are not programmatic but are responsive to individual events, a more particularized inquiry may be necessary. The number of prior entries, the scope of the search, the time of day when it is proposed to be made, the lapse of time since the fire, the continued use of the building, and the owner's efforts to secure it against intruders might all be relevant factors. Even though a fire victim's privacy must normally yield to the vital social objective of ascertaining the cause of the fire, the magistrate can perform the important function of preventing harassment by keeping that invasion to a minimum.”). A line of Ninth Circuit cases holds that searches made under the regulatory-search doctrine and other exceptions to the requirement of particularized probable cause or reasonable suspicion violate the Fourth Amendment if it is shown that they were conducted for the illicit purpose of apprehending suspected perpetrators or seizing evidence of criminal activity. *Perez Cruz v. Barr*, 926 F.3d 1128, 1139-40 (9th Cir. 2019) (“Under these no-probable-cause circumstances, ‘the exemption from the need for probable cause (and warrant), which is accorded to searches made for the purpose of inventory or administrative regulation, is not accorded to searches that are not made for those purposes.’ *Whren [v. United States]*, 517 U.S. [806] at 811–12 [(1996)]. Without an inquiry into purpose, these exceptions would provide officers with ‘a purposeful and general means of discovering evidence of crime,’ which the Fourth Amendment forbids.”); *United States v. Orozco*, 858 F.3d 1204 (9th Cir. 2017); and see *United States v. Johnson*, 889 F.3d 1120, 1125-26 (9th Cir. 2018), quoted in § 23.25 *supra*; cf. *United States v. Grey*, 959 F.3d 1166, 1183 (9th Cir. 2020) (“Where, as here, law enforcement officers are called upon to assist in the execution of an administrative warrant providing for the inspection of a private residence, the execution of the warrant is consistent with the Fourth Amendment only so long as the officers’ primary purpose in executing the warrant is to assist in the inspection. If the person challenging the execution of the warrant shows that the officers’ primary purpose was to gather evidence in support of an ongoing criminal investigation, the conduct does not satisfy the Fourth Amendment.”); *United States v. Feliciana*, 974 F.3d 519, 526 (4th Cir. 2020), summarized in § 23.09 *supra* (rejecting a regulatory-search justification for stopping a commercial vehicle when the officer who conducted the stop did so for a purpose other than that underlying the regulatory scheme and was not within the class of officers authorized to enforce the regulatory scheme: “the Government cannot justify the constitutionality of this traffic stop by relying on a regulatory scheme that was not the basis for the stop”).

§ 23.16(c) Electronic and Nonelectronic Surveillance

The concept of a “search” also encompasses situations in which police officers, although not physically entering an area, use artificial contrivances like peepholes or electronic surveillance equipment to extend their presence into a private area. See, e.g., *Silverman v. United States*, 365 U.S. 505 (1961); *Regalado v. California*, 374 U.S. 497 (1963) (per curiam); *United States v. Karo*, 468 U.S. 705, 714 (1984); *Kyllo v. United States*, 533 U.S. at 34-35, 40; *United States v. Jones*, 565 U.S. 400, 404-05, 409 (2012); cf. *Grady v. North Carolina*, 575 U.S. 306,

310 (2015) (per curiam). *See also Florida v. Jardines*, 569 U.S. at 11-12 (“The government’s use of trained [drug-sniffing] police dogs to investigate the home and its immediate surroundings is a ‘search’ within the meaning of the Fourth Amendment.”); *United States v. Burston*, 806 F.3d 1123, 1125, 1127-28 (8th Cir. 2015) (a police officer conducted an unlawful search by releasing a drug-sniffing dog “off-leash to sniff the air” in an area within the curtilage of the defendant’s apartment while the officer “remained six feet from the apartment”); *People v. McKnight*, 2019 CO 36, 446 P.3d 397, 400 (2019) (following the legalization of marijuana in Colorado, the state constitution requires probable cause of the presence of illegal drugs before police can arrange a sniff by a dog trained to alert to marijuana as well as the latter drugs: “a sniff from a drug-detection dog that is trained to alert to marijuana constitutes a search under article II, section 7 of the Colorado Constitution because that sniff can detect lawful activity”.); *United States v. Correa*, 908 F.3d 208, 214 (7th Cir. 2018) (DEA agents seized an electronic garage-door opener from the defendant during a consent search after a traffic stop; an agent “first took the openers at least three blocks away from the scene of Correa’s arrest to test them on the garage of the building from which the unidentified men had emerged with the cash eight days earlier. When the openers did not work there, he tried them on ‘a bunch of townhouses with garages attached to them right in that area.’ And when that did not work, he ‘did a grid system.’ We believe that seeing this kind of approach – driving a car up and down streets and alleys testing multiple garage door openers, but backing up after one garage door opened, waiting for it to close, and then opening it again – would strike the layperson as an obvious search” (*id.* at 218), and the Seventh Circuit therefore finds that these activities constitute a search for Fourth Amendment purposes, although it holds the search reasonable even without a warrant “at least where the search disclose[d] no further information . . . because these searches produced only an address, not any meaningful private information about the interior or contents of the garage. Correa had no reasonable expectation of privacy in that information. Officers routinely obtain that kind of information without a warrant as booking information and in searches incident to arrest.” (*id.* at 219); *State v. Kraft*, 301 So.3d 981 (Fla. App. 2020) (suppressing evidence obtained by video surveillance from cameras surreptitiously placed in massage parlors under a warrant authorizing surveillance to detect suspected prostitution: the warrant contained no minimization provisions and so allowed indiscriminate observation and recording).

If, on the other hand, the police merely used technology as a means for viewing what was exposed to observation by the public at large, then there is no “search” for Fourth Amendment purposes. *See, e.g., Texas v. Brown*, 460 U.S. 730, 740 (1983) (plurality opinion) (officer’s use of flashlight to examine interior of automobile was not “search” since “the interior of an automobile . . . may be viewed from outside the vehicle by either inquisitive passersby or diligent police officers”); *United States v. Dunn*, 480 U.S. 294, 305 (1987) (“the officers’ use of the beam of a flashlight, directed through the essentially open front of respondent’s barn, did not transform their observations into an unreasonable search within the meaning of the Fourth Amendment”); *see also, e.g., California v. Ciraolo*, 476 U.S. 207, 215 (1986) (warrantless observation of marijuana plants in the fenced yard of a home, made possible because police officers flew over the yard in a private plane and observed it from an altitude of 1,000 feet, did not violate the homeowner’s reasonable expectation of privacy because the marijuana plants were “visible to the

naked eye,” albeit only with the assistance of the aircraft); *cf. Dow Chemical Co. v. United States*, 476 U.S. 227, 237-39 (1986) (in the context of inspections of commercial property, where “the Government has ‘greater latitude,’” the Court approves the use of an aerial camera that enhanced human vision “somewhat” but was not “so revealing of intimate details as to raise constitutional concerns”; the Court notes that use of “[a]n electronic device to penetrate walls or windows so as to hear and record confidential discussions of chemical formulae or other trade secrets would raise very different and far more serious questions.”).

The basic principle in this area was established by *Katz v. United States*, 389 U.S. 347, 353 (1967), holding that “electronically listening to and recording . . . words [spoken in a zone of] . . . privacy upon which [a person] . . . justifiably relied” is a “search” for Fourth Amendment purposes, without regard to “the presence or absence of a physical intrusion into any given enclosure.” The principle is illustrated by comparing the decisions in *United States v. Knotts*, 460 U.S. 276 (1983), and *United States v. Karo*, 468 U.S. 705 (1984). In *Knotts*, the Court held that police officers’ tracing of the movements of an automobile by means of an electronic beeper planted in a can of chloroform purchased by a drug manufacturing suspect was not a “search” since it revealed nothing more than what could be observed through “[v]isual surveillance from public places.” 460 U.S. at 282. In *Karo*, the police employed the same tactic of installing an electronic beeper in a can of ether, but the can thereafter ended up inside a private home. Distinguishing the *Knotts* case as limited to surveillance of a public area, the Court in *Karo* held that “the monitoring of a beeper in a private residence, a location not open to visual surveillance, violates the Fourth Amendment rights of those who have a justifiable interest in the privacy of the residence.” 468 U.S. at 714. *See also, e.g., Kyllo v. United States*, 533 U.S. 27, 29, 31 (2001) (“the use of a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constitutes a ‘search’ within the meaning of the Fourth Amendment”: “obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical ‘intrusion into a constitutionally protected area,’ . . . constitutes a search – at least where (as here) the technology in question is not in general public use.”). *See Carpenter v. United States*, 138 S. Ct. 2206 (2018); and compare *United States v. Jones*, 565 U.S. at 404-05, 409 (“hold[ing] that the Government’s installation of a GPS [Global-Positioning-System] device on a target’s vehicle, . . . and its use of that device to monitor the vehicle’s movements, constitutes a ‘search’” – although basing this ruling on a “common-law trespassory test” rather than “the *Katz* reasonable-expectation-of-privacy test” – and concluding that the government’s attachment of the GPS tracking device to the underside of Jones’ vehicle constituted a “physical intrusion” into “private property for the purpose of obtaining information” and thus a “‘search’ within the meaning of the Fourth Amendment when it was adopted”), *with id.* at 418-19, 430 (Alito, J., concurring in the judgment, joined by Ginsburg, Breyer & Kagan, JJ.) (rejecting the majority’s reliance on “18th-century tort law” and reaching the same result as the majority by “asking whether respondent’s reasonable expectations of privacy were violated by the long-term monitoring of the movements of the vehicle he drove,” and concluding that although “relatively short-term monitoring of a person’s movements on public streets accords with expectations of privacy that our society has recognized as reasonable,” “the use of longer term GPS monitoring” – such as

occurred in this case, where “law enforcement agents tracked every movement that respondent made in the vehicle he was driving” for “four weeks” – “impinges on expectations of privacy” and thus constitutes a “search” for purposes of the Fourth Amendment). *And see Grady v. North Carolina*, 576 U.S. at 309-10 (applying *United States v. Jones* to hold that a satellite-based monitoring program for recidivist sex offenders, which tracked program participants by means of a tracking device that participants were required to “wear . . . at all times,” “effect[ed] a Fourth Amendment search”: “a State . . . conducts a search when it attaches a device to a person’s body, without consent, for the purpose of tracking that individual’s movements”; “The State’s program is plainly designed to obtain information. And since it does so by physically intruding on a subject’s body, it effects a Fourth Amendment search.”).

Courts are increasingly finding a privacy interest in various other forms of electronic data and requiring that the police obtain a warrant in order to obtain that data. *See, e.g., Leaders of a Beautiful Struggle v. Baltimore Police Department*, 2 F.4th 330 (4th Cir. 2021) (en banc) (holding that plaintiffs seeking a preliminary injunction against the maintenance of data from Baltimore’s experimental aerial surveillance [AIR] program have shown a likelihood of succeeding on their claim that the program violates the Fourth Amendment: “*Carpenter* [*v. United States, supra*] solidified [the teaching of Supreme Court precedents since 2001 drawing] the line between short-term tracking of public movements – akin to what law enforcement could do ‘[p]rior to the digital age’ – and prolonged tracking that can reveal intimate details through habits and patterns. . . . The latter form of surveillance invades the reasonable expectation of privacy that individuals have in the whole of their movements and therefore requires a warrant.” *Id.* at 341. “. . . [Th]e AIR program’s surveillance is not ‘short-term’ and transcends mere augmentation of ordinary police capabilities. People understand that they may be filmed by security cameras on city streets, or a police officer could stake out their house and tail them for a time. . . . But capturing everyone’s movements outside during the daytime for 45 days goes beyond that ordinary capacity.” *Id.* at 345.). Intensive police surveillance of residences by cameras mounted on utility poles which record the comings and goings of homeowners and visitors for extended periods of time have divided the courts, with some state high courts and the federal Fifth Circuit finding that this kind of activity constitutes a search for Fourth Amendment purposes, two other federal circuits finding that it does not, and the First Circuit splitting 3-to-3 on the issue. *Compare People v. Tafoya*, 2021 CO 62, 494 P.3d 613 (2021), and *State v. Jones*, 2017 S.D. 59, 903 N.W.2d 101 (S.D. 2017) (dictum), and *United States v. Cuevas-Sanchez*, 821 F.2d 248 (5th Cir. 1987) (dictum), with *United States v. Tuggle*, 4 F.4th 505 (7th Cir. 2021), and *United States v. Houston*, 813 F.3d 282 (6th Cir. 2016); *see United States v. Moore-Bush*, 36 F.4th 320 (1st Cir. 2022) (en banc); *cf. Commonwealth v. Mora*, 485 Mass. 360, 361, 150 N.E.3d 297, 301-02 (2020) (“Over a period of seven months, the Attorney General investigated an alleged drug distribution network based in Essex County. At different times during the course of the investigation, officers installed a total of five hidden video cameras on public telephone and electrical poles. Three of these cameras were aimed towards homes of alleged members of the drug conspiracy. Using the video footage collected by these ‘pole cameras,’ in addition to other evidence, the Commonwealth secured indictments against twelve defendants, including the defendants ¶ We conclude that the continuous, long-term pole camera surveillance targeted

at the residences of Mora and Suarez well may have been a search within the meaning of the Fourth Amendment, a question we do not reach, but certainly was a search under [Massachusetts Declaration of Rights] art. 14.”). *See also Tracey v. State*, 152 So.3d 504, 522, 525-26 (Fla. 2014) (an individual has a reasonable “expectation of privacy of location as signaled by one’s cell phone – even on public roads”; “Simply because the cell phone user knows or should know that his cell phone gives off signals that enable the service provider to detect its location for call routing purposes, and which enable cell phone applications to operate for navigation, weather reporting, and other purposes, does not mean that the user is consenting to use of that location information by third parties for any other unrelated purposes.”; because “no warrant based on probable cause authorized the use of Tracey’s real time cell site location information to track him,” police officers’ use of “cell site location information emanating from his cell phone in order to track him in real time” was an unlawful search and “the evidence obtained as a result of that search was subject to suppression.”); *Jones v. United States*, 168 A.3d 703, 713 (D.C. 2017) (police “use of a cell-site simulator to locate . . . [the defendant’s] phone invaded a reasonable expectation of privacy and was thus a search” that violated the Fourth Amendment in the absence of a search warrant); *Commonwealth v. Augustine*, 467 Mass. 230, 231, 232, 4 N.E.3d 846, 849, 850 (2014) (construing the state constitution to hold that the state must obtain a search warrant in order to acquire “historical cell site location information for a particular cellular telephone” from “a cellular telephone service provider”; the court observes that although the information “at issue here is a business record of the defendant’s cellular service provider, he had a reasonable expectation of privacy in it”); *Commonwealth v. Fredericq*, 482 Mass. 70, 71, 77-78, 121 N.E.3d 166, 171, 175 (2019) (“the defendant has standing to challenge the Commonwealth’s warrantless CSLI [cell site location information] search because, by monitoring the . . . CSLI [of a telephone which, although registered to the defendant, was used solely by another individual], the police effectively monitored the movement of a vehicle in which . . . [the defendant] was a passenger”; “For all practical purposes, the CSLI monitoring of the cellular telephone tracked the defendant’s location when he was in the vehicle in much the same way as would GPS tracking of that vehicle.”); *State v. Earls*, 214 N.J. 564, 569, 70 A.3d 630, 633 (2013) (construing the state constitution to hold that “cell-phone users have a reasonable expectation of privacy in their cell-phone location information, and that police must obtain a search warrant before accessing that information”); *State v. Reid*, 194 N.J. 386, 399, 945 A.2d 26, 33-34 (2008) (state constitution “protects an individual’s privacy interest in the subscriber information he or she provides to an Internet service provider”). Concerning geofence searches, *see, e.g., Matter of Search of Information Stored at Premises Controlled by Google*, 481 F. Supp. 3d 730 (N.D. Ill. 2020); *Matter of Search of Information that is Stored at Premises Controlled by Google*, 542 F. Supp. 3d 1153 (D. Kan. 2021). *But see City of Ontario v. Quon*, 560 U.S. 746, 761-62 (2010) (upholding a police department’s review of text messages sent and received on a government-owned pager that was issued to a police officer and that was reviewed by the department for the purpose of “determin[ing] whether [the officer’s] overages were the result of work-related messaging or personal use,” where the officer had been given advance notice “that his [text] messages were subject to auditing”); *United States v. Beaudion*, 979 F.3d 1092, 1098 (5th Cir. 2020) (a defendant lacked standing to complain that law enforcement officers violated the Fourth Amendment by obtaining a GPS tracking warrant for his girlfriend’s cell phone: the court rejects

Beaudion’s contention that “the Government’s search extended beyond . . . [the girlfriend] and her phone to include Beaudion and the car in which he and . . . [the girlfriend] were traveling . . . [and that] ‘[t]he purpose of the search warrant was to track the movements of [t]he car by using the GPS location of the cell phone inside of the car.’”).

In cases involving advanced surveillance technology with which the courts are not familiar, a respondent challenging its use is entitled to make a record that contains sufficient information to enable appellate review of the way in which the specific instrument works and the extent to which it intrudes upon privacy. *See, e.g., Andrews v. Baltimore City Police Department*, 8 F.4th 234, 238 (4th Cir. 2020) (“Absent a more detailed understanding of the Hailstorm simulator’s configuration and surveillance capabilities, we cannot address the issues necessary for resolution of this case. Despite the government’s use of a sophisticated, wide-reaching, and hard-to-detect new surveillance tool – one with potentially significant implications for constitutional privacy – we know very little about how many searches it conducted, of whom, and what data it collected and stored. We thus cannot strike the appropriate ‘balance between the public interest and the individual’s right to personal security free from arbitrary interference by law officers’ that is central to the Fourth Amendment analysis. . . . We therefore remand this matter so that the district court may resolve certain factual issues and, if necessary, provide updated conclusions of law as to whether the Hailstorm simulator’s use was a constitutional violation.”); *cf.* SMITH-HURD ILL. COMP. STAT. ANN. ch. 725, § 137/15; WEST’S REV. CODE WASH. ANN. § 9.73.260(4)(c)(ii). Defense counsel should move for discovery of this information (see § 9.09(a) *supra*) and, if necessary, for funding to retain an expert consultant to evaluate it (see § 11.01 *supra*).

Search warrants or surveillance orders that authorize Fourth Amendment “searches” may be issued on probable cause. *See, e.g., United States v. Gibson*, 996 F.3d 451 (7th Cir. 2021). Absent probable cause, they are invalid. *Carpenter v. United States*, 138 S. Ct. 2206 (2018). Suppression issues arising from searches conducted under these warrants are apparently governed by the *Leon/Sheppard* rules discussed in § 23.17 *infra*. *See, e.g., United States v. Friend*, 992 F.3d 728 (8th Cir. 2021); *United States v. Goldstein*, 989 F.3d 1178 (11th Cir. 2021) (alternative ground); *United States v. Goldstein*, 914 F.3d 200 (3d Cir. 2019) (alternative ground).

§ 23.17 ENTRY OF PREMISES PURSUANT TO A SEARCH WARRANT

Search warrants are issued by a magistrate (or, in some jurisdictions, by a judge) in an *ex parte* proceeding. Defense attorneys thus are almost never in a position to contest the sufficiency of the application for a warrant before the warrant is executed. Their first opportunity to challenge a search made pursuant to a search warrant ordinarily comes after the search has been completed, the respondent arrested, and charges filed.

The reason for “the Fourth Amendment rule ordinarily prohibiting the warrantless entry of a person’s house [or other protected location] as unreasonable *per se*” (*Georgia v. Randolph*, 547 U.S. 103, 109 (2006)) “is not that it denies law enforcement the support of the usual

inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime” (*Johnson v. United States*, 333 U.S. 10, 13-14 (1948)). To assure that that protective function is served, the affidavit or other materials presented to the magistrate as the basis for a warrant must be fact-specific and sufficiently detailed to enable the magistrate to make an independent judgment whether the information known to the authorities adds up to probable cause. See § 23.17(a) *infra*. The magistrate, not the affiant, must draw the inferences that mediate between concrete factual observations and the ultimate finding of probable cause. *See, e.g., United States v. Gifford*, 727 F.3d 92, 99-100 (1st Cir. 2013); *United States v. Button*, 653 F.2d 319, 323-24 (8th Cir. 1981); *United States v. Flanagan*, 423 F.2d 745, 746-47 (5th Cir. 1970); *Gillespie v. United States*, 368 F.2d 1, 4-6 (8th Cir. 1966). Therefore, when the affidavit supporting a search warrant asserts as empirical fact an undisclosed inference on the part of the affiant, a reviewing court must “[d]etermine whether the hidden inference was so significant as to cross the line between permissible interpretation and usurpation. * * * A hidden inference should be deemed significant if it can be fairly concluded that it had a substantial bearing on the magistrate’s determination of probable cause in each of two respects: ¶ (1) Relevance : The more directly relevant the inference is to the magistrate’s inquiry, the more substantial its bearing and the more significant it will be. * * * ¶ (2) Complexity : The more complex and attenuated the logical process by which a relevant conclusion is reached, the more important it is that the magistrate receive an opportunity to test the inference for validity as part of his neutral and detached function. Conversely, an inference so straightforward, and so patently within the affiant’s area of expertise, as to be a matter of “routine interpretation” for the affiant is probably not so significant as to require the magistrate’s review even though the conclusion thus reached is highly relevant.” *State v. Castagnola*, 2015-Ohio-1565, 145 Ohio St. 3d 1, 12-13, 46 N.E.3d 638, 652 (2015), summarized in § 23.17(b) *infra*.

In *United States v. Leon*, 468 U.S. 897 (1984), and *Massachusetts v. Sheppard*, 468 U.S. 981 (1984), the Supreme Court limited the grounds for such challenges. *Leon* and *Sheppard* held that evidence obtained by a search conducted under a search warrant should not be suppressed if the police officers executing the warrant reasonably relied on the magistrate’s determination of probable cause in issuing the warrant, even though the magistrate’s finding of probable cause was erroneous. *See, e.g., United States v. Morton*, 46 F.4th 331 (5th Cir. 2022) (en banc). *Leon* and *Sheppard* are not substantive constitutional decisions; they do not modify the explicit Fourth Amendment rule that a search warrant issued without probable cause is unconstitutional (*see, e.g., State v. Thompson*, 419 S.C. 250, 797 S.E.2d 716 (2017)); they simply withdraw the ordinary Fourth Amendment exclusionary rule as a means of enforcing this particular constitutional command. *Cf. United States v. Werdene*, 883 F.3d 204 (3d Cir. 2018) (extending the good-faith doctrine to preclude the exclusion of evidence obtained under a search warrant that violated the Fourth Amendment because it exceeded the territorial jurisdiction of the issuing magistrate “and was not authorized by any positive law” (*id.* at 214)). In a decision that ignores the basic rationale of *Leon* – that the exclusionary rule exists to guarantee police compliance with the Fourth Amendment and should not be applied when a violation is the fault of a magistrate

alone – and flouts the explicit statement in *Leon* that the Court’s analysis of “the deterrent effect of excluding evidence obtained in reasonable reliance on a subsequently invalidated warrant assumes, of course, that the officers properly executed the warrant and searched only those places and for those objects that it was reasonable to believe were covered by the warrant” (468 U.S. at 918 n. 19), the Court of Appeals for the First Circuit has applied *Leon*’s “good faith” doctrine to uphold the search of the third floor of a residence by officers serving a search warrant for the second floor. *United States v. Pimentel*, 26 F.4th 86 (1st Cir. 2022). *Pimentel*’s exact holding is questionable because its murky opinion also relies to some extent on the alternative ground that the warrant was ambiguous and on the idiosyncratic circumstance that “the notation ‘2nd floor’ was not included in the original warrant application; rather, it was added in handwriting at the request of the issuing judge’s clerk, who had sought clarification regarding where in the building Pimentel lived” (*id.* at 88). In any event, the First Circuit’s expansive view of the “good faith” justification for admitting evidence obtained through Fourth Amendment violations (*see also United States v. Moore-Bush*, 36 F.4th 320 (1st Cir. 2022) (en banc) (concurring opinion of three judges)) may signal a trend in that direction among the lower federal courts. *See United States v. Aigbekaen*, 943 F.3d 713 (4th Cir. 2019); *United States v. Skaggs*, 25 F.4th 494 (7th Cir. 2022); *United States v. Taylor*, 54 F.4th 795 (4th Cir. 2022). Compare the concluding paragraph of § 23.03 *supra*, describing the relatively narrow roster of circumstances in which the Supreme Court has recognized a “good faith” exception to the exclusionary rule *a là Leon* and *Sheppard*.

In the wake of *Leon* and *Sheppard*, there are essentially eight situations in which defense counsel can seek suppression of the proceeds of a search conducted pursuant to a search warrant: (i) when the affidavit submitted in support of the issuance of the warrant states merely “bare bones” conclusions, *United States v. Leon*, 468 U.S. at 915, 923 n.24, 926, or is “so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable,” *id.* at 923; (ii) when the police knowingly or negligently fail to limit their application for a warrant to the pertinent unit of a multiunit building; (iii) when “the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth,” *id.* at 923; (iv) when the affidavit includes information obtained by an earlier unconstitutional search or seizure and this information is necessary to sustain a finding of probable cause; (v) when the magistrate who issues the warrant is not neutral and detached, thereby rendering reliance on the warrant unreasonable, *id.*; (vi) when the warrant is “so facially deficient – *i.e.*, in failing to particularize the place to be searched or the things to be seized – that the executing officers cannot reasonably presume it to be valid,” *id.*; (vii) when the police, in executing the warrant, exceeded the authority granted by it; and (viii) when an officer who executed the warrant was also the person who submitted to the issuing magistrate the information purporting to establish probable cause, and the deficiency of the warrant is the result of the deficiency of that information. These eight situations are discussed in greater detail in the following subsections.

The retraction of the Fourth Amendment exclusionary rule in *Leon* and *Sheppard* does not, of course, control the evidentiary consequences of state constitutional violations in the issuance of warrants. Defense counsel can and should ask state courts to reject *Leon* and

Sheppard as a matter of state constitutional law and continue to suppress evidence obtained by any search made pursuant to a warrant issued without probable cause. *See, e.g., State v. Novembrino*, 105 N.J. 95, 157-58, 519 A.2d 820, 856-57 (1987); *People v. Bigelow*, 66 N.Y.2d 417, 426-27, 488 N.E.2d 451, 457-58, 497 N.Y.S.2d 630, 636-37 (1985). The argument for state constitutional repudiation of regressive criminal-procedure decisions handed down by the post-Warren Supreme Court of the United States (see § 7.09 *supra*) is particularly forceful in this context. Over the past half-century the “basic conclusion” of the Kerner Commission that “[o]ur nation is moving toward two societies, one black, one white – separate and unequal” (NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT 1 (1968)), has proved increasingly prophetic. More and more, police activity has become the paradigmatic, iconic locus for the fact and for the public awareness that government treats white people differently than people of color. More and more, minority communities have focused their disillusionment, their outrage, their anger, and their fear upon the police as the prime agency of governmental oppression. Ferguson Missouri, Staten Island New York, Minneapolis Minnesota, and their prominent precursors and progeny are only the most obvious demonstrations of this. In a world where minority communities fundamentally distrust the police, any legal ruling that visibly countenances illegal activity carried out by police officers will enhance that distrust. And this is a matter that should concern state judges of every ideological bent, because minority-community bitterness against the police specifically and against law-enforcement processes more generally is all too likely to increase the level of violence which it is the purpose of policing and of the criminal law to prevent. Particularly for ghetto-dwellers who are “without means of escape from an oppressive urban environment”(FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE: TO ESTABLISH JUSTICE, TO ENSURE DOMESTIC TRANQUILITY [“EISENHOWER COMMISSION”] xxi (1969)) and for whom the police stand as the primary agents and symbols of that oppression (*see, e.g.,* ALICE GOFFMAN, ON THE RUN: FUGITIVE LIFE IN AN AMERICAN CITY(2014)), any retrenchment of visible judicial control over the police can only add to the legitimate feelings of frustration which are “poisoning the spirit of trust and cooperation that is essential to [the] . . . proper functioning” of legal institutions (EISENHOWER COMMISSION xv-xvi). Rulings like *Leon* and *Sheppard*, which forswear judicial redress for *conceded* constitutional violations committed by police officers as a result of systemic failings that the police themselves cannot prevent, can only subvert law enforcement as well as the rule of law.

Search warrant cases involving the seizure or search of a computer, cellphone, or tablet may give rise to a variety of issues. For example, the affidavit submitted in support of the issuance of the warrant may have been impermissibly “bare bones” (see § 23.17(a) *infra*); the search warrant may have lacked the requisite degree of particularity (see §§ 23.17(b), 23.17(f) *infra*); or the police may have exceeded the scope of the warrant by seizing or searching the electronic device (see § 23.17(g) *infra*). If a lawfully seized computer or other electronic device is password-protected and the police or prosecution seek a court order compelling the defendant to supply the password, the defendant can object on self-incrimination grounds. See § 23.08(b) *supra*, discussing the self-incrimination issue in the context of cellphone searches.

§ 23.17(a) “Bare Bones” Affidavits

The “test for whether the good faith exception applies is “whether a reasonably well trained officer would have known that the search was illegal despite the magistrate’s authorization”” (*United States v. Caesar*, 2 F.4th 160, 170 (3d Cir. 2021); *United States v. Hodson*, 543 F.3d 286 (6th Cir. 2008); *State v. Henderson*, 2019-Ohio-1974, 136 N.E.3d 848 (Ohio App. 2019)). In *United States v. Leon*, *supra*, the Court recognized that a search warrant and a search conducted pursuant to that warrant are patently invalid if the affidavit submitted in support of the issuance of the warrant states merely “bare bones” conclusions, *Leon*, 468 U.S. at 923 n.24, 926, or is “so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable,” *id.* at 925. *Accord*, *Malley v. Briggs*, 475 U.S. 335, 344-45 (1986). The inadequacy of such an affidavit is so well settled in Fourth Amendment jurisprudence that an officer would be grossly derelict not to know it. *See, e.g., Nathanson v. United States*, 290 U.S. 41 (1933); *Aguilar v. Texas*, 378 U.S. 108 (1964); *Riggan v. Virginia*, 384 U.S. 152 (1966) (per curiam); *Illinois v. Gates*, 462 U.S. 213, 239 (1983) (dictum) (“[a]n officer’s statement that ‘[a]ffiants have received reliable information from a credible person and do believe’ that heroin is stored in a home, is likewise inadequate”). “To elude the ‘bare bones’ label, the affidavit must state more than ‘suspicions, or conclusions, without providing some underlying factual circumstances regarding veracity, reliability, and basis of knowledge’ and make ‘some connection’ between the illegal activity and the place to be searched.” *United States v. Ward*, 967 F.3d 550, 554 (6th Cir. 2020) (affirming the suppression of evidence seized under a bare-bones affidavit); *accord*, *State v. Schubert*, 2022-Ohio-4604, 2022 WL 17836574, at *3 (Ohio 2022); *State v. Baldwin*, 664 S.W.3d 122 (Tex. Crim. App. 2022) (“We granted review to answer this question: under what circumstances may boilerplate language about cell phones be considered in a probable cause analysis? We hold that boilerplate language may be used in an affidavit for the search of a cell phone, but to support probable cause, the language must be coupled with other facts and reasonable inferences that establish a nexus between the device and the offense.” *Id.* at 123. Here “the affidavit contained insufficient particularized facts to allow the magistrate to determine probable cause for a warrant to search the phone. Insofar as the court of appeals affirmed the trial court’s order granting the motion to suppress evidence obtained from the cell phone found in Baldwin’s vehicle, we affirm.” *Id.* at 135-36. The following excerpts from the affidavit are illustrative of the boilerplate held insufficient: “based on your Affiant’s training and experience, Affiant knows from other cases he [sic] has investigated and from training and experiences that it is common for suspects to communicate about their plans via text messaging, phone calls, or through other communication applications. Further, Affiant knows from training and experiences that someone who commits the offense of aggravated assault or murder often makes phone calls and/or text messages immediately prior and after the crime. ¶ Affiant further knows based on training and experience, often times, in a moment of panic and in an attempt to cover up an assault or murder that suspects utilize the internet via their cellular telephone to search for information.” *Id.* at 126.). When a warrant is based upon bare-bones conclusory allegations or upon grossly inadequate showings of probable cause, the logic of *Leon* – to preserve the exclusionary rule in warrant cases when any adequately trained police officer would know that a search warrant is unconstitutional – implies that suppression is required. *See United States v. Lopez-Zuniga*, 909 F.3d 906, 909-10 (8th Cir. 2018) (approving suppression of

evidence obtained through GPS tracking based on a warrant entirely lacking in probable cause: “On appeal, the government has abandoned its argument that probable cause supported the first warrant; it argues only that the good-faith exception saves evidence obtained from the issuance of the first warrant from suppression. We disagree. Lopez-Zuniga makes only a brief appearance in the affidavit in support of the first warrant application, and the only information about him is that he dropped off someone appearing to be Garcia-Jimenez at his apartment and then days later picked him up to go to a restaurant and mall. The first affidavit does not connect Lopez-Zuniga to any of Garcia-Jimenez’s suspected illicit activities. As the magistrate judge in this case said, if this amounts to probable cause, ‘then *anyone* who drops a drug trafficker off at the trafficker’s residence and travels with the trafficker for innocent activity, such as the trafficker’s grandmother or mere acquaintance, would be subject to search.’ We agree, and we think the warrant was so lacking in indicia of probable cause that belief in its existence would have been entirely unreasonable.”); *United States v. Waide*, 60 F.4th 327, 336, 342 (6th Cir. 2023) (“The only information contained in the [search warrant] affidavit that is proffered to support a finding of probable cause is the statement of an unidentified person made to the unidentified property owner, and then communicated second-hand to . . . [the fire department investigator who executed the affidavit], regarding an unknown person entering the property and removing items from the shed around the unspecified time of the fire. When presented with such hearsay information from an undisclosed source, ‘a court must consider the veracity, reliability, and the basis of knowledge for that information as part of the totality of the circumstances for evaluating the impact of that information.’ . . . ‘[I]n the absence of any indicia of the informants’ reliability, courts insist that the affidavit contain substantial independent police corroboration.’ . . . ¶ . . . Here . . . the uncorroborated information is not sufficiently reliable to support a finding of probable cause. ¶ . . . In sum, the . . . warrant was ‘based on an affidavit “so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.”’ . . . The *Leon* good-faith exception is therefore inapplicable.”); *State v. Johndro*, 2013 ME 106, 82 A.3d 820, 824-26 (Me. 2013) (“[T]he affidavit indicates that both witnesses saw a ‘suspicious car’ in the area of the burglarized homes around noon on the day the burglaries were discovered. It provides no indication as to what time the burglaries occurred, or what time they were reported. A vehicle being driven down the road in the middle of the day, and even pulling in and out of several driveways, without more, is not a sufficient nexus to criminal activity, notwithstanding the subjective feelings of the witnesses who observed this behavior. . . . ¶ [T]he justice of the peace . . . [could] consider . . . [Johndro’s] prior burglary convictions as part of the probable cause analysis. . . . Standing alone, however, this history would not give a prudent person reason to believe that evidence of the burglaries would exist in Johndro’s home. . . . ¶ This is especially true because there is no indication that Johndro was the person driving the car near the crime scenes. According to the affidavit, one witness observed that the operator was male; no further description was provided. The affidavit’s failure to identify Johndro as the operator renders the weak connection between the vehicle and Johndro’s home even more tenuous. . . . ¶ . . . Because nothing in the affidavit establishes a connection between the burglaries and Johndro’s residence, officers’ reliance on the warrant was not objectively reasonable” and *Leon*’s good faith exception to the exclusionary rule is inapplicable); *People v. Rojas*, 2013 IL App (1st) 113780, 998 N.E.2d 567, 575-76, 376 Ill. Dec. 25, 33-34 (Ill. App. 2013) (“While the 20–page complaint is not bare-

bones in and of itself, *it is bare-bones with regard to defendant's . . . [home] address. . . .* [T]he nearly two pages of “probable cause” evidence attempting to create a nexus between defendant’s criminal drug trafficking activity and his family’s Cromwell home was entirely lacking. . . . Probable cause regarding the other [five] locations [covered by the same warrant] cannot be bootstrapped to supply probable cause, and by implication, good faith, for the Cromwell location. If we allow . . . [the affiant officer’s] conjecture that people involved in drug trafficking keep records of their drug activity in their homes to provide the ‘indicia’ of probable cause necessary for application of the good-faith exception here, we fear we would be opening up any criminal to the official search of his home – as most people keep records in their homes.”); *People v. Gutierrez*, 222 P.3d 925 (Colo. 2009) (“[T]his case involves contrasting interpretations of the probable cause required to support the government’s search of the files found on the premises of Amalia’s Tax Service. The district attorney contends that the State only needed probable cause to search the premises of Amalia’s Tax Service generally, and that this would permit a search of each file found on those premises. . . . ¶ Although precedent is sparse, our review of Fourth Amendment law leads us to conclude that probable cause is required to intrude upon (through search and seizure) each constitutionally protected privacy interest an individual may have, irrespective of whether that interest is in his person or his tax returns.” *Id.* at 937. ¶ . . . To summarize, probable cause may not be analyzed merely in relation to the property or premises searched. Rather, unless the custodian or business itself is pervaded by fraud, probable cause must be analyzed in relation to each individual’s constitutionally protected interests. *Id.* at 940. ¶ . . . The affidavit did not provide probable cause to search Gutierrez’s individual file. Nowhere in the affidavit is Gutierrez’s name mentioned, and the affidavit offers no facts which could ‘provide the magistrate with a substantial basis,’ . . . for finding probable cause to believe that evidence of criminal impersonation or identity theft would be found in his particular tax return or client file. . . . *Id.* ¶ . . . The supporting affidavit in the present case does not merely fail to establish a ‘sufficient nexus’ between Gutierrez’s tax return and the suspected criminal activity, it fails to establish any connection at all between Gutierrez and criminal activity. . . . *Id.* at 943. ¶ . . . Accordingly, we hold that *Leon*’s good faith exception is inapplicable and suppression of Gutierrez’s tax records is appropriate.” *Id.* at 944.) *But see United States v. Barnes*, 895 F.3d 1194 (9th Cir. 2018) (holding that an arrest warrant issued pursuant to a municipal court practice under which judges routinely rubber-stamped the prosecutors’ complaints with no independent examination of their basis “was inexcusably infirm . . . [because of this] judicial abandonment” (*id.* at 1201): “We . . . join our sister circuits in concluding that a defendant may show judicial abandonment through any one of the following ways: (1) the magistrate was biased against the defendant or otherwise personally interested in issuing the warrant; (2) the magistrate functionally occupied a different, non-neutral role while making the probable cause determination; or (3) the magistrate failed to review the requisite affidavits or materials prior to making a probable cause determination.” *Id.* at 1202. However, “[we also] conclude, consistent with the Fifth, Sixth, and Tenth Circuits, that the exclusionary rule [as limited by *Leon* and *Sheppard*] only applies if the issuing judge abandoned his or her judicial role *and* law enforcement officers knew or should have known of the abandonment” (*id.* at 1203).). Searches based on wholly conclusory affidavits – those that merely recite the ultimate fact in issue or the affiant’s belief of it (for example, that *X* has a sawed-off shotgun in a certain house) – thus

remain challengeable under *Leon* and *Sheppard*. Cf. *Luke v. Gulley*, 50 F.4th 90, 96 (11th Cir. 2022) (finding that an arrest and prosecution pursuant to an arrest warrant violated the Fourth Amendment: “Detective Gulley does not dispute that his affidavit lacked sufficient information to provide the magistrate judge probable cause to issue the warrant to arrest Luke for Lewis’s murder. The detective’s affidavit is skeletal, consisting of a conclusory allegation that Luke killed Lewis by ‘sho[oting] at the truck Lewis was driving’ ‘based on the [detective]’s Investigation, and eye witness verbal statements.’ The affidavit is devoid of relevant and reliable facts from which one could infer that Luke murdered Lewis. . . . That Detective Gulley told the magistrate judge there was a ‘gang shooting’ added no information to implicate Luke in Lewis’s death. And we do not consider in the calculus of probable cause that the detective relied on the investigative file and his intuition to identify Luke as a suspect because no record exists that he submitted the file to or explained his thought processes to the magistrate judge. See *Whitely v. Warden*, 401 U.S. 560,] . . . 565 n.8 [(1971)] (‘[A]n otherwise insufficient affidavit cannot be rehabilitated by testimony concerning information possessed by the affiant when he sought the warrant but not disclosed to the issuing magistrate’). Because Detective Gulley’s affidavit ‘consists of nothing more than [his] conclusion that . . . [Luke] perpetrated the offense described,’ it ‘could not support the independent judgment of [the] disinterested magistrate’ judge.”). Conclusory assertions that the person to be arrested or whose house is to be searched is a “known criminal” or is “known” to deal in narcotics should be accorded “no weight.” See *Spinelli v. United States*, 393 U.S. 410, 414, 418-19 (1969). Allegations that the person named in the warrant *consorts* with “known” criminals, narcotics dealers, and the like, are doubly worthless. See *United States v. Hatcher*, 473 F.2d 321 (6th Cir. 1973); *United States v. Herron*, 215 F.3d 812 (8th Cir. 2000)). Cf. *Dollard v. Whisenand*, 946 F.3d 342, 359 (7th Cir. 2019) (probable cause to believe that the professional staff of an addiction treatment clinic were operating an illegal pill mill was insufficient to justify a warrant for arrest of the clinic’s parking valet: “‘The concept of guilt by association is repugnant to our notion of elemental justice and fair play.’”). And see *United States v. Mora*, 989 F.3d 794, 801 (10th Cir. 2021) (“Although the totality of the circumstances established probable cause that Defendant engaged in alien smuggling, the government failed to articulate how evidence of alien smuggling justified the search of his home. . . . ¶ [T]he government identifies a few general statements in the affidavit about commonly owned items. The affiant stated, based on his training and experience, that alien smugglers often use electronic communication devices, GPS devices, and electronic banking systems to conduct operations and store records. None of those boilerplate statements, however, are specific to Defendant’s crime or circumstances. See *United States v. Zimmerman*, 277 F.3d 426, 433 (3d Cir. 2002) (observing that ‘[r]ambling boilerplate recitations designed to meet all law enforcement needs do not produce probable cause’”); *United States v. Sanders*, 59 F.4th 232 (6th Cir. 2023) (finding that a search violated the Fourth Amendment because the authorizing warrant “failed to establish a nexus between the drug activity and the . . . apartment” searched (*id.* at 242): “[T]he [police] affiant included few facts that support a nexus between the drug evidence officers sought and the Yellowstone Parkway apartment that the officers searched. Initially, the affiant stated that he received a tip from a confidential informant that “[Defendant] was selling Heroin/Fentanyl from [the Yellowstone Parkway apartment].” *Id.* at 238. “Acting on this information, . . . [the affiant] set up two controlled purchases.” *Id.* at 235. “Next, pertaining

to the first controlled purchase, officers observed Defendant drive directly from the controlled purchase location to the Yellowstone Parkway apartment. Finally, pertaining to the second controlled purchase, officers observed Defendant exit the Yellowstone Parkway apartment and drive directly to the controlled purchase location, and then drive directly back from that location to the Yellowstone Parkway apartment, which Defendant then entered. *Id.* at 238. “Nothing in the affidavit establishes that evidence of drug dealing existed in the Yellowstone Parkway apartment rather than in the vehicle in which the two controlled purchases occurred.” *Id.* at 241.).

§ 23.17(b) Improper Multi-unit Warrant Applications; Overly Broad Warrants

If officers seeking a warrant know “or even if they should have known” that the premises described in their application includes separate units with different occupants, they are constitutionally obliged to limit the application to the unit that they are presenting probable cause to search. *Maryland v. Garrison*, 480 U.S. 79, 85-87 (1987) (dictum); *see also United States v. Voustantiounk*, 685 F.3d 206, 215 (2d Cir. 2012). A violation of this obligation should entail exclusion of any evidence seized from the other units, because the rationale of *Leon* and *Sheppard* is to withdraw the exclusionary rule as a remedy for *magistrates’* errors in the search warrant process but preserve it as a remedy for *police errors*.

Similarly, warrants authorizing searches which extend to materials having no connection with the crimes that the warrant affidavits justify investigating are challengeable for overbreadth. *See, e.g., State v. Missak*, 2023 WL 3635471 (N.J. App. 2023) (holding that a warrant to search the entire contents of a cell phone violates the Fourth Amendment and Article I, ¶ 7 of the New Jersey Constitution because it purports to authorize “searches of information and data within the phone for which . . . [the supporting affidavit] does not adequately establish probable cause” (*id.* at *9): the affiant, claiming expertise in searches of electronic devices, asserted two justifications for searching materials that were not tied to the offenses for which her affidavit presented probable cause: (a) “proving who used, controlled, or accessed an electronic device, and who entered, controlled, or saw data on it, is generally important to an investigation and ‘requires examination of data that, on its face, might be innocent, such as registry information and files accessed around that time.’ Based on that assertion, and the other facts set forth in the . . . [affidavit, the affiant] stated [that] a ‘forensic examiner must be allowed to access and examine ALL of the data on a computer, electronic device, or storage media’” (*id.* at *2), and (b) “‘a suspect may try to conceal criminal evidence’ and ‘might store it in random order with deceptive file names . . . [so that] the search may require an examination of ‘all the stored data to determine which particular files are evidence or instruments of crimes’” (*id.*); but the court holds that these purported justifications “fall[] short of the constitutional mark, . . . because establishing probable cause for a search requires more than a showing of what ‘may’ have occurred’ (*id.* at *8), and “[t]he progress of two-hundred-thirty-two years since the ratification of the Bill of Rights has not tempered . . . [the federal and state constitutions’] denunciation of general searches” (*id.* at *6).); *Burns v. United States*, 235 A.2d 758, 772-73 (D.C. 2020) (“The privacy interests underlying . . . fundamental Fourth Amendment principles may be at their most compelling when police wish to search the contents of a modern smart phone. . . . ¶ A search warrant for data on a modern smart

phone . . . must fully comply with the requirements of the Warrant Clause. It is not enough for police to show there is probable cause to arrest the owner or user of the cell phone, or even to establish probable cause to believe the phone contains some evidence of a crime. To be compliant with the Fourth Amendment, the warrant must specify the particular items of evidence to be searched for and seized from the phone and be strictly limited to the time period and information or other data for which probable cause has been properly established through the facts and circumstances set forth under oath in the warrant’s supporting affidavit. Vigilance in enforcing the probable cause and particularity requirements is thus essential to the protection of the vital privacy interests inherent in virtually every modern cell phone and to the achievement of the ‘meaningful constraints’ contemplated in *Riley* [*v. California* (summarized in § 23.08(b) *supra*)]”); *State v. Castagnola*, 2015-Ohio-1565, 145 Ohio St. 3d 1, 46 N.E.3d 638 (2015) (a warrant which authorized a search of “Records and documents either stored on computers, ledgers, or any other electronic recording device to include hard drives and external portable hard drives, cell phones, printers, storage devices of any kind” (*id.* at 18, 46 N.E.3d at 657) “lacked particularity and was therefore invalid” (*id.* at 21, 46 N.E.3d at 659): “[D]etails regarding the records or documents stored on the computer should have been included in the search warrant to guide and control the searcher and to sufficiently narrow the category of records or documents subject to seizure. . . . [T]his degree of specificity was required, since the circumstances and the nature of the activity under investigation permitted the affiant to be this specific.” *Id.* at 20-21, 46 N.E.3d at 658.); *United States v. Galpin*, 720 F.3d 436 (2d Cir. 2013) (“The chief evil that prompted the framing and adoption of the Fourth Amendment was the ‘indiscriminate searches and seizures’ conducted by the British ‘under the authority of “general warrants.”’ . . . ([T]he central concern underlying the Fourth Amendment [is] the concern about giving police officers unbridled discretion to rummage at will among a person’s private effects.’). To prevent such ‘general, exploratory rummaging in a person’s belongings’ and the attendant privacy violations, . . . the Fourth Amendment provides that ‘a warrant may not be issued unless probable cause is properly established and the scope of the authorized search is set out with particularity.’” *Id.* at 445. “Where, as here, the property to be searched is a computer hard drive, the particularity requirement assumes even greater importance.” *Id.* at 446. “The district court determined, and the government does not dispute, that insofar as the warrant generally authorized officers to search Galpin’s physical property and electronic equipment for evidence of violations of ‘NYS Penal Law and or Federal Statutes,’ the warrant violated the Fourth Amendment’s particularity requirement.” *Id.* at 446. “[W]e agree that the warrant was facially overbroad and thus violated the Fourth Amendment . . .” *Id.* at 446.); *United States v. Abrams*, 615 F.2d 541 (1st Cir. 1980) (“The warrant, after describing the location of the doctors’ offices, states: ¶ [‘(T)here is now being concealed certain property, namely evidence of a crime, to wit, certain business and billing and medical records of patients of Doctors Abrams, London, Braun, and Abrams, London and Associates, Inc. which show actual medical services performed and fraudulent services claimed to have been performed in a scheme to defraud the United States and to submit false medicare and medicaid claims for payments to the United States or its agents; in violation of Title 18 . . . [§ 1001.’] ¶ In executing the warrant, all of the Medicare and Medicaid records in the doctors’ offices were seized. In addition, approximately twenty medical records of non-Medicare-Medicaid patients were seized. The search and seizure started at 2:40 P.M. and was terminated at

5:57 P.M. on the same day. *Id.* at 542. “The general warrant and the unrestricted search that follows have been condemned by Americans since Colonial days.” *Id.* at 543. “The warrant at issue fails to meet the requirement of particularity. The officers’ discretion was unfettered, there is no limitation as to time and there is no description as to what specific records are to be seized. As a result of this general description, the executing officers seized all of the Medicare and Medicaid records of the three doctors and, in addition, records of non-Medicare-Medicaid patients. It seems clear that the executing officers could not or made no attempt to distinguish bona fide records from fraudulent ones so they seized all of them in order that a detailed examination could be made later. This is exactly the kind of investigatory dragnet that the fourth amendment was designed to prevent.” *Id.*); *People v. Coke*, 461 P.3d 508, 516 (Colo. 2020) (“A search conducted pursuant to a warrant is typically reasonable. . . . However, so-called ‘general warrants,’ which permit ‘a general, exploratory rummaging in a person’s belongings,’ are prohibited. . . . ¶ Here, the warrant allowed officers to search Coke’s phone for the following: ¶ • Data which tends to show possession, dominion and control over said equipment; including but not limited to system ownership information, phone number, pictures, or documents bearing the owners name or information; ¶ • Any electronic data that would be illegal to possess (contraband), or fruits or proceeds of a crime, or data intended to be used in the commission of a crime; ¶ • All telephone contact lists, phone books and telephone logs; ¶ • Any text messages and Multimedia Messaging Service (MMS) stored, sent, received or deleted; ¶ • Any photographs or images stored, sent, received or deleted; ¶ • Any videos stored, sent, received or deleted[;] ¶ • Any electronic data packets stored, sent, received or deleted. ¶ The trial court found that the warrant was overbroad because phones ‘are a repository of almost everything that is private and personal and deserving of [heightened] protection’ and the warrant gave the officers virtually unfettered access to it. We agree.”).

United States v. Christine, 687 F.2d 749 (3d Cir. 1982) is a leading case regarding “the question whether a partially invalid search warrant may be redacted so that evidence obtained pursuant to valid, severable portions of the warrant need not be suppressed” (*id.* at 750). “After examining the purposes of the warrant requirement and the means by which those purposes are served, we conclude that the practice of redaction is fully consistent with the Fourth Amendment and should be utilized to salvage partially invalid warrants.” *Id.* at 750-51. *See, e.g., United States v. Sells*, 463 F.3d 1148 (10th Cir. 2006) (“Under the severability doctrine, ‘[t]he infirmity of part of a warrant requires the suppression of evidence seized pursuant to that part of the warrant, but does not require the suppression of anything described in the valid portions of the warrant (or lawfully seized – on plain view grounds, for example – during . . . execution [of the valid portions]).’ . . . We [have] adopted the doctrine . . . [but in *United States v. Naugle*, 997 F.2 819, 822-23 (10th Cir. 1993),] we limited the applicability of the doctrine by holding that it applies only if ‘the valid portions of the warrant [are] sufficiently particularized, distinguishable from the invalid portions, and make up the greater part of the warrant.’”); *Cassady v. Goering*, 567 F.3d 628, 638-41 (10th Cir. 2009) (applying *Sells* analysis to invalidate the whole of a warrant: “The warrant here can be divided into three general parts: (1) the section authorizing seizure of narcotics and related illegal contraband; (2) the section authorizing seizure of all other evidence of criminal activity; and (3) the section authorizing seizure of Mr. Cassady’s personal

property if its seizure is authorized on a number of enumerated grounds totally unrelated to a narcotics operation. Only the first of these sections – directing officers to seize ‘[a]ny & all narcotics, to wit; marijuana plants, and/or marijuana’ and illegal contraband related to marijuana distribution – is arguably valid. And this is true only if we assume that everything in the sentence beginning, ‘Any and all illegal contraband including but not limited to,’ is meant to be narrowed by a requirement that the illegal contraband be related ‘to the transportation, ordering, purchasing, and distribution of controlled substances, in particular a Schedule I controlled substance, to wit: marijuana,’ which appears at the end of this convoluted sentence. . . . Even assuming we view the reference to ‘contraband’ narrowly as contraband related to a marijuana operation, which is supported by the crime for which there was probable cause, severance would still be improper in this case for the following reasons. . . . ¶ The second and third sections are clearly invalid. The second section expressly permits seizure of “all other evidence of criminal activity,” without any limitation or reference to a specific crime. . . . The third section authorizes seizure of ¶ [‘]articles of personal property tending to establish the identity of the person or persons in control or possession of the place or vehicle . . . [upon the grounds] that this property is stolen or embezzled; or is designed or intended for use as a means of committing a criminal offense; or is or has been used as a means of committing a criminal offense; or the possession of which is illegal; or would be material evidence in a subsequent criminal prosecution in this state or another state; or the seizure of which is expressly required, authorized or permitted by any statute of this state.[’] ¶ . . . Neither section is linked in any way to marijuana cultivation; instead, both sections appear intended to give officers as few limits as possible. . . . ¶ In sum, then, the warrant contains one mostly valid and two invalid sections. While the severance analysis does not end with a ‘mere counting of provisions, . . . the ‘number of valid versus invalid provisions is one element in the analysis of which portion makes up the greater part of the warrant’ . . . ¶ Here, the invalid portions of the warrant are sufficiently ‘broad and invasive’ so as to ‘contaminate the whole warrant.’ . . . [T]he warrant’s invalid provisions ‘allow for the seizure of evidence, whether or not related to [marijuana possession and distribution], and largely subsume those provisions that would have been adequate standing alone.’ . . . The warrant epitomizes a general warrant, and the officers treated it as such.”)

§ 23.17(c) Affidavits Containing “Deliberate Falsehoods” or Statements Manifesting a “Reckless Disregard for the Truth”

In *Franks v. Delaware*, 438 U.S. 154 (1978), the Court held

“that, where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant’s request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit’s false material set to one side, the affidavit’s remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits

of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.” (*Id.* at 155-56.)

See, e.g., Harte v. Board of Commissioners of County of Johnson, Kansas, 864 F.3d 1154 (10th Cir. 2017); *Humbert v. Mayor and City Council of Baltimore City*, 866 F.3d 546 (4th Cir. 2017); *Frimmel Management, LLC v. United States*, 897 F.3d 1045 (9th Cir. 2018). *And see Bickford v. Hensley*, 832 Fed. Appx. 549 (10th Cir. 2020) (applying *Franks* to sustain a challenge to an arrest warrant); *accord, Terwilliger v. Reyna*, 4 F.4th 270 (5th Cir. 2021); *Goldring v. Henry*, 2021 WL 5274721, at *4 (11th Cir. November 12, 2021) (same: “[t]he law is clearly established . . . that the Constitution prohibits a police officer from knowingly making false statements in an arrest affidavit about the probable cause for an arrest in order to detain a citizen if such false statements were necessary to the probable cause”); *Tlapanco v. Elges*, 969 F.3d 638 (6th Cir. 2020) (applying *Franks* to sustain challenges to both search and arrest warrants). A *Franks* hearing is also required if a respondent makes a substantial showing that an officer applying for a search warrant deliberately or recklessly omitted significant exculpatory information from the affidavit (*see, e.g., Washington v. Napolitano*, 29 F.4th 93, 98-99 (2d Cir. 2022) (“[W]e hold that, if a police officer finds an individual’s statements regarding his lack of intent to commit a crime to be credible in light of the totality of the circumstances, or if (at the very least) such exculpatory statements could materially impact the probable cause determination by a neutral magistrate judge, that officer cannot then use the incriminating portions of those statements as the foundation for probable cause in an arrest warrant affidavit for that individual, while either knowingly or recklessly concealing from the judge that credibility assessment (if it has been reached) and/or the exculpatory details of those statements.”); *Gregory v. City of Louisville*, 444 F.3d 725 (6th Cir. 2006); *Burke v. Town of Walpole*, 405 F.3d 66 (1st Cir. 2005); *DeLoach v. Bevers*, 922 F.2d 618 (10th Cir. 1990); *Phillips v. Whittington*, 2022 WL 797418, at *5, *7 (5th Cir. March 15, 2022); *Dahlin v. Frieborn*, 859 Fed. Appx. 69 (Mem) (9th Cir. 2021); *State v. Missouri*, 337 S.C. 548, 524 S.E.2d 394 (1999); *State v. Jardine*, 118 Idaho 288, 796 P.2d 165 (Idaho App. 1990), and cases cited) or that casts significant doubt upon the credibility of the officer’s sources, such as the fact that the officer’s confidential informant was a paid informer or was facing criminal charges and hoped to receive a reduced sentence by informing (*e.g., United States v. Clark*, 935 F.3d 558 (7th Cir. 2019); *cf. United States v. Taylor*, 63 F.4th 637 (7th Cir. 2023) (failure to include in a search warrant affidavit the facts that the affiant police officer and another retired police officer involved in the investigation had sexual relations with the individual who was the source of most of the affidavit’s incriminating information – together with the misleading characterization of that individual as a “female friend” who “approached” the officers with this information – would call for a *Franks* analysis)) or the known lack of qualifications of professional personnel whose purported expert opinions form the basis for factual conclusions recited in the warrant application (*Camm v. Faith*, 937 F.3d 1096 (7th Cir. 2019)) or that suggests that the information adduced and necessary to support the issuance of the warrant was tainted by earlier unconstitutional activity on the part of law enforcement agents (*United States v. Tate*, 524 F.3d 449 (4th Cir. 2008)). The rule of *Franks* “has a limited scope, both in regard to when exclusion of the seized evidence is mandated, and when a hearing on allegations of misstatements must be accorded.” *Franks v. Delaware*, 438 U.S. at 167.

“To mandate an evidentiary hearing, the challenger’s attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted . . . is only that of the affiant, not of any nongovernmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing.” (*Id.* at 171-72.)

Accord, United States v. Leon, 468 U.S. at 914, 925; compare *United States v. Sandalo*, 70 F.4th 77 (2d Cir. 2023), with *United States v. Lauria*, 70 F.4th 106 (2d Cir. 2023). “That said, individuals have a clearly established Fourth Amendment right to be free from malicious prosecution by a . . . [government agent] who has ‘made, influenced, or participated in the decision to prosecute the plaintiff’ by, for example, ‘knowingly or recklessly’ making false statements that are material to the prosecution either in reports or in affidavits filed to secure warrants.” *King v. Harwood*, 852 F.3d 568, 582-83 (6th Cir. 2017). See, e.g., *Rainsberger v. Benner*, 913 F.3d 640, 647 (7th Cir. 2019) (“An officer violates the Fourth Amendment if he intentionally or recklessly includes false statements in a warrant application and those false statements were material to a finding of probable cause. . . . An officer similarly violates the Fourth Amendment if he intentionally or recklessly withholds material information from a probable cause affidavit. . . . We use a straightforward method to determine whether the alleged lies or omissions are material: ‘We eliminate the alleged false statements, incorporate any allegedly omitted facts, and then evaluate whether the resulting “hypothetical” affidavit would establish probable cause.’”); *Winfrey v. Rogers*, 901 F.3d 483 (5th Cir. 2018) (same); *United States v. Glover*, 755 F.3d 811, 819-21 (7th Cir. 2014) (“The government’s response to Glover’s motion to suppress revealed Doe’s history as an informant, his multiple convictions, his prior gang affiliation, his use of aliases, and his interest in being paid for useful information. Glover renewed his request for a hearing under *Franks v. Delaware*, . . . to determine whether the officer acted with reckless disregard for the truth by omitting the credibility information from the probable cause affidavit. To obtain a *Franks* hearing, the defendant must make a ‘substantial preliminary showing’ of (1) a material falsity or omission that would alter the probable cause determination, and (2) a deliberate or reckless disregard for the truth. . . . This is a burden of production. Proof by a preponderance of the evidence is not required until the *Franks* hearing itself. . . . ¶ In this case, the omitted credibility information was clearly material . . . ¶ The district court did not show that it considered whether the credibility omissions themselves, even in the absence of more direct evidence of the officer’s state of mind, provide sufficient

circumstantial evidence to support a reasonable and thus permissible inference of reckless disregard for the truth. We hold that they do. . . . ¶ On remand the government may provide a satisfactory explanation for the omission of the damaging information about the informant's credibility, but Glover is entitled to test its explanation. We therefore REVERSE the denial of defendant's motion to suppress and REMAND for a *Franks* hearing.”); *United States v. Carneiro*, 861 F.2d 1171 (9th Cir. 1988) (material omissions and misstatements in an application for an electronic-surveillance warrant rendered the warrant invalid); *State v. Douglass*, 544 S.W.3d 182, 188 (Mo. 2018) (an officer submitting an application and supporting affidavit for a search warrant also attached a standard form listing items to be seized; he check-marked many categories including “any deceased human fetus or corpse” although the only offenses for which the affidavit stated probable cause were theft crimes; he “testified he checked the corpse clause because, if a corpse was found during the search, he would be required to obtain a ‘piggyback warrant’ – by checking the box, he was just saving the police from having to stop the search to obtain an additional search warrant if a corpse was found”; the court treats the check mark as a deliberate falsehood for *Franks* purposes); *State v. Tichenor*, 2016 WL 4151375, at *3 (Ariz. App. 2016) (“A defendant may challenge an affiant’s statements at an evidentiary hearing after establishing by a preponderance of the evidence, that the affiant ‘knowingly and intentionally, or with reckless disregard for the truth’ made a false, material statement or omitted a material fact in the affidavit. . . . If the trial court finds the affiant intentionally or recklessly made a false material statement or omitted a material fact, the court then must redraft the affidavit by removing the false statement or adding the omitted fact before determining whether sufficient probable cause remains to support the warrant.”); *Cf. United States v. Cordero-Rosario*, 786 F.3d 64, 72 (1st Cir. 2015) (the *Leon-Sheppard* doctrine does not save a warrant-based search where the agent who made it was relying on warrants that were constitutionally inadequate because of his own failure to provide the facts in the affidavits that could have supported their issuance”).

§ 23.17(d) Warrants Based on Tainted Evidence

If an affidavit in support of a search warrant includes information that is the product of an earlier unconstitutional search or seizure by the police and does not contain sufficient independent evidence to make out probable cause without reference to the tainted evidence, the resulting warrant and any search made under its authority are invalid. *Florida v. Jardines*, 569 U.S. 1 (2013); *United States v. Karo*, 468 U.S. 705, 719-21 (1984) (dictum); *United States v. Waide*, 60 F.4th 327 (6th Cir. 2023), summarized in § 23.37 *infra*; *United States v. Mora*, 989 F.3d 794 (10th Cir. 2021); *United States v. Wilson*, 13 F.4th 961 (9th Cir. 2021), summarized in § 23.18(c) *infra*; *United States v. Lopez-Zuniga*, 909 F.3d 906, 910 (8th Cir. 2018); *State v. Harris*, 369 Or. 628, 650, 509 P.3d 83, 96-97 (2022); *People v. Bonilla*, 2018 IL 122484, 120 N.E.3d 930 (2018); see § 23.40 *infra*. To the extent that the earlier unconstitutionality was the consequence of improper police conduct rather than improper magisterial conduct, it continues to invoke the exclusionary sanction that *Leon* and *Sheppard* retain as a curb on the police and withdraw only as a curb on magistrates. *United States v. Bagley*, 877 F.3d 1151 (10th Cir. 2017); *United States v. Nora*, 765 F.3d 1049, 1058-60 (9th Cir. 2014). *Cf. Frimmel Management, LLC v. United States*, 897 F.3d 1045 (9th Cir. 2018) (evidence obtained through an Immigration and

Customs Enforcement notice of inspection and subpoena had to be suppressed when ICE’s investigation was triggered by information received from a local sheriff’s department that had seized a restaurant’s employment records during the course of a raid based on search warrants containing reckless omissions and distortions).

§ 23.17(e) Neutral and Detached Magistrate

Exclusion of evidence seized under a warrant is obligatory, even when the police acted in “good faith,” if the magistrate who issued the warrant was not neutral and detached. *Leon*, 468 U.S. at 923. This principle would include situations “where the issuing magistrate wholly abandoned his judicial role in the manner condemned in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979),” *Leon*, 468 U.S. at 923, “allow[ing] himself to become a member, if not the leader, of the search party which was essentially a police operation . . . [and] acting . . . as an adjunct law enforcement officer.” *Lo-Ji*, 442 U.S. at 327. It would also include situations in which the magistrate “‘serve[s] merely as a rubber stamp for the police.’” *Leon*, 468 U.S. at 914.

§ 23.17(f) The Particularity Requirement

The *Leon/Sheppard* doctrine does not alter the longstanding Fourth Amendment requirement that a warrant must identify the premises to be searched and the things to be seized with reasonable particularity. *Leon*, 468 U.S. at 923; *Sheppard*, 468 U.S. at 988 n.5; *see, e.g., Groh v. Ramirez*, 540 U.S. 551, 557-63 (2004); *Maryland v. Garrison*, 480 U.S. 79, 84 (1987) (dictum). The Supreme Court has “clearly stated that the presumptive rule against warrantless searches applies with equal force to searches whose only defect is a lack of particularity in the warrant.” *Groh v. Ramirez*, 540 U.S. at 559. “The manifest purpose of this particularity requirement [is] . . . to prevent general searches. By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers [of the Fourth Amendment] intended to prohibit.” *Maryland v. Garrison*, 480 U.S. at 84. *See also Groh v. Ramirez*, 540 U.S. at 557-58 (“The fact that the *application* [for the warrant] adequately described the ‘things to be seized’ does not save the warrant from its facial invalidity. The Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents.”; the Court declines to reach the question of whether “the Fourth Amendment prohibits a warrant from cross-referencing other documents,” noting that “most Courts of Appeals have held that a court may construe a warrant with reference to a supporting application or affidavit if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant”); *Lo-Ji Sales, Inc. v. New York*, 442 U.S. at 325-26; *Stanford v. Texas*, 379 U.S. 476 (1965); *Dalia v. United States*, 441 U.S. 238, 255-56 (1979) (dictum); *United States v. Suggs*, 998 F.3d 1125, 1132-33, 1139 (10th Cir. 2021) (holding the particularity requirement violated by a residential search warrant that “targeted some particular items but also included a catch-all phrase authorizing the search and seizure of ‘[a]ny item identified as being involved in crime’”; “The . . . question as to severability is whether the valid portions ‘make up the greater part of the warrant.’ . . . They do not. Because the warrant has

two valid and two invalid sections, we might have had a draw if the ‘greater part’ inquiry was limited to merely counting parts. But given the scope and invasiveness of the invalid parts – particularly the ‘miscellaneous’ catch-all section authorizing officers to search for and seize ‘[a]ny item identified as being involved in crime’—the valid parts do not constitute the greater part of the warrant.”); *United States v. Dunn*, 719 Fed. Appx. 746, 748-49 (10th Cir. 2017) (per curiam) (“the particularity requirement was violated” and therefore “the good-faith exception to the exclusionary rule does not apply”; “The warrant here listed particular items to be searched, but prefaced the list with a catch-all phrase, stating that the items to be searched ‘include but are not limited to’ the listed items. . . . ¶ The qualifying phrase, ‘not limited to,’ is frequently included with particular categories in a warrant. In those situations, we have held that the ‘not limited to’ language does not taint a warrant when the language serves only to modify one or more categories in the list. . . . ¶ But here, the phrase ‘not limited to’ is used in connection with the entire warrant, not just particular categories. Thus, the addition of this phrase allowed officers to search for any item for any reason.”); *State v. Douglass*, 544 S.W.3d 182 (Mo. 2018) (a search warrant listed numerous categories of items to be seized; some categories specifically described objects that there was ample probable cause to find and seize; others included overbroad or catch-all clauses or authorizations unsupported by probable cause; the court holds that the warrant is a constitutionally prohibited ‘general warrant’ and requires suppression of even the items seized within the pinpoint categories; it rejects the argument that “the invalid portion of the warrant . . . could be redacted pursuant to the ‘severance doctrine’ . . . [so that] all items . . . seized under the valid portions of the warrant” would escape suppression: “Severance is appropriate under the doctrine *only* ‘if the valid portions of the warrant [are] sufficiently particularized, distinguishable from the invalid portions, and make up the greater part of the warrant.’” *Id.* at 189-90 (emphasis in original).); *People v. Gordon*, 36 N.Y.3d 420, 422-23, 429, 436, 166 N.E.3d 514, 515, 519, 525, 142 N.Y.S.3d 440, 441, 445, 451 (2021) (“a search warrant authorizing a search of Mr. Gordon’s ‘person’ and the ‘entire premises’ . . . did not encompass the search of two vehicles located outside the residence, and the police lacked probable cause to search those vehicles”: “The requirement that warrants must describe with particularity the places, vehicles, and persons to be searched is vital to judicial supervision of the warrant process”; “Although some federal courts of appeals have interpreted the Fourth Amendment in a manner that might permit the search here, we decline to follow suit. Instead, we exercise our independent authority to follow our existing state constitutional jurisprudence, even if federal constitutional jurisprudence has changed, because ‘we are persuaded that the proper safeguarding of fundamental constitutional rights requires that we do so’”); *United States v. Galpin*, 720 F.3d 436, 446 (2d Cir. 2013) (“Where, as here, the property to be searched is a computer hard drive, the particularity requirement assumes even greater importance. As numerous courts and commentators have observed, advances in technology and the centrality of computers in the lives of average people have rendered the computer hard drive akin to a residence in terms of the scope and quantity of private information it may contain.”); *State v. Harris*, 369 Or. 628, 650, 509 P.3d 83, 96-97 (2022) (affirming the suppression of evidence resulting from the acquisition of cell-phone data pursuant to an overbroad search warrant “Overbreadth is an aspect of the requirement in Article I, section 9 [of the Oregon Constitution], that warrants issue only ‘upon probable cause, *** and particularly describing the place to be searched, and the person or thing

to be seized.’ . . . The constitutional requirement means that, ‘even if the warrant is sufficiently specific, it must not authorize a search that is broader than the supporting affidavit supplies probable cause to justify.’”); *State v. Castagnola*, 2015-Ohio-1565, 145 Ohio St. 3d 1, 19-21, 46 N.E.3d 638, 657-59 (2015) (“the search warrant lacked particularity and was therefore invalid” because the authorization to search “[r]ecords and documents stored on computers” in the defendant’s home “did not contain any description or qualifiers of the ‘records and documents stored on the computer’ that the searcher was permitted to look for”); *Wheeler v. State*, 135 A.3d 282, 304-05 (Del. 2016) (“warrants, in order to satisfy the particularity requirement, must describe what investigating officers believe will be found on electronic devices with as much specificity as possible under the circumstances. . . . ¶ . . . Where, as here, the investigators had available to them a more precise description of the alleged criminal activity that is the subject of the warrant, such information should be included in the instrument and the search and seizure should be appropriately narrowed to the relevant time period so as to mitigate the potential for unconstitutional exploratory rummaging”); *State v. Henderson*, 289 Neb. 271, 289, 854 N.W.2d 616, 633 (2014) (“a warrant for the search of the contents of a cell phone must be sufficiently limited in scope to allow a search of only that content that is related to the probable cause that justifies the search”); and see *United States v. Lyles*, 910 F.3d 787, 795-96 (4th Cir. 2018) (“This case, ultimately, touches on the Fourth Amendment’s independent requirement that ‘all searches and seizures must be reasonable.’ . . . Reasonableness has many dimensions. One must be proportionality between the gravity of the offense and the intrusiveness of the search. That was absent here. In this case, the ‘underlying offense . . . [was] relatively minor’ . . . First-time possession of less than ten grams of marijuana in Maryland, while unlawful, is a civil infraction ‘punishable by a fine not exceeding \$100.’ . . . The warrant here, on the other hand, permitted an intrusion that was anything but minor. It foretold a major incursion into a person’s belongings and effects. The magnitude of the intrusion relative to the seriousness of any offense ‘is of central relevance to determining reasonableness,’ . . . and this is especially the case when ‘any and all’ is the warrant’s insistent refrain with respect to almost every category of personality that might conceivably be in a house.”); and see *United States v. Taylor*, 63 F.4th 637 (7th Cir. 2023) (where a typed search warrant signed by the issuing judge described the subject of the search as evidence of child pornography but the warrant had been amended by the handwritten addition of authorization to search for evidence of bestiality, a hearing was required to determine whether the addition had been approved by the judge; if not, the amendment of the warrant by the executing officers would violate the particularity requirement of the Fourth Amendment). Cf. *In re Appeal of Application for Search Warrant*, 2012 VT 102, 71 A.3d 1158, 1162, 1172, 1174, 1181, 1183 (Vt. 2012) (judicial officer who “granted a warrant to search the residence and to seize electronic devices to be searched at an off-site facility” had the authority to attach *ex ante* conditions “requiring that the search [of the electronic devices] be performed by third parties or trained computer personnel separate from the investigators and operating behind a firewall,” “requiring that the information be segregated and redacted prior to disclosure,” “requiring police to use focused search techniques,” and “prohibiting the use of specialized search tools without prior court authorization”; “Because modern computers contain a plethora of private information, exposing them to wholesale searches presents a special threat of exposing irrelevant but damaging secrets.”; “especially in a nonphysical context, particularity may be achieved through

specification of how a search will be conducted”). *But cf. United States v. Grubbs*, 547 U.S. 90, 98-99 (2006) (“The Fourth Amendment does not require that the warrant set forth the magistrate’s basis for finding probable cause,” and, in the case of an anticipatory search warrant, “does not require that the triggering condition . . . be set forth in the warrant itself”).

For a discussion of the additional protections grounded in the Sixth Amendment right to counsel, in the attorney-client privilege, and in the work-product doctrine when a warrant authorizes search of a lawyer’s files or of material that includes attorney-client communications, *see In re Search Warrant Issued June 13, 2019*, 942 F.3d 159 (4th Cir. 2019); *Harbor Healthcare System, L.P., v. United States*, 5 F.4th 593 (5th Cir. 2021); *In re Sealed Search Warrant and Application for a Warrant by Telephone or Other Reliable Electronic Means*, 11 F.4th 1235 (11th Cir. 2021).

§ 23.17(g) Scope of the Search Permitted in Executing a Warrant

The “good faith” doctrine of *Leon* and *Sheppard* does not in any way affect the courts’ obligation to review “the reasonableness of the manner in which [a search warrant] . . . was executed.” *Maryland v. Garrison*, 480 U.S. 79, 84 (1987).

The permissible scope of a search pursuant to a warrant is strictly limited to the premises specified in the warrant. *Id.* at 86-87. *See, e.g., United States v. Bershchansky*, 788 F.3d 102, 105, 111-12 (2d Cir. 2015) (Department of Homeland Agents, who were authorized by a warrant to search “Apartment 2 at the location where Bershchansky lived,” exceeded the scope of the warrant “by searching Apartment 1 instead”); *People v. Moore*, 195 A.D.3d 1585, 1586-87, 148 N.Y.S.3d 599, 600-01 (N.Y. App. Div., 4th Dep’t 2021) (evidence seized by the police during the execution of a search warrant is suppressed because the area from which the evidence was seized was not one of the locations itemized in the warrant: the warrant authorized a search of the upper apartment and “common areas” of a 2½ story house but the evidence was “found by the police behind a doorway on stairs leading to the attic,” which “cannot be considered a part of the upper apartment itself,” and the defendant “testified that the door to the attic was closed and locked, and that during the execution of the warrant, the door was broken down by the police” and so “it cannot be said that the attic was accessible to all tenants and their invitees” and thus a “common area”); *Manriquez v. Ensley*, 46 F.4th 1124, 1126-27 (9th Cir. 2022) (“The Fourth Amendment specifically requires a warrant to include a description of the ‘place to be searched.’ The police officers here – at first – complied with that requirement, obtaining a warrant that listed a motel room suspected of being a hub for drug trafficking. The officers then decided to search the suspect’s home as well, and asked the judge over the phone to expand the scope of the warrant to include the home. The judge agreed, but the officers did not physically amend the warrant. ¶ We agree with the district court that the officers violated the Fourth Amendment because the warrant was facially defective. While a judge had orally approved the search of the home, the text of the Fourth Amendment still requires the warrant to specify the place to be searched. ¶ But we hold that the district court erred in denying the officers qualified immunity because it was not clearly established at the time that the search would violate the Fourth

Amendment.”). When the officers who are applying for a warrant know or should know that a particular building contains multiple units, their application and the warrant are required to specify the individual unit to be searched. See § 23.17(b) *supra*. If, however, they reasonably believe that the entire building is a single unit and in good faith obtain a warrant for the building as a whole, their “failure to realize the overbreadth of the warrant” will be deemed “objectively understandable and reasonable,” *Maryland v. Garrison*, 480 U.S. at 88, and their search of any portion of the building will be sustained until such time as it discloses that separate units do exist within the building. *Id.* at 86-89. At that time a continuation of the search beyond the unit for which probable cause was shown to the magistrate – and perhaps any further search at all until the warrant is reissued with a more limited specification of the place to be searched – is unconstitutional, *id.* at 86-87, and the products of the search are suppressible.

Within the premises specified by the warrant, “the scope of a lawful 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.’” *Id.* at 84. See § 23.22(a) *infra*. This is a corollary of the pervasive Fourth Amendment principle that “[t]he scope of [a] search must be ‘strictly tied to and justified by’ the circumstances which rendered its initiation permissible” (*New York v. Belton*, 453 U.S. 454, 457 (1981) (dictum). See also *Birchfield v. North Dakota*, 579 U.S. 438, 469 (2016) (dictum) (“Search warrants protect privacy in two main ways. First, they ensure that a search is not carried out unless a neutral magistrate makes an independent determination that there is probable cause to believe that evidence will be found. . . . Second, if the magistrate finds probable cause, the warrant limits the intrusion on privacy by specifying the scope of the search – that is, the area that can be searched and the items that can be sought.”). The officers may search “the entire area in which the object of the search may be found,” performing whatever additional “acts of entry or opening may be required to complete the search. Thus a warrant that authorizes an officer to search a home for illegal weapons also provides authority to open closets, chests, drawers, and containers in which the weapon might be found.” *United States v. Ross*, 456 U.S. 798, 820-21 (1982) (dictum); *cf. Dalia v. United States*, 441 U.S. 238, 257-58 (1979) (dictum). However, the search may not extend into areas that could not contain the objects specified in the warrant. See *United States v. Ross*, 456 U.S. at 824 (dictum). “[A] warrant to search for a stolen refrigerator would not authorize the opening of desk drawers.” *Walter v. United States*, 447 U.S. 649, 657 (1980) (plurality opinion) (dictum).

A search warrant valid when issued may cease to support a constitutional search if changes in circumstances between the time of its issuance and the time of its execution deprive the magistrate’s probable-cause finding of continuing force. “[P]robable cause may cease to exist after a warrant is issued. The police may learn, for instance, that contraband is no longer located at the place to be searched. . . . Or the probable-cause showing may have grown ‘stale’ in view of the time that has passed since the warrant was issued.” *United States v. Grubbs*, 547 U.S. 90, 95 n.2 (2006); *United States v. Dalton*, 918 F.3d 1117, 1127-28 (10th Cir. 2019) (dictum) (“There is a plethora of cases in nearly every circuit explaining the circumstances in which a time delay will nullify probable cause as found in the warrant. . . . ¶ . . . [T]here are far fewer examples of cases where new information, rather than the passage of time, nullifies the probable cause articulated in

a warrant. . . ¶ . . . [But] we are persuaded that probable cause becomes stale when new information received by the police nullifies information critical to the earlier probable cause determination before the warrant is executed.”). Or information obtained by the officers executing the warrant may provide an innocent explanation for the apparently incriminating facts upon which the magistrate’s finding was based. *See Harte v. Board of Commissioners of County of Johnson, Kansas*, 864 F.3d 1154, 1182-83 (10th Cir. 2017) (opinion of Judge Phillips). In the case of anticipatory warrants (search warrants issued on a showing of probable cause that requires the occurrence of a future “triggering” event), the warrant may not be executed unless the triggering event is observed to happen in the manner that the warrant describes. *United States v. Perkins*, 887 F.3d 272 (6th Cir. 2018).

Nor may the officers seize anything not specified in the warrant, *Marron v. United States*, 275 U.S. 192, 196-98 (1927); *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 394 n.7 (1971) (dictum); *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 323 (1978) (dictum); *see also Dahlin v. Frieborn*, 2021 WL 2182123 (9th Cir. 2021) (“the law is clearly established that a search may not exceed the scope of the search warrant”); *United States v. Ganias*, 755 F.3d 125, 137-38 (2d Cir. 2014) (government exceeded the scope of a “warrant for the seizure of particular [business record] data on a computer” by retaining a forensic mirror image of the computer’s hard drive for two-and-a-half years “until [the government] finally developed probable cause to search and seize” computer files containing “personal financial records . . . not covered by the . . . [original search] warrant”); *United States v. Sedaghaty*, 728 F.3d 885, 910-15 (9th Cir. 2013) (“The question we consider de novo is whether the search was unreasonable because agents relied on the affidavit in support of the warrant to expand the authorized scope of items detailed in the warrant itself.” “The plain text of the warrant . . . clearly delineates what is to be seized.” “May a broad ranging probable cause affidavit serve to expand the express limitations imposed by a magistrate in issuing the warrant itself? We believe the answer is no. The affidavit as a whole cannot trump a limited warrant.”); *cf. Lo-Ji Sales, Inc. v. New York*, 442 U.S. at 325.

The sole exception to the four-corners-of-the-warrant limitation upon objects that can be seized is grounded in the “plain view” doctrine discussed in § 23.22(b) *infra*: Objects not encompassed by the warrant’s terms but which the officer encounters while conducting a search of the limited scope described in the preceding paragraph may be seized if, but only if, their appearance and situation give the officer probable cause to believe that they are contraband or otherwise subject to seizure. *Arizona v. Hicks*, 480 U.S. 321 (1987); *Texas v. Brown*, 460 U.S. 730 (1983) (plurality opinion).

When a warrant contains specific restrictions regarding the time or manner of service, violation of those restrictions renders its execution unconstitutional. *Jones v. Kirchner*, 835 F.3d 74, 85 (D.C. Cir. 2016) (“In this case the magistrate, as clearly indicated on the face of the warrant, affirmatively denied the Defendants permission to search Jones’s house before 6:00 AM. The plaintiff alleges the Defendants nonetheless executed the warrant at 4:45 AM. Just as a warrant is ‘dead,’ and a search undertaken pursuant to that warrant invalid, after the expiration

date on the warrant, *Sgro v. United States*, 287 U.S. 206, 212 . . . (1932), a warrant is not yet alive, and a search is likewise invalid, if executed before the time authorized in the warrant. If the Defendants executed the warrant when the magistrate said they could not, then they exceeded the authorization of the warrant and, accordingly, violated the Fourth Amendment.” “[B]ecause a warrant generally authorizes no more than what it expressly provides, to act unreasonably beyond the terms of a warrant is akin to acting without a warrant at all.” *Simon v. City of New York*, 893 F.3d 83, 94 (2d Cir. 2018); *accord, Zuniga-Perez v. Sessions*, 897 F.3d 114, 123, 126 (2d Cir. 2018).

Regarding searches of *persons* found on the premises, see § 23.22(c) *infra*.

23.17(h) Deficiency of the Warrant Due to Deficiency of Information Supplied by the Same Officer Who Later Executes the Warrant

See United States v. Sheehan, 70 F.4th 36 (1st Cir. 2023) (“Sheehan argues that the . . . affidavit’s description of ‘pictures consist[ing] of images of prepubescent penises that lacked pubic hair’ is . . . insufficient to ground a showing of probable cause.” *Id.* at 45. “[C]hild nudity alone does not make an image pornographic” (*id.*); the “affidavit’s description of the images on Sheehan’s phone could only have established probable cause by providing enough detail for the magistrate to determine . . . that the images seen by the state trooper were sufficiently ‘lewd,’ such that they were indicative of child pornography.” *Id.* at 46. “We hold that the affidavit failed to cross this threshold. Its cursory description . . . did little more than signify that the images contained child nudity. That description offered no detail as to the focus of the images, how the children were positioned in the images, or whether the images were sexually provocative in any other respect.” *Id.* Such a description, “coupled with the unconnected fact that the defendant was charged with indecent assault and battery of a child, does not, without further elaboration and factual support, suffice to show probable cause of possession of child pornography.” *Id.* at 48. “[A]n officer’s reliance on a magistrate’s approval of a facially deficient warrant is especially unreasonable when those ‘deficiencies arise from the failure of the [officer] conducting the search to provide the required supporting information in the affidavit.’ . . . ; *cf. Groh v. Ramirez*, 540 U.S. 551, 563-65 (2004) (‘[B]ecause petitioner himself prepared the invalid warrant, he may not argue that he reasonably relied on the Magistrate’s assurance that the warrant contained an adequate description of the things to be seized and was therefore valid.’). In such circumstances, suppression ‘remains an appropriate remedy.’” *Id.* at 51.).

§ 23.18 WARRANTLESS ENTRIES OF BUILDINGS AND SEARCHES ON CONSENT

The police may enter a building without a warrant whenever they obtain the valid consent of a party who has the authority to admit persons to the building. *Washington v. Chrisman*, 455 U.S. 1, 9-10 (1982). “The standard for measuring the scope of a suspect’s consent under the Fourth Amendment is that of ‘objective’ reasonableness – what would the typical reasonable person have understood by the exchange between the officer and the suspect?” *Florida v. Jimeno*, 500 U.S. 248, 251 (1991). *Compare United States v. Jones*, 22 F.4th 667, 678 (7th Cir. 2022)

(officers told the occupant of a motel room that they had an arrest warrant for a third party and wanted to enter the room to search places where a person might be hidden; the occupant's response, "that's fine," is held to be effective consent to the officers' looking under a bed with a 6" to 10" clearance from the floor; "[A] reasonable person would likely believe looking underneath the beds in . . . [the] motel room was well within the scope of his consent. Again, the officers explained they would look only "where a person could be." . . . [I]t seems perfectly reasonable that someone could be hiding under a bed to evade arrest even if it was a tight squeeze."), with *People v. Hickey*, 172 A.D.3d 745, 747, 98 N.Y.S.3d 287, 289 (N.Y. App. Div., 2d Dep't 2019) ("Contrary to the People's contention, the consent of the defendant's mother to the police to enter the home to speak with the defendant did not constitute a consent to Officer Temple's search of the living room" after the defendant reacted to the police entry by "dart[ing] to the back of the house to the living room," tossing an object "underneath a chair in the living room as he ducked behind a wall," and then "compl[ying] with the officers' requests to come out with his hands up"), and *Commonwealth v. Ortiz*, 478 Mass. 820, 820, 90 N.E.3d 735, 736-37 (2018) ("In this case we must decide whether a driver's consent to allow the police to search for narcotics or firearms 'in the vehicle' authorizes a police officer to search under the hood of the vehicle and, as part of that search, to remove the vehicle's air filter. We hold that it does not. A typical reasonable person would understand the scope of such consent to be limited to a search of the interior of the vehicle, including the trunk."). Compare *United States v. Lopez-Cruz*, 730 F.3d 803, 805-06, 808 (9th Cir. 2013) (although the defendant consented to a border patrol agent's request to inspect and search two cell phones that the defendant identified as belonging to a friend of his, "the agent's answering of the phone [which led to the acquisition of information that incriminated the defendant] exceeded the scope of the consent that [the agent] obtained and, thus, violated Lopez's Fourth Amendment right"), and *State v. Mefford*, 2022 MT 185, 410 Mont. 146, 155, 517 P.3d 210, 218 (2022) (alerted by a GPS monitor that a parolee was out of his home in potential violation of his curfew condition, a parole officer interviewed the parolee to investigate; the parolee explained that he had lost cell-phone access in his home and had gone out to sit in his automobile in the parking lot to message his daughter through Facebook Messenger; the parole officer requested the cell phone to confirm this story; the parolee handed it over; the phone showed an outgoing message at the relevant time but the parole officer, suspecting that that communication was not made to the parolee's daughter, opened the digital photo application on the phone and discovered child porn photos; the Montana Supreme Court, finding that the search exceeded the parolee's consent, holds that it violated the state and federal constitutions: "[w]hen an official search is properly authorized – whether by consent or by the issuance of a valid warrant – the scope of the search is limited by the terms of the authorization"), with *United States v. Butler*, 2023 WL 3719025 (11th Cir. 2023) (the defendant, knowing that agents were investigating electronic child pornography, handed his cell phone to an agent at the agent's request; the agent asked for permission to search the phone and the defendant granted it and unlocked the phone, again at the agent's request; the Eleventh Circuit holds that an intensive forensic search and of all of the contents of the phone a month later was within the scope of the defendant's consent).

§ 23.18(a) Voluntariness of the Consent

In order to be valid, the consent must be voluntary. *Amos v. United States*, 255 U.S. 313 (1921). See, e.g., *Harris v. Klare*, 902 F.3d 630 (6th Cir. 2018). It must “not be coerced, by explicit or implicit means, by implied threat or covert force . . . no matter how subtly . . . applied.” *Schneckloth v. Bustamonte*, 412 U.S. 218, 228 (1973) (dictum). “[W]hen a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving [by a preponderance of the evidence, see *United States v. Matlock*, 415 U.S. 164, 177, 177-78 n.14 (1974)] that the consent was, in fact, freely and voluntarily given.” *Schneckloth v. Bustamonte*, 412 U.S. at 222, and cases cited; see also *Florida v. Royer*, 460 U.S. 491, 497 (1983) (plurality opinion); *United States v. Mendenhall*, 446 U.S. 554, 557 (1980) (dictum).

As with confessions, see § 24.03 *infra*, the test of voluntariness is said to turn upon “the totality of all surrounding circumstances,” *Schneckloth v. Bustamonte*, 412 U.S. at 226: “[A]ccount must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents,” *id.* at 229; cf. *United States v. Watson*, 423 U.S. 411, 424-25 (1976). Factors that may render a person “vulnerable” and particularly susceptible to coercion include youth, emotional disturbance, lack of education, and mental deficiency. See, e.g., *State v. Butler*, 232 Ariz. 84, 88-89, 302 P.3d 609, 613-14 (2013); *In re J.M.*, 619 A.2d 497, 502-04 (D.C. 1992); and see § 24.05 *infra*. See generally Megan Annitto, *Consent Searches of Minors*, 38 N.Y.U. REV. L. & SOC. CHANGE 1 (2014).

Courts are loth to find voluntary consent when police entry is sought under an apparent show of authority to enter and is merely acquiesced in by the occupant. *Johnson v. United States*, 333 U.S. 10 (1948); *Bumper v. North Carolina*, 391 U.S. 543 (1968); *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 329 (1979). See also *United States v. Shaw*, 707 F.3d 666, 669 (6th Cir. 2013) (“An officer may not falsely tell a homeowner that he has an arrest warrant for a house, then use that falsity as the basis for obtaining entry into the house.”); cf. *State v. Valenzuela*, 239 Ariz. 299, 306-07, 371 P.3d 627, 634-35 (2016) (“[W]e conclude that the State failed to prove by a preponderance of the evidence that Valenzuela’s consent was voluntary. *Bumper* and *Johnson* direct this outcome. By telling Valenzuela multiple times that Arizona law required him to submit to and complete testing to determine AC or drug content, the officer invoked lawful authority and effectively proclaimed that Valenzuela had no right to resist the search. ¶ . . . [T]he . . . officer here . . . informed Valenzuela that Arizona law required him to submit to testing or his license would be suspended. The implied consent law, however, nowhere ‘requires’ a DUI arrestee to submit to testing, and the DPS officer’s admonition therefore did not mirror the statute. . . . But even assuming that the officer accurately paraphrased the law, this distinction is immaterial. The *Bumper* Court’s ruling turned on the grandmother’s acquiescence to the officer’s assertion of lawful authority to search regardless of the truthfulness of the officer’s claim to possess a warrant. . . . The officer’s claim of authority to search was ‘instinct with coercion’ whether or not he actually possessed a valid warrant.”).

Valid consent may be obtained from an individual who is in police custody, *United States v. Watson*, 423 U.S. at 424, but “courts have been particularly sensitive to the heightened

possibilities for coercion when the ‘consent’ to a search was given by a person in custody.” *Schneckloth v. Bustamonte*, 412 U.S. at 240 n.29. *See, e.g., United States v. Hall*, 565 F.2d 917, 920 (5th Cir. 1978); *Guzman v. State*, 283 Ark. 112, 120, 672 S.W.2d 656, 659-60 (1984); *Commonwealth v. Smith*, 470 Pa. 220, 228, 368 A.2d 272, 277 (1977). *See also Kaupp v. Texas*, 538 U.S. 626, 631 (2003) (per curiam) (police officers’ removal of a 17-year-old suspect from his home in the middle of the night and transporting of him to the stationhouse could not be deemed “consensual” even though the suspect said ““Okay”” in response to an officer’s statement ““we need to go and talk”” because there was “no reason to think [the suspect’s] answer was anything more than ‘a mere submission to a claim of lawful authority’”). Consent during a period of *illegal* custody is *eo ipso* ineffective. *Florida v. Royer*, 460 U.S. at 507-08 (plurality opinion); *id.* at 508-09 (concurring opinions of Justices Powell and Brennan); *United States v. Lopez*, 907 F.3d 472, 487 (7th Cir. 2018), quoted in § 23.37 *infra*; *Harris v. Klare*, 902 F.3d at 637, quoted in § 23.37 *infra*; *United States v. Murphy*, 703 F.3d 182, 190 (2d Cir. 2012); *State v. Betts*, 2013 VT 53, 194 Vt. 212, 219-21, 75 A.3d 629, 635-36 (2013) (the rule that “consent obtained during an illegal detention is invalid” necessarily calls for holding as well that “consent for a search is not voluntary when obtained in response to the threat of an unlawful detention”). *See also People v. Frederick*, 500 Mich. 228, 231, 238, 895 N.W.2d 541, 542-43, 546 (2017) (police officers’ “predawn” knocking on the front doors of the defendants’ homes (at 4 a.m. in one case and 5:30 a.m. in the other) exceeded “the scope of the implied license to approach a house and knock” – which is “time-sensitive” and does not include “knock[ing] at someone’s door in the middle of the night” – and therefore “the defendants’ consent to search – even if voluntary – is invalid unless it is sufficiently attenuated from the illegality”). And see § 23.37 *infra*.

At least with regard to persons who have not been taken to the stationhouse or other place of closed confinement, the police may obtain valid consent for a warrantless search without first warning the consenting party of his or her Fourth Amendment rights, *see Coolidge v. New Hampshire*, 403 U.S. 443, 484-90 (1971); *Schneckloth v. Bustamonte*, 412 U.S. at 234; *United States v. Matlock*, 415 U.S. at 167 n.2; *United States v. Watson*, 423 U.S. at 424-25; *Edwards v. Arizona*, 451 U.S. 477, 483-84 (1981) (dictum), since “knowledge of a right to refuse is not a prerequisite of a voluntary consent,” *Schneckloth v. Bustamonte*, 412 U.S. at 234; *see also United States v. Drayton*, 536 U.S. 194, 206 (2002); *Ohio v. Robinette*, 519 U.S. 33, 39-40 (1996). Even with respect to persons at large in the world, however, “knowledge of the right to refuse consent is one factor to be taken into account” in determining the voluntariness of consent for federal Fourth Amendment purposes (*Schneckloth v. Bustamonte*, 412 U.S. at 227; *see also United States v. Drayton*, 536 U.S. at 206; *United States v. Mendenhall*, 446 U.S. at 558-59), and the Court has not rejected the argument that explicit warnings should be required in the case of persons who are in police custody “in the confines of the police station” (*United States v. Watson*, 423 U.S. at 424), or in similar settings where “the techniques of police questioning and the nature of custodial surroundings produce an inherently coercive situation” (*Schneckloth v. Bustamonte*, 412 U.S. at 247), in which the reasoning of *Miranda v. Arizona*, 384 U.S. 436 (1966) (see §§ 26.5-26.9 *infra*) appears to be fully applicable (*see Berkemer v. McCarty*, 468 U.S. 420, 437-40 (1984); *Arizona v. Roberson*, 486 U.S. 675, 685-86 (1988); *United States v. Washington*, 431 U.S. 181, 187 n.5 (1977) (dictum); *Roberts v. United States*, 445 U.S. 552, 560-

61 (1980) (dictum). *And see Schneckloth v. Bustamonte*, 412 U.S. at 240 n.29, 247 n.36. *Cf. Ohio v. Robinette*, 519 U.S. at 35 (a motorist who was stopped for speeding on the open road, and who was thereafter given a verbal warning and received his driver’s license back from the police officer, did not have to be “advised that he is ‘free to go’” in order for his consent to the officer’s request to search the car to be “recognized as voluntary”). Several state high courts have declined to follow *Schneckloth* in construing their state constitutions and have held that consent to a search is ineffective unless preceded by an explicit warning and waiver of the right not to undergo the search. *E.g.*, *State v. Brown*, 356 Ark. 460, 466, 156 S.W.3d 722, 726 (2004) (reviewing such decisions in other jurisdictions and concluding “that the circuit judge correctly construed the Arkansas Constitution to require law enforcement officers to advise home dwellers of their right to refuse to consent to a search”); *State v. Budd*, 185 Wash. 2d 566, 573, 374 P.3d 137, 141 (2016) (reaffirming a state constitutional rule that when the police engage in a so-called “knock and talk,” in which they “go to a home without a warrant and ask for the resident’s consent to search the premises,” the “police ‘must, prior to entering the home, inform the person from whom consent is sought that he or she may lawfully refuse to consent to the search and that they can revoke, at any time, the consent that they give, and can limit the scope of the consent to certain areas of the home’”; “Officers must give these warnings before entering the home because the resident’s knowledge of the privilege is a ‘threshold requirement for an intelligent decision as to its exercise.’”). See generally § 7.09 *supra*.

When law enforcement agents employ subterfuge to obtain consent, the courts “distinguish between ‘undercover’ entries, where a person invites a government agent who is concealing that he is a government agent into her home, and ‘ruse’ entries, where a known government agent misrepresents his purpose in seeking entry. . . . The former does not violate the Fourth Amendment, as long as the undercover agent does not exceed the scope of his invitation while inside the home. . . . But ‘[a] ruse entry when the suspect is informed that the person seeking entry is a government agent but is misinformed as to the purpose for which the agent seeks entry cannot be justified by consent.’” *Whalen v. McMullen*, 907 F.3d 1139, 1147 (9th Cir. 2018) (dictum) (concluding that a detective investigating welfare fraud violated the Fourth Amendment when he obtained consent to enter a suspect’s home by falsely purporting to be investigating an identity theft ring and assuring her that she was neither under suspicion nor in danger of having her identity compromised: “McMullen appealed to Whalen’s trust in law enforcement and her sense of civic duty to assist him in his ‘identity theft’ investigation. . . . But there was no identify theft investigation underway. McMullen lied to Whalen about his real purpose – to investigate her for possible social security fraud. Whalen’s consent to McMullen’s entry into her home is vitiated by his deception.” *Id.* at 1147-48.) *Accord, United States v. Harrison*, 639 F.3d 1273 (10th Cir. 2011) (ATF agents investigating possible narcotics and firearms offenses gained consent to enter an apartment by representing that they had received an anonymous phone call indicating that there were drugs and bombs in the apartment and that “any time we get a phone call like this, you know, our boss makes us come out and investigate it further and see if there’s any threat or danger to the community.” *Id.* at 1276. “[T]he ATF had no reason to believe there were bombs in the apartment, but . . . planned to say this to . . . ‘in an effort to gain . . . consent to search.’” *Id.* “Notwithstanding the legality of searches conducted by

undercover agents, the ‘Fourth Amendment can certainly be violated by guileful as well as by forcible intrusions into a constitutionally protected area.’ . . . We have repeatedly held that deception and trickery are among the factors that can render consent involuntary. . . . When government agents seek an individual’s cooperation with a government investigation by misrepresenting the nature of that investigation, this deception is appropriately considered as part of the totality of circumstances in determining whether consent was gained by coercion or duress. We should be especially cautious when this deception creates the impression that the defendant will be in physical danger if he or she refuses to consent to the search.” *Id.* at 1278-79.); *Pagán-González v. Moreno*, 919 F.3d 582 (1st Cir. 2019) (requiring the suppression of evidence obtained from a computer when ten FBI agents came to the home of its 21-year-old owner and his parents and obtained their consent to take and search it by misrepresenting that it was “‘sending a signal and/or viruses to computers in Washington’” (*id.* at 587), and that the agents would try to fix the faulty modem or would replace it at FBI expense if it were not reparable: Although consents obtained by government agents who pose as private citizens may be found voluntary, “[t]he dynamic is meaningfully different . . . when police officers identify themselves as such but misrepresent their purpose. Because citizens will respond to law enforcement with a sense of obligation and presumption of trustworthiness, multiple courts have held facially consensual searches to be invalid where the ‘consent’ was elicited through officers’ lies about the nature or scope of their investigations.” (*Id.* at 592.) “[D]espite the broadly framed objections of courts to deception by known government agents, the general consensus in the case law is that such deception, including lying about the purpose of an investigation, is not categorically off-limits in obtaining consent to search. The question instead is whether the deception in context rendered the consent involuntary.” *Id.* at 593-94. “[C]ourts have regularly held that coercion is implicit when officers falsely present a need for urgent action.” *Id.* at 595. “Roughly ten FBI agents appeared at appellant’s door with the alarming news that computers in Washington, D.C. – the heart of the country’s political and military operations – were receiving signals or viruses from a computer at appellant’s location. If the report of a virus infecting technology in the nation’s capital was not itself enough to convey an urgent need to address a pressing threat, the show of force by the federal agents elevated the seriousness of the situation and communicated that the problematic computer posed a substantial threat – perhaps even to the nation’s security.” *Id.* at 597. “[T]he virus ruse falls squarely within the ‘body of relevant case law’ in which consent premised on a fabricated emergency was found invalid.” *Id.* at 600.); *cf. United States v. Boyd*, 910 F. Supp. 2d 995, 1003 (W.D. Mich. 2011) (suppressing evidence obtained in an apartment search which the Government sought to justify as consensual: “The interaction between the officers and the occupants of the apartment began with a lie. After Investigator Millard knocked twice, Ms. Martin asked who was at the door. Instead of telling the truth about his identity, Investigator Millard lied, telling whoever was on the other side of the door that he was ‘Tim from maintenance.’ . . . The officers used this lie about their identity purposefully. By Investigator Millard’s own admission, the false identification was designed to induce contact with the apartment’s occupants. The officers’ deceit had the exact manipulative effect Investigator Millard wanted, as Ms. Martin eventually opened the door.”).

The extent to which state law can require *ex ante* blanket consent to certain searches and

seizures as a condition of receiving various licenses, privileges, or benefits is largely an open question. The convoluted reasoning in *United States v. Knights*, 534 U.S. 112 (2001), summarized in § 23.15(b) *supra*, plainly implies that a state cannot condition a convict’s release on probation upon his or her agreement to be subject to searches and seizures that would violate the Fourth Amendment in the case of non-probationers. Since Knights “signed . . . [a] probation order, which stated immediately above his signature that “I HAVE RECEIVED A COPY, READ AND UNDERSTAND THE ABOVE TERMS AND CONDITIONS OF PROBATION AND AGREE TO ABIDE BY SAME,” and since one of those terms was “that Knights would ‘[s]ubmit his . . . person, property, place of residence, vehicle, personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer” (*id.* at 114), the case would have been a no-brainer if consents of this sort were legally effective. Conspicuously avoiding this straightforward approach (which the Government forcefully advocated), the Court wrote that it “need not decide whether Knights’ [sic] acceptance of the search condition constituted consent in the *Schneckloth* sense of a complete waiver of his Fourth Amendment rights, . . . because we conclude that the search of Knights was reasonable under our general Fourth Amendment approach of ‘examining the totality of the circumstances,’ . . . with the probation search condition being a salient circumstance (*id.* at 118) because “[t]he probation condition . . . significantly diminished Knights’ [sic] reasonable expectation of privacy” (*id.* at 119-20). See also *Samson v. California*, 547 U.S. 843, 846, 851-52 (2006), summarized in § 23.10 *supra*; *United States v. Beechler*, 68 F.4th 358, 365 (7th Cir. 2023) (“When assessing the privacy expectations of a person subject to a correctional system, salient factors include the level of punishment or supervision to which the individual has been subjected, whether the individual has agreed to waive some or all Fourth Amendment rights in exchange for more freedom within the correctional system, and expectations of privacy formed pursuant to state law. . . . On the other side of the scale, a court must consider the government’s interest in protecting the public, reducing recidivism, and promoting reintegration into society.”). Compare *United States v. Fletcher*, 978 F.3d 1009, 1015, 1018-19 (6th Cir. 2020) (“while [*Knights* holds that] the privacy interest of a probationer has been ‘significantly diminished,’ it is still substantial” and was violated when a probation officer searched the contents of a probationer’s cell phone in purported reliance on a state statute authorizing warrantless searches of a probationer’s “‘person[,] tangible or intangible personal property, or . . . real property upon reasonable suspicion’”; this statute, unlike the applicable provision in *Knights*, did not “clearly or unambiguously include[] a cell phone” [see the discussion of *Knights* in § 23.15(b) *supra*]; and “[t]he Supreme Court in *Riley [v. California]*, 573 U.S. 373 (2014), discussed in § 23.08(b) *supra*] recognized that the search of a cell phone is unique and – as compared to the search of a home – infringes far more on individual privacy”). A generation later, in *Birchfield v. North Dakota*, 579 U.S. 438 (2016), summarized in § 23.14(d) *supra*, the Supreme Court, “[h]aving concluded that the search incident to arrest doctrine does not justify the warrantless taking of a blood sample” from a motorist arrested for drunk driving (*id.* at 476), was required to address the question whether “such tests are justified based on the driver’s legally implied consent to submit to them” (*id.*) under state “implied-consent laws” that “go beyond” the “typical penalty for . . . [refusal to submit to blood testing for sobriety – namely,] suspension or revocation of the motorist’s license” – and “make it a crime for a motorist

to refuse to be tested after being lawfully arrested for driving while impaired” (*id.* at 444). The Court answered that question in the negative, but on extremely narrow grounds. “Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. . . . Petitioners do not question the constitutionality of those laws, and nothing we say here should be read to cast doubt on them. ¶ It is another matter, however, for a State not only to insist upon an intrusive blood test, but also to impose criminal penalties on the refusal to submit to such a test. There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads.¶ . . . [R]easonableness is always the touchstone of Fourth Amendment analysis, . . . [a]nd applying this standard, we conclude that motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense.” *Id.* at 476-77. In the wake of *Birchfield*, lower courts have continued to uphold the suspension of driver’s licenses under implied-consent laws as a sanction for refusal to submit to blood-draw testing (*e.g.*, *Renfroe v. Commonwealth, Pennsylvania Department of Transportation*, 179 A.3d 644 (Pa. Commonwealth Ct. 2017)); they have found that blood draws performed upon drivers who consented to them after being warned that a refusal would result in the suspension of their operating privileges are not *per se* unconstitutional (*see State v. Fleckenstein*, 907 N.W.2d 365, 369 (N.D. 2018)); they have found that refusals to consent may be used in criminal prosecutions as evidence of consciousness of guilt (*Fitzgerald v. People*, 2017 CO 26, 394 P.3d 671 (Colo. 2017); *Commonwealth v. Bell*, 653 Pa. 515, 211 A.3d 761 (2019)) or as the basis for a mandatory minimum sentence on a DWI conviction (*State v. LeMeunier-Fitzgerald*, 2018 ME 85, 188 A.3d 183 (Me. 2018)); *but see Commonwealth v. McCarthy*, 628 S.W.3d 18, 23 (Ky. 2021) (“We conclude the trial court properly held that under *Birchfield* McCarthy’s refusal to submit to a blood test could not be used to enhance his criminal penalty for DUI and, under controlling Kentucky precedent, could not be used as evidence that he was guilty of DUI. The trial court erred, however, in allowing the Commonwealth to introduce the refusal evidence to explain to the jury the lack of scientific evidence as to McCarthy’s blood alcohol content . . .”). And a dictum in a plurality opinion in *Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2532-33 (2019), gives its blessing to “the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply” with a request for a blood draw. (After noting that “our decisions [dealing with “implied consent” laws] have not rested on the idea that these laws do what their popular name might seem to suggest” – that is, create actual consent to all the searches they authorize” and that “[i]nstead, we have based our decisions on the precedent regarding the specific constitutional claims in each case,” the plurality says specifically that “punishing . . . [drivers’] refusal [to submit to a blood draw requested by an arresting officer] with automatic license revocation does not violate drivers’ due process rights if they have been arrested upon probable cause . . . ; on the contrary, this kind of summary penalty is ‘unquestionably legitimate.’”) The *Mitchell* plurality opinion and the post-*Birchfield* lower-court cases that uphold such sanctions observe correctly that *Birchfield* explicitly declined to address their constitutionality, but neither *Birchfield* nor its progeny to date have explained how the enforcement of implied consent through administrative sanctions and adverse evidentiary consequences is consistent with the settled general principle that consents extracted *ex ante* as the price for receiving government “privileges” are ineffective. *See Garrity v. New Jersey*, 385 U.S.

493 (1967); *Gardner v. Broderick*, 392 U.S. 273 (1968); *Lefkowitz v. Turley*, 414 U.S. 70 (1973); *Lefkowitz v. Cunningham*, 431 U.S. 801, 805 (1977) (“when a State compels testimony by threatening to inflict potent sanctions unless the constitutional privilege is surrendered, that testimony is obtained in violation of the Fifth Amendment and cannot be used against the declarant in a subsequent criminal prosecution”). In each of these Fifth Amendment cases, the “potent sanctions” threatened were nothing more or less than the termination of public employment or of “the opportunity to secure public contracts” (*id.* at 806) – advantages which the states have no greater obligation to bestow than driver’s licenses. Pending authoritative resolution of the question left undecided by *Birchfield* whether the Fourth Amendment permits searches that involve significant intrusions upon person, privacy or property on the basis of anterior general consents extracted as the condition of state-conferred licenses or benefits, counsel are warranted in taking the position that the answer is no. Counsel should rely primarily on their state constitutional guarantees and rules against coerced waivers of those guarantees (*see Commonwealth v. Norman*, 484 Mass. 330, 335, 142 N.E.3d 1, 6-7 (2020) (holding that the requirement of submission to GPS tracking as a condition of pretrial release violates the state constitution: “Although consent can justify a warrantless search, ‘the Commonwealth bears the burden of proof that consent was freely and voluntarily given, meaning it was unfettered by coercion, express or implied’ ¶ Here, the only evidence of consent is the fact that the defendant signed the form [of consent required as a condition for release]. If he had not, the consequence presumably would have been pretrial detention The Commonwealth has not met its burden of showing free and voluntary consent.”); *Commonwealth v. Feliz*, 486 Mass. 510, 515, 159 N.E.3d 661, 667 (2020) (“In examining the reasonableness of a condition of probation that authorizes suspicionless searches without probable cause or reasonable suspicion, courts weigh the government’s need for the search and the degree of invasion of the reasonable expectations of privacy that the search entails. . . . ¶ Some conditions, such as those that authorize blanket suspicionless searches of a probationer’s home, are so invasive that they are not permissible under art. 14 [of the Massachusetts Constitution].”); *State v. Ochoa*, 792 N.W.2d 260 (Iowa 2010); and *see* § 7.09 *supra*) but also argue as a backstop that, as a matter of federal Fourth Amendment law, the *Garrity-Gardner-Lefkowitz* principle trumps the plurality’s dictum in *Mitchell*. *See Serpas v. Schmidt*, 1983 WL 2192 (N.D. Ill. 1983) (invalidating a requirement that groomers employed by a public racetrack consent to searches of their living quarters at the track and of their persons as a condition for occupational licensure: “[i]t has long been held by the Supreme Court that the government may deny an individual a benefit for legitimate reasons; it may not, however, deny a benefit for a reason which infringes an individual’s constitutional rights” (*id.* at *10)). Alternatively, counsel can argue that at the least the compulsion exerted by such sanctions is a factor to be considered under *Schneekloth*’s “totality-of-the-circumstances” analysis in determining the voluntariness of a defendant’s consent. *See Commonwealth v. Myers*, 640 Pa. 653, 164 A.3d 1162 (2017) (an encyclopedic, cautious plurality opinion invoking constitutional restraints as a basis for construing the State’s implied-consent law to forbid the taking of a blood draw from an unconscious driver: “In recent years, a multitude of courts in our sister states have interpreted their respective – and similar – implied consent provisions and have concluded that the legislative proclamation that motorists are deemed to have consented to chemical tests is insufficient to establish the voluntariness of consent that is necessary to serve as

an exception to the warrant requirement.” *Id.* at 673, 164 A.3d at 1173. “Even where implied consent statutes establish a clear right of refusal . . . numerous state courts have concluded that implied consent laws which provide that motorists are deemed to consent to chemical tests do not, in themselves, serve as exceptions to the warrant requirement.” *Id.* at 674, 164 A.3d at 1174. “Although it does not squarely resolve the question of whether implied consent may serve as an independent warrant exception, the *Birchfield* decision does not suggest any contrary conclusion. To be sure, *Birchfield* (like our own precedents) provides a general if uncontroversial endorsement of the concept of implied consent. . . . But *Birchfield* in no way suggests that the existence of a statutory implied consent provision obviates the constitutional necessity that consent to a search must be voluntarily given” *Id.* at 681, 164 A.3d at 1178. “We . . . agree with Professor LaFave that *Birchfield* does not cast doubt upon the principle that the consent exception to the warrant requirement requires analysis under the totality of the circumstances, and may not be satisfied merely by legislative proclamation. . . . We find it particularly doubtful that the Court, while relying upon the seminal *Schneckloth* decision in discussing the necessity of voluntariness, would sweep away decades of jurisprudence by implication only, and would alter dramatically the mechanics of the consent exception without explicitly so declaring.” *Id.* at 684, 164 A.3d at 1180.); *State v. Prado*, 2021 WI 64, 397 Wis. 2d 719, 960 N.W.2d 869 (Wis. 2021) (an implied-consent statute which “provides: ‘A person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn [the] consent’ . . . [statutorily implied in the case of any person operating a vehicle on a public highway, and which thereby authorizes] a law enforcement officer [who] has probable cause to believe that an incapacitated person has violated the . . . [drunk driving] statutes . . . [to] take blood from the person for testing without a search warrant” (397 Wis. 2d at 731, 960 N.W.2d at 875) is facially unconstitutional under the Fourth Amendment; “In the context of warrantless blood draws, consent ‘deemed’ by statute is not the same as actual consent, and in the case of an incapacitated driver the former is incompatible with the Fourth Amendment. Generally, in determining whether constitutionally sufficient consent is present, a court will review whether consent was given in fact by words, gestures, or conduct. . . . This inquiry is fundamentally at odds with the concept of ‘deemed’ consent in the case of an incapacitated driver because an unconscious person can exhibit no words, gestures, or conduct to manifest consent.” 397 Wis. 2d at 739, 960 N.W.2d at 879. “The State’s essential argument in this case boils down to an assertion that the incapacitated driver provision is constitutional because exigent circumstances may have been present. This argument conflates the consent and exigent circumstances exceptions to the warrant requirement. The incapacitated driver provision of the implied consent statute is not focused on exigent circumstances. As the moniker ‘implied consent’ connotes, the statute addresses consent, which is an exception to the warrant requirement separate and apart from exigent circumstances. 397 Wis. 2d at 738-39, 960 N.W.2d at 875).)

§ 23.18(b) Authority To Consent: Consent by a Party Other Than the Respondent

Consent by a party other than the respondent is a significant issue in juvenile court because the police routinely obtain consent for entry of a respondent’s room and search of his or her belongings from the respondent’s parent.

The test of a third party's authority to consent is whether the third party possessed – or reasonably appeared to the police to possess – “common authority over or other sufficient relationship to the premises or effects sought to be inspected.” *United States v. Matlock*, 415 U.S. 164, 171 (1974). See also *Frazier v. Cupp*, 394 U.S. 731, 740 (1969); *Georgia v. Randolph*, 547 U.S. 103, 109 (2006) (“the exception for consent extends even to entries and searches with the permission of a co-occupant whom the police reasonably, but erroneously, believe to possess shared authority as an occupant”); *Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990). “Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, . . . but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.” *United States v. Matlock*, 415 U.S. at 171 n.7. See also *Georgia v. Randolph*, 547 U.S. at 111 (“The constant element in assessing Fourth Amendment reasonableness in the consent cases . . . is the great significance given widely shared social expectations, which are naturally enough influenced by the law of property, but not controlled by its rules.”); *Stoner v. California*, 376 U.S. 483 (1964) (hotel manager's consent to the entry of a guest's room is ineffective); *Chapman v. United States*, 365 U.S. 610 (1961) (landlord's consent to the entry of a tenant's house is ineffective); *United States v. Thomas*, 65 F.4th 922, 923-24 (7th Cir. 2023) (requiring suppression of evidence seized in the search of a condominium although the landlord consented to the search and the defendant had leased the condo under “a bogus name in order to avoid arrest on multiple warrants”: the Government “conceded that the lease gave Thomas a subjective expectation of privacy in the condo. But it argued that this is not an expectation that society is prepared to accept as reasonable, because Thomas had obtained the lease by deceiving the landlord about his identity, which is a crime in Georgia.” The Seventh Circuit rejects this argument because “Georgia has codified . . . [a condo lessee's] expectation that his tenancy could not be revoked without notice and an opportunity for judicial process . . . [; no judicial revocation proceedings were held before the search of Thomas's condo; therefore,] his expectation of privacy . . . is one that society recognizes as reasonable.”); *United States v. Terry*, 915 F.3d 1141, 1143 (7th Cir. 2019) (“Is it reasonable for officers to assume that a woman who answers the door in a bathrobe has authority to consent to a search of a male suspect's residence? We hold that the answer is no. The officers could reasonably assume that the woman had spent the night at the apartment, but that's about as far as a bathrobe could take them. Without more, it was unreasonable for them to conclude that she and the suspect shared access to or control over the property.”); cf. *Payton v. New York*, 445 U.S. 573, 583 (1980) (three-year old child's opening of the door to the house could not constitute valid consent to a police entry to arrest the child's father).

Although “voluntary consent of an individual possessing [or reasonably appearing to possess the requisite] authority” may suffice “when the suspect is absent,” *Georgia v. Randolph*, 547 U.S. at 109 (emphasis added), a different standard applies when a co-occupant “who later seeks to suppress the evidence . . . is present at the scene and expressly refuses to consent.” *Id.* at 106. In *Georgia v. Randolph*, the Court addressed the latter scenario and held that “a physically

present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant." *Id.* at 122-23. *Accord, Fernandez v. California*, 571 U.S. 292, 300-01 (2014) (dictum). *See also Clemons v. Couch*, 3 F.4th 897, 902 n.3 (6th Cir. 2021) (after a domestic squabble, a homeowner ordered his daughter-in-law out of the house where she and her husband had been staying; she returned with a state trooper to retrieve her personal belongings, and they entered the house; the homeowner ordered the trooper to leave; the Sixth Circuit concludes that the homeowner's "demand that . . . [the trooper] leave negated any consent that . . . [the trooper] may have had to enter the home. "); *United States v. Johnson*, 656 F.3d 375, 377-79 (6th Cir. 2011) (the defendant's objection to the search at the scene was sufficient to override the consent given by his wife and her grandmother, even though the defendant "was not a full-time resident of the home and his possessory interest was therefore inferior to that of" the consenting individuals, "who lived there full-time": the Supreme Court in *Randolph* "expressly avoided making . . . distinctions" between "relative degrees of possessory interest among residential co-occupants"). *Compare Fernandez v. California*, 571 U.S. at 294, 303 (a domestic violence victim's consent to police entry of the home she shared with the defendant was valid, notwithstanding the defendant's objection at the time the police arrived, because the "consent was provided by [the] . . . abused woman well after her male partner had been [lawfully] removed" by the police: when "an occupant . . . is absent due to a lawful detention or arrest," the absent occupant "stands in the same shoes as an occupant who is absent for any other reason"; the Court emphasizes, however, that the defendant did not "contest the fact that the police had reasonable grounds for removing him from the apartment so that they could speak with . . . an apparent victim of domestic violence, outside of [the defendant's] . . . potentially intimidating presence," and did "not even contest the existence of probable cause to place him under arrest"), *with State v. Coles*, 218 N.J. 322, 328, 347-48, 95 A.3d 136, 139, 150-51 (2014) ("As the United States Supreme Court's *Fernandez* opinion makes clear, valid third-party consent is subject to the exception that the third party's consent cannot be manufactured through the unlawful detention of the defendant"; the New Jersey Supreme Court holds on state constitutional grounds, "bolstered by Fourth Amendment principles," that the officers' initially valid detention of the defendant became unlawful once his identity and residence were confirmed and thus he "was being unlawfully detained by police, a few houses away from his home" at the time the police obtained consent from his aunt to search his bedroom in her house; the "asserted consent-based search" therefore was unlawful because "[t]he officer's action detaining defendant in a patrol car when probable cause to arrest was lacking effectively prevented any objection from defendant" and "[it] also prevented him from disputing his aunt's statements in response to police inquiries about control over the room").

It should be noted that in *Randolph* the objecting party and the consenting party were both adults; it is unclear whether the result would be different if the objecting party were a juvenile and the consenting party were his or her adult relative, caretaker or other owner of a possessory interest in the premises that the juvenile lacks; but prosecutors will predictably argue that a child cannot countermand an adult possessor's consent to a police entry into premises. In cases of this sort, courts may well draw distinctions between different portions of the premises, holding, for example, that the child's objection cannot exclude the police from common portions of a

dwelling but can preclude them from searching the child's own room or areas of it reserved for storage of the child's personal effects. *See Georgia v. Randolph*, 547 U.S. at 112, quoted in the paragraph after next; and *cf.* § 23.35 *infra*.

At least in the absence of a child's refusal of consent to police entry and search of the home, a parent ordinarily will be deemed to have the authority to consent to an entry of the home in which s/he lives with the respondent and to an inspection of any of the "common areas" of the home. The question whether a parent has the authority to consent to a search of his or her child's room is a far less clear-cut issue. In *Griffin v. Wisconsin*, 483 U.S. 868 (1987), the Court observed in *dictum* that the interest of "parental custodial authority" would weigh against the application of the warrant requirement to a "search of a minor child's room," *id.* at 876, but that issue was not before the Court, and the majority decision does not purport to address the constitutional interests that could outweigh the interest of "parental custodial authority." Some lower courts have chosen to adopt a general rule on this subject, either recognizing an absolute parental right to consent emanating from the parent's ownership of, or control over, the premises, *see, e.g., United States v. Stone*, 401 F.2d 32, 34 (7th Cir. 1968); *Maxwell v. Stephens*, 348 F.2d 325, 336-38 (8th Cir. 1965), or conversely holding that the right to consent to a search of one's room is a personal right that cannot be waived by one's parent, *People v. Flowers*, 23 Mich. App. 523, 527, 179 N.W.2d 56, 58 (1970). *See generally* Kristin Henning, *The Fourth Amendment Rights of Children at Home: When Parental Authority Goes Too Far*, 53 WM. & MARY L. REV. 55 (2011).

Unless defense counsel is in a jurisdiction that has already adopted a categorical rule concerning a parent's power to consent to the search of his or her child's room, counsel's safest course will usually be to elicit facts showing that this particular family treated the respondent's room as reserved for his or her private occupancy and use, to the exclusion of other family members, including the parent(s). Such a showing would bring the case within the general rule that a parent cannot consent to search of an area or object that has been clearly demarcated as reserved for the child's use. *See, e.g., In re Scott K.*, 24 Cal. 3d 395, 595 P.2d 105, 155 Cal. Rptr. 671 (1979) (a parent's authority to consent to search of the home did not extend to consenting to the search of a child's locked toolbox inside the child's bedroom); *State v. Peterson*, 525 S.W.2d 599, 608-09 (Mo. App. 1975) (a father could not validly consent to search of his child's room because the room was exclusively reserved for the child's occupancy and use); *see also United States v. Peyton*, 745 F.3d 546, 552-56 (D.C. Cir. 2014) (an adult defendant's great-great-grandmother, with whom he shared a one-bedroom apartment, lacked both actual and apparent authority to consent to a search of a closed shoebox of his that was next to his bed: "The fact that a person has common authority over a house, an apartment, or a particular room, does not mean that she can authorize a search of anything and everything within that area."); *State v. Colvard*, 296 Ga. 381, 381-82, 383, 768 S.E.2d 473, 474, 475 (2015) (an adult defendant's uncle, in whose apartment the defendant lived, did not have authority to consent to a search of the defendant's bedroom, which was "used exclusively" by the defendant, had a lock on the door for which the uncle did not have a key and the "Uncle could not go into the bedroom when the door was locked," and the bedroom door was locked at the time of the police entry of the home although

“it did not appear that the bedroom door was securely fastened” since the police were able to “pop [it] open” easily); *cf. Georgia v. Randolph*, 547 U.S. at 112 (“when it comes to searching through bureau drawers, there will be instances in which even a person clearly belonging on premises as an occupant may lack any perceived authority to consent; ‘a child of eight might well be considered to have the power to consent to the police crossing the threshold into that part of the house where any caller, such as a pollster or salesman, might well be admitted,’ 4 LaFave § 8.4(c), at 207 (4th ed. 2004), but no one would reasonably expect such a child to be in a position to authorize anyone to rummage through his parents’ bedroom”); *United States v. Moran*, 944 F.3d 1 (1st Cir. 2019) (arrestee’s sister had neither actual nor apparent authority to consent to a warrantless search of closed, opaque black trash bags containing his personal effects which he had asked her to hold for him in her storage unit); *State v. Jackson*, 878 N.W.2d 422 (Iowa 2016) (finding a Fourth Amendment violation where an “officer relied on a third party’s consent in conducting the search. The third party possessed actual authority to consent to a search of the bedroom the backpack was in but lacked actual authority to consent to a search of the backpack itself.” *Id.* at 424. “[A] warrantless search is not authorized when the circumstances would cause a reasonable officer to doubt whether the party consenting had authority to consent with respect to the location to be searched. The mere fact that an officer subjectively relied on third-party consent does not render that reliance reasonable. . . . Reliance on apparent authority to authorize a search is only reasonable when the authority of the person consenting is actually apparent with respect to the location to be searched. Thus, when the totality of the circumstances indicates a reasonable officer would have conducted further inquiry to determine whether the person who consented to a premises search had authority to consent to a search of a closed container, the government must demonstrate the officer did just that in order to establish the search of the container was reasonable.” *Id.* at 438.); *Reeves v. Warden*, 346 F.2d 915 (4th Cir. 1965) (a co-tenant cannot consent to entry of an area reserved for the defendant’s private occupancy and use). In making such a showing, counsel should stress any of the following facts that can be proved: The respondent’s room has a lock on it and is normally locked when the respondent is not inside the room; the parent does not normally enter the respondent’s room without asking the respondent’s permission (and the parent does not regularly enter the room at will for the purpose of cleaning it); the family has an understanding that the room has been set aside for the respondent’s private use, and this was done for the sake of giving the respondent an area that s/he could view as private and exclusively his or her own.

§ 23.18(c) “Private Searches”

A situation analytically distinct from third-party consent searches but sometimes entangled with it is presented when a private citizen unconnected with law enforcement makes a search or seizure of property or premises in which that person has no protected interest but the respondent does. If the private citizen is not acting in collaboration or coordination with any government agent at the time of the search or seizure, neither that initial action nor the subsequent delivery of its fruits to law enforcement officers implicates the Fourth Amendment. *Burdeau v. McDowell*, 256 U.S. 465 (1921); *United States v. Phillips*, 32 F.4th 865 (9th Cir. 2022); *United States v. Miller*, 982 F.3d 412 (6th Cir. 2020); *Commonwealth v. Shaffer*, 653 Pa.

258, 209 A.3d 957 (2019). Compare *United States v. Meals*, 21 F.4th 903, 905 (5th Cir. 2021) (as required by statute (18 U.S.C. §2258A(a)), Google sent an electronic CyberTipline report to the National Center for Missing and Exploited Children (NCMEC) that Meals and a 15-year-old were exchanging messages about their past and future sexual encounters via Facebook; NCMEC reported this to law enforcement authorities who used the tip to obtain a warrant for Meals’s electronic devices; Meals’s motion to suppress evidence obtained in executing the warrant was denied, and the Court of Appeals affirms “because Facebook did not act as a government agent and NCMEC’s search, assuming that it is a government agent, did not exceed the scope of Facebook’s cyber tip”), and *United States v. Rosenow*, 50 F.4th 715 (9th Cir. 2022) (same), and *United States v. Sykes*, 65 F.4th 867 (6th Cir. 2023) (essentially the same), with *United States v. Ackerman*, 831 F.3d 1292 (10th Cir. 2016) (alternative ground) (holding that NCMEC’s Cyber Tipline activities are subject to Fourth Amendment constraint: “[W]hen an actor is endowed with law enforcement powers beyond those enjoyed by private citizens, courts have traditionally found the exercise of the public police power engaged. . . . ¶ NCMEC’s law enforcement powers extend well beyond those enjoyed by private citizens – and in this way it seems to mark it as a fair candidate for a governmental entity. NCMEC’s two primary authorizing statutes . . . mandate its collaboration with federal (as well as state and local) law enforcement in over a dozen different ways, many of which involve duties and powers conferred on and enjoyed by NCMEC but no other private person. For example, NCMEC is statutorily obliged to operate the official national clearinghouse for information about missing and exploited children, to help law enforcement locate and recover missing and exploited children, to ‘provide forensic technical assistance . . . to law enforcement’ to help identify victims of child exploitation, to track and identify patterns of attempted child abductions for law enforcement purposes, to ‘provide training . . . to law enforcement agencies in identifying and locating non-compliant sex offenders,’ and of course to operate the CyberTipline as a means of combating Internet child sexual exploitation. . . . This special relationship runs both ways, too, for NCMEC is also empowered to call on various federal agencies for unique forms of assistance in aid of its statutory functions.”), and *United States v. Wilson*, 13 F.4th 961 (9th Cir. 2021) (Google sent a CyberTipline report to the NCMEC that Wilson had uploaded four images of apparent child pornography to his email account as email attachments. “No one at Google had opened or viewed Wilson’s email attachments; its report was based on an automated assessment that the images Wilson uploaded were the same as images other Google employees had earlier viewed and classified as child pornography. Someone at NCMEC then, also without opening or viewing them, sent Wilson’s email attachments to the San Diego Internet Crimes Against Children Task Force (ICAC), where an officer ultimately viewed the email attachments without a warrant. The officer then applied for warrants to search both Wilson’s email account and Wilson’s home, describing the attachments in detail in the application.” *Id.* at 964. The Ninth Circuit holds that the ICAC officer’s warrantless viewing of the images was a violation of the Fourth Amendment: “Viewing Wilson’s email attachments . . . substantively expanded the information available to law enforcement far beyond what the label [affixed to Wilson’s attachments: “A1,” indicating an image of a sex act involving a prepubescent minor] alone conveyed, and was used to provide probable cause to search further and to prosecute. The government learned at least two things above and beyond the information conveyed by the CyberTip by viewing Wilson’s images: First,

Agent Thompson learned exactly what the image showed. Second, Agent Thompson learned the image was in fact child pornography. Until he viewed the images, they were at most ‘suspected’ child pornography. . . . ¶ . . . Because the government saw more from its search than the private party had seen, it exceeded the scope of the private search.” *Id.* at 973-74.), and *State v. Terrell*, 372 N.C. 657, 658, 671, 831 S.E.2d 17, 18, 26 (2019) (rejecting the prosecution’s argument that the “private search” doctrine authorized “a law enforcement officer’s warrantless search of defendant’s USB drive, following a prior search of the USB drive by a private individual” who gave the thumb drive to the police after viewing images stored on it: “It is clear that . . . [the private individual’s] limited search did not frustrate defendant’s legitimate expectation of privacy in the *entire* contents of his thumb drive and that Detective Bailey’s follow-up search . . . was not permissible under [*United States v.*] *Jacobsen*[, 466 U.S. 109 (1984)] because he did not possess ‘a virtual certainty that nothing else of significance was in the [thumb drive] and that a manual inspection of the [thumb drive] and its contents would not tell him anything more than he already had been told’” by the private individual); *United States v. Donnes*, 947 F.2d 1430, 1434-35 (10th Cir. 1991) (ordering suppression of methamphetamine found by officers when they opened a camera lens case inside a glove that had been picked up by a private citizen and handed to an officer because it looked suspicious: “In *United States v. Jacobsen*, 466 U.S. 109 (1984), the Supreme Court recognized a standard for evaluating the actions of law enforcement officials when presented with evidence uncovered during a private search. The Court stated that ‘[t]he additional invasions of [defendant’s] privacy by the Government agent must be tested by the degree to which they exceeded the scope of the private search. *Id.* at 115. The district court found that . . . [the private individual here] gave the glove and its contents to the officer immediately after seeing the syringe inside the glove. . . . [The private individual] did not himself open the camera lens case which was also inside the glove.”); *United States v. Runyan*, 275 F.3d 449, 461 (5th Cir. 2001) (similar holding: “Language from the Supreme Court’s *Jacobsen* opinion suggests that the critical inquiry under the Fourth Amendment is whether the authorities obtained information with respect to which the defendant’s expectation of privacy has not already been frustrated. Thus, *Jacobsen* directs courts to inquire whether the government learned something from the police search that it could not have learned from the private searcher’s testimony and, if so, whether the defendant had a legitimate expectation of privacy in that information.”).

The Fourth Amendment does regulate the search or seizure “if the private party acted as an instrument or agent of the Government.” *Skinner v. Railway Labor Executives’ Association*, 489 U.S. 602, 614 (1989). *See, e.g., United States v. Shelton*, 997 F.3d 749 (7th Cir. 2021); *United States v. Ackerman*, 831 F.3d at 1300-04 (alternative ground); *United States v. Hardin*, 539 F.3d 404 (6th Cir. 2008) (acting under an arrest warrant for parole violation by an armed-robbery convict, government investigators went to the apartment of a woman whom they had been informed was his girlfriend; they “told the apartment manager that ‘we need to see if he is there’ and . . . ‘asked him to go ahead and under a ruse check to see if a water leak was in the apartment to see if he was there’” (*id.* at 407) (emphasis in original); although they testified without contradiction “that the apartment manager was shocked and worried about . . . [the parolee’s] potential presence in the apartment complex” (*id.*), the court holds that “because the officers urged the apartment manager to investigate and enter the apartment, and the manager,

independent of his interaction with the officers, had no reason or duty to enter the apartment, . . . the manager was acting as an agent of the government” (*id.* at 420)); *United States v. Walther*, 652 F.2d 788 (9th Cir. 1981) (“[T]wo of the critical factors in the “instrument or agent” analysis are: (1) the government’s knowledge and acquiescence, and (2) the intent of the party performing the search.” *Id.* at 792. An airline employee who opened a freight package in an airport baggage terminal is held to be a government agent under this test: “Though . . . [the employee] testified that he believed that a federal regulation gave the airlines the right to open any piece of luggage consigned to them for shipping, he also testified that the only reason why he opened the case was his suspicion that it contained illegal drugs. Thus, legitimate business considerations such as prevention of fraudulent loss claims were not a factor. The record contained sufficient evidence for the [district] court to conclude also that . . . [the employee] opened the case with the expectation of probable reward from the DEA. . . . [The employee] acknowledged that there was no reason that he should not expect a reward, and the testimony of a DEA agent established that it would be reasonable for him to have such an expectation. . . . We are thus satisfied that . . . [the employee] opened the package with the requisite mental state of an “instrument or agent.” *Id.* ¶ “We are also satisfied that . . . [the employee’s] prior experience with the DEA provides proof of the government’s acquiescence in the search. While the DEA had no prior knowledge that this particular search would be conducted and had not directly encouraged . . . [the employee] to search this overnight case, it had certainly encouraged . . . [him] to engage in this type of search. . . . [The employee] had been rewarded for providing drug-related information in the past. He had opened Speed Paks before, and did so with no discouragement from the DEA. The DEA thus had knowledge of a particular pattern of search activity dealing with a specific category of cargo, and had acquiesced in such activity.” *Id.* at 793.); *United States v. Reed*, 15 F.3d 928, 930-33 (9th Cir. 1994) (dictum); *State v. Moninger*, 957 So.2d 2 (Fla. App. 2007), *review dismissed as improvidently granted*, 982 So.2d 682 (Fla. 2008); *State v. Lien*, 364 Or. 750, 776-81, 441 P.3d 185, 200-02 (2019); *Fogg v. United States*, 247 A.3d 306 (D.C. 2021); *but see United States v. Bebris*, 4 F.4th 551 (7th Cir. 2021). “The decisive factor in determining the applicability of the . . . [Amendment] is the actuality of a share by a . . . [government] official in the total enterprise of securing and selecting evidence by other than sanctioned means. It is immaterial whether a . . . [government] agent originated the idea or joined in it while the search was in progress. So long as he was in it before the object of the search was completely accomplished, he must be deemed to have participated in it.” *Lustig v. United States*, 338 U.S. 74, 79 (1949) (plurality opinion). “Whether a private party should be deemed an agent or instrument of the government for Fourth Amendment purposes necessarily turns on the degree of the government’s participation in the private party’s activities, a question that can only be resolved in light of all the circumstances.’ . . . In evaluating agency in the Fourth Amendment context, our court has focused on three relevant factors: ‘[1] whether the government had knowledge of and acquiesced in the intrusive conduct; [2] whether the citizen intended to assist law enforcement or instead acted to further his own purposes; and [3] whether the citizen acted at the government’s request.’ . . . A defendant bears the burden of proving by a preponderance of the evidence that a private party acted as a government agent.” *United States v. Highbull*, 894 F.3d 988, 992 (8th Cir. 2018); *United States v. Fortney*, 772 Fed. Appx. 269, 273, 275 (6th Cir. 2019) (discussing two theories of official involvement in private searches – the state-compulsion test and the symbiotic relationship or

nexus test – and applying the latter test to find a Fourth Amendment violation: “‘Under the symbiotic relationship or nexus test, the action of a private party constitutes state action when there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself.’ . . . The test requires demonstrating that the state was ‘intimately involved in the challenged private conduct’ such that the conduct can ‘be attributed to the state[.]’ . . . The district court found that Fortney did not satisfy this test because the ‘three officers on site did not play an active role in the search.’ Here we part ways with the district court. . . . ¶ . . . Fortney unambiguously objected to the search. By everyone’s account, Fortney attempted to promptly and independently retrieve his property after he was fired but stopped this effort because three police officers triangulated around him. Then, as the three officers looked on – and in contrast to his earlier refusal – he allowed . . . [his employment supervisor, who had just fired him] to search every pocket of his bag, remove his wallet, and hand the wallet to the police so that they could go through its contents.”); *Meier v. City of St. Louis*, 934 F.3d 824, 829 (8th Cir. 2019) (a private towing company acting at the direction of a police dispatcher picked up, towed, and held a truck that was listed by police as “wanted” because of possible involvement in a hit-and-run incident; the Eighth Circuit concludes that the towing company is a state actor because “an act violating the Constitution is considered to have occurred under color of law if it is ‘fairly attributable’ to a governmental entity.”); *State v. Collins*, 367 Md. 700, 717-18, 790 A.2d 660, 670 (2002) (holding that two bail bond agents were state actors for Fourth Amendment purposes because they were accompanied to the door of the defendant’s apartment by a police officer who initially knocked on the door and asked the defendant “if *we* could check the residence for a wanted subject” (not the defendant himself) but who remained outside while the bondsmen insisted on entering; the bondsmen had taken the initiative in the episode, telling the officer that they wished to apprehend a wanted subject and requesting his aid pursuant to an established practice whereby officers “stood by” bondsmen to intervene if, but only if, the officer witnessed a crime being committed: however, “[i]n the case *sub judice*, the actions of . . . [the officer] in relation to the bail bond agents and . . . [defendant] was more akin to non-incident and impliedly supportive conduct, as opposed to mere standby protection services. In conjunction with the inherent nature of the bail bond process, the extra actions of the officer under the specific circumstances here present, transformed the actions of the bail bond persons into ‘State action’ subjecting the search to Fourth Amendment analysis.”). And see §§ 23.33 - 23.36 *infra*.

§ 23.18(d) Application of the “Private Search” Doctrine to Home Entries by Law Enforcement Officers

This subject is canvassed thoroughly, with discussion of the relevant authorities, in *State v. Wright*, 221 N.J. 456, 459-78, 114 A.3d 340, 342-53 (2015):

“In this case, we consider whether the ‘third-party intervention’ or ‘private search’ doctrine applies to a warrantless search of a home.

“The doctrine originally addressed situations like the following: Private actors

search an item, discover contraband, and notify law enforcement officers or present the item to them. The police, in turn, replicate the search without first getting a warrant. *See, e.g., United States v. Jacobsen*, 466 U.S. 109 (1984) [§ 23.22(b) subdivision (ii) *infra*]. Because the original search is carried out by private actors, it does not implicate the Fourth Amendment. And if the officers' search of the item does not exceed the scope of the private search, the police have not invaded a defendant's protected privacy interest and do not need a warrant.

"The State now seeks to expand the doctrine to a very different setting: the search of a private home. In this case, a resident reported a leak in her apartment to her landlord, who showed up the following day with a plumber. The landlord and plumber entered the apartment while no one was home, spotted the leak in the kitchen, and checked elsewhere for additional leaks. In the rear bedroom, the plumber saw drugs on top of a nightstand and inside an open drawer. He and the landlord notified the police.

"Instead of using that information to apply for a search warrant, an officer walked into the apartment and looked around the kitchen and bedroom area. He, too, noticed the drugs and found a scale as well. The police conducted a full search moments later, with the resident's consent, and found other contraband.

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"Relying on the protections in the State Constitution, we conclude that the private search doctrine cannot apply to private dwellings. Absent exigency or some other exception to the warrant requirement, the police must get a warrant to enter a private home and conduct a search, even if a private actor has already searched the area and notified law enforcement.

"To be sure, whenever residents invite someone into their home, they run the risk that the third party will reveal what they have seen to others. . . . A landlord, like any other guest, may tell the police about contraband he or she has observed. And the police, in turn, can use that information to apply for a search warrant. . . . But that course of events does not create an exception to the warrant requirement.

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"We recognize that residents have a reduced expectation of privacy in their home whenever a landlord or guest enters the premises. But residents do not thereby forfeit an expectation of privacy as to the police. In other words, an invitation to a plumber, a dinner guest, or a landlord does not open the door to one's home to a warrantless search by a police officer.

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“The proper course under the State and Federal Constitutions is the simplest and most direct one. If private parties tell the police about unlawful activities inside a person’s home, the police can use that information to establish probable cause and seek a search warrant. In the time it takes to get the warrant, police officers can secure the apartment or home from the outside, for a reasonable period of time, if reasonably necessary to avoid any tampering with or destruction of evidence. *Illinois v. McArthur*, 531 U.S. 326, 334 . . . (2001) [§ 23.06(c) *supra*]. But law enforcement cannot accept a landlord’s invitation to enter a home without a warrant unless an exception to the warrant requirement applies.”

Accord, *State v. Shaw*, 237 N.J. 588, 611, 207 A.3d 229, 242 (2019) (extending *Wright* to motel rooms; “[w]e note, as a general matter, that the third-party intervention doctrine is a poor fit to living spaces”); *State v. Rodriguez*, 521 S.W.3d 1 (Tex. Crim. App. 2017).

§ 23.19 WARRANTLESS ENTRY FOR THE PURPOSE OF MAKING A VALID ARREST

Before the decisions in *Payton v. New York*, 445 U.S. 573 (1980), and *Steagald v. United States*, 451 U.S. 204 (1981), there was a substantial body of caselaw holding that police officers who had probable cause to arrest an individual could constitutionally enter premises (including residential premises) to make the arrest without a search or arrest warrant. In *Payton*, the Supreme Court held that “the Fourth Amendment . . . prohibits the police from making a warrantless and nonconsensual entry into a suspect’s home in order to make a routine felony arrest” (445 U.S. at 576). *See, e.g., Collins v. Virginia*, 138 S. Ct. 1663, 1672 (2018) (“it is a ‘settled rule that 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”); *United States v. McCraw*, 920 F.2d 224, 228 (4th Cir. 1990) (“Mathis’s suppression motion presents the question of whether officers without an arrest warrant but with probable cause may, absent exigent circumstances, force their way into a hotel room and arrest the occupant who, from inside his room, partially opens the door to determine the identity of officers knocking on the door. We hold that a person does not surrender his expectation of privacy nor consent to the officers’ entry by so doing, and that his arrest inside his room under such circumstances is contrary to the fourth amendment and the United States Supreme Court’s decision in *Payton*). This holding has generally been understood to require an arrest warrant – not a search warrant – as the precondition for police entry into a building to effect the arrest of someone believed to be inside; dictum at the end of the opinion said that “an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within” (*id.* at 603). The reference to a “routine” arrest is conventionally read as distinguishing cases in which there is a demonstrated need to apprehend the suspect immediately, without the delay that applying for a warrant would entail. *See, e.g., Bailey v. Swindell*, 940 F.3d 1295, 1303 (11th Cir. 2019) (a police officer went to the front door of Bailey’s parents’ home and asked to speak with

him about an incident involving his estranged wife; Bailey came out onto the porch but refused to talk with the officer; they argued briefly; Bailey retreated into the house; the officer followed him through the doorway, tackled him and arrested him: “Because . . . [the officer] can point to no exigency, he violated the Fourth Amendment when he crossed the threshold to effectuate a warrantless, in-home arrest.”).

In *Steagald*, the Court held that “a law enforcement officer may [not] legally search for the subject of an arrest warrant in the home of a third party without first obtaining a search warrant[,] absent exigent circumstances or consent” (451 U.S. at 205-06). The gap between *Steagald*’s “third-party”-home holding and *Payton*’s “suspect’s”-home dictum left unclear such questions as (1) whether a search warrant is required for “arrest entries” into nonresidential premises; (2) whether a particular residence should be treated as that of the “suspect” in joint-occupancy situations, situations in which the suspect is living as a guest (more or less transiently or permanently) in someone else’s home, and other complicated multi-person living arrangements (and also what degree of well-founded belief police officers must have that a particular dwelling satisfies the criteria for the suspect’s residence rather than a third party’s); and (3) whether “reason to believe the suspect is within” a particular residence means *probable cause* (see § 23.07(d) *supra*) or some other degree of founded belief. Concerning the second and third questions, see *United States v. Brinkley*, 980 F.3d 377 (4th Cir. 2020): (a) “Pursuant to *Payton* and *Steagald*, the officers needed to establish reason to believe not just that Brinkley was *staying* in the Stoney Trace apartment but that he *resided* there. If Brinkley was merely staying as a guest in someone else’s home, *Steagald* would require the officers to obtain a search warrant before they could enter it. Detective Stark’s discovery that Brinkley was involved with Chisholm, and that Chisholm was associated with the Stoney Trace apartment, certainly provided additional evidence that Brinkley might well have stayed at Chisholm’s home, but it did not speak to whether he did so as a resident or as Chisholm’s overnight guest. . . . Further investigation was necessary to establish probable cause that Brinkley *resided* there.” *Id.* at 387-88. (b) “The courts of appeals have unanimously interpreted *Payton*’s standard – ‘reason to believe the suspect is within,’ . . . – to require a two-prong test: the officers must have reason to believe both (1) ‘that the location is the defendant’s residence’ and (2) ‘that he [will] be home’ when they enter. . . . But the quantum of proof necessary to satisfy *Payton* has divided the circuits, with some construing ‘reason to believe’ to demand less than probable cause and others equating the two standards. See *United States v. Vasquez-Algarin*, 821 F.3d 467, 474–77 (3d Cir. 2016) (collecting cases). ¶ It seems to us that interpreting reasonable belief to require probable cause hews most closely to Supreme Court precedent and most faithfully implements the special protections that the Fourth Amendment affords the home. For these reasons, we join those courts ‘that have held that reasonable belief in the *Payton* context “embodies the same standard of reasonableness inherent in probable cause.”’” *Id.* at 384, 386; see also, e.g., *United States v. Gorman*, 314 F.3d 1105 (9th Cir. 2002); and see *United States v. Vasquez-Algarin*, 821 F.3d 467, 469 (3d Cir. 2016) (“Law enforcement officers need both an arrest warrant and a search warrant to apprehend a suspect at what they know to be a third party’s home. If the suspect resides at the address in question, however, officers need only an arrest warrant and a ‘reason to believe’ that the individual is present at the time of their entry. This case sits between these two rules and calls on

us to decide their critical point of inflection: how certain must officers be that a suspect resides at and is present at a particular address before forcing entry into a private dwelling? ¶ A careful examination of the Supreme Court’s Fourth Amendment jurisprudence reveals that the standard cannot be anything less than probable cause. Because here, law enforcement acted on information that fell short of the standard, we will vacate the conviction and remand to the District Court.”). *But see Cunningham v. Baltimore County*, 246 Md. App. 630, 677, 232 A.3d 278, 306-07 (2020) (“Based on our review of the case law, we are persuaded, consistent with the majority of state courts addressing the reasonable belief standard in the context of an entry into the home pursuant to an arrest warrant, that the ‘reason to believe’ standard does not rise to the level of probable cause. Rather, we hold, consistent with the decision in *Taylor*, that the term ‘reason to believe’ in the context of the execution of an arrest warrant is akin to reasonable suspicion.”).

More basically, *Steagald*’s rationale casts doubt on the logical foundation of the *Payton* dictum itself:

“[W]hile an arrest warrant and a search warrant both serve to subject the probable-cause determination of the police to judicial review, the interests protected by the two warrants differ. An arrest warrant is issued by a magistrate upon a showing that probable cause exists to believe that the subject of the warrant has committed an offense and thus the warrant primarily serves to protect an individual from an unreasonable seizure. A search warrant, in contrast is issued upon a showing of probable cause to believe that the legitimate object of a search is located in a particular place, and therefore safeguards an individual’s interest in the privacy of his home and possessions against the unjustified intrusion of the police.” (451 U.S. at 212-13.)

An individual whose arrest is sought and justified on the ground of probable cause that s/he has committed a crime has no less interest in “the privacy of his home” than any other person. This proposition is the necessary predicate and implication of the well-settled rule of *Chimel v. California*, 395 U.S. 752 (1969), discussed in § 23.08(a) *supra*. *Chimel* was arrested in his home on a valid arrest warrant but a search of areas of his house beyond his “wingspan” was held to violate the Fourth Amendment in the absence of a search warrant for the premises. *See also Vale v. Louisiana*, 399 U.S. 30, 33-35 (1970); *Wilson v. Layne*, 526 U.S. 603, 609-11 (1999); *Maryland v. Buie*, 494 U.S. 325, 335 (1990) (dictum). So, in the “routine” arrest situation contemplated by *Payton*, where “officers were able to procure . . . warrants for . . . [homeowners’] arrest[s and] . . . [t]here is . . . no reason . . . to suppose that it was impracticable for them to obtain a search warrant as well” (*Vale v. Louisiana*, 399 U.S. at 35), they should be required to do so.

The lower courts have reached discordant results when wrestling with issues clouded by *Payton-Steagald* fallout. *See* 3 WAYNE R. LAFAYE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 6.1(b) (5th ed. & Supp.). In the current murky state of the law, counsel should not hesitate to take the position that both a search warrant and an arrest warrant are required in order to justify the police entering any premises in which an individual has a Fourth-

Amendment-protected interest (see § 23.15 *supra*) for the purpose of arresting him or her, except when they are “in ‘hot pursuit’ of a fugitive” (*Steagald v. United States*, 451 U.S. at 221) or under other “exigent circumstances” (see § 23.20 *infra*) that make it impracticable to obtain a warrant (*Steagald v. United States*, 451 U.S. at 213-16, 218, 221-22; *Minnesota v. Olson*, 495 U.S. 91, 100-01 (1990) (elaborated in § 23.20)). This position is supported by the lead opinion in *Commonwealth v. Romero*, 646 Pa. 47, 183 A.3d 364 (2018), which meticulously analyzes the pertinent authorities and concludes that

“the Fourth Amendment requires that, even when seeking to execute an arrest warrant, a law enforcement entry into a home must be authorized by a warrant reflecting a magisterial determination of probable cause to search that home, whether by a separate search warrant or contained within the arrest warrant itself. Absent such a warrant, an entry into a residence is excused only by a recognized exception to the search warrant requirement.” (646 Pa. at 114, 183 A.3d at 405-06.)

On its facts, the *Romero* case did not involve a police entry into the home of the person they were seeking to arrest; the home they thought was his turned out to be his half-brother’s; and it was the half-brother’s family whose Fourth Amendment rights the Pennsylvania Supreme Court’s lead opinion held *ex post* to have been violated. But the logic of the opinion would require the same result if the house had been his, because the police action and its justification are identical *ex ante* in the two situations. It is hornbook Fourth Amendment law that the lawfulness of a search or seizure depends on the circumstances as they appeared to officers at the time they acted (see § 23.07(d) *supra*): its “reasonableness . . . must be measured by what the officers knew before they conducted their search” (*Florida v. J.L.*, 529 U.S. 266, 271 (2000)).

At the least, *Payton*’s requirement that arresting officers have “reason to believe” that the person named in their arrest warrant “lives [in]” and is currently “within” the premises they enter should be construed as demanding probable cause for belief that these two preconditions exist. See *Maryland v. Buie*, 494 U.S. 325, 332 (1990) (dictum) (an arrest entry can be sustained only when the officers “[p]ossessing an arrest warrant . . . [have] probable cause to believe [that the person named in the warrant] was in his home”); *Lankford v. Gelston*, 364 F.2d 197 (4th Cir. 1966); *United States v. Vasquez-Algarin*, 821 F.3d 467 (3d Cir. 2016) (surveying conflicting federal circuit court decisions and concluding that the better rule is that a valid arrest entry requires probable cause (*id.* at 477-80) to believe “that the arrestee resided at and was present within the targeted home” (*id.* at 472)). Similarly, if the police act without an arrest warrant in reliance on a claim of exigent circumstances, “there must be at least probable cause to believe” that facts exist which give rise to “‘the need to prevent a suspect’s escape, or the risk of danger to the police or to other persons inside or outside the dwelling’” or which presage the “‘imminent destruction of evidence.’” *Minnesota v. Olson*, 495 U.S. 91, 100 (1990). The mere “‘inherent mobility’ of persons” sought to be arrested does not suffice to establish the requisite exigency because the police can cope with that problem “‘simply by waiting for a suspect to leave the [premises]’” (*cf. Steagald v. United States*, 451 U.S. at 221 n.14).

Police making any of the permissible types of arrest entry without a search warrant – entries pursuant to an arrest warrant and “hot pursuit” entries or entries under exigent circumstances (both discussed in § 23.20 *infra*) – are governed by the following rules:

- (i) The intended arrest itself must be valid within the principles of § 23.07 *supra*. If the arrest is not valid, the arrest entry falls with it. *E.g.*, *Massachusetts v. Painten*, 368 F.2d 142 (1st Cir. 1966), *cert. dismissed*, 389 U.S. 560 (1968).
- (ii) Upon entry, the police may “search anywhere in the house that . . . [the person sought] might . . . [be] found” (*id.* at 330). However, the entry and search may not exceed the bounds appropriate in hunting for a person (*id.* at 335-36), and they may not intrude into closed areas too small to contain a human being (*see United States v. Ross*, 456 U.S. 798, 824 (1982) (dictum)), unless the officers have probable cause to believe that the person sought to be arrested is armed and that they therefore “need to check the entire premises [for weapons] for safety reasons” (*Payton v. New York*, 445 U.S. at 589 (dictum); *see Warden v. Hayden*, 387 U.S. 294, 298-300 (1967)). *Cf. Arizona v. Hicks*, 480 U.S. 321 (1987), elaborated in § 23.22(b) *infra*.
- (iii) “Once . . . [the person sought has been] found, . . . the search for him . . . [is] over, and there . . . [is] no longer that particular justification for entering any rooms that had not yet been searched.” *Maryland v. Buie*, 494 U.S. at 333. “[A]s an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched.” *Id.* at 334. See also § 23.08 *supra*. “Beyond that, however, . . . [the only basis for continuing the search or entering additional rooms after the arrest is the “protective sweep” doctrine described in § 23.22(d) *infra*, which requires] articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.” *Maryland v. Buie*, 494 U.S. at 334.

Another limited exception to the search warrant requirement is a kind of hybrid of “arrest entry” reasoning and “consent” reasoning. In *Washington v. Chrisman*, 455 U.S. 1 (1982), the United States Supreme Court held that when a person who has been validly arrested in a location other than his or her home requests and receives permission from the arresting officer to return home before being taken to the lockup, the officer may accompany that person into the home, as an exercise of “the arresting officer’s authority to maintain custody over the arrested person” (*id.* at 6). *Contra, State v. Chrisman*, 100 Wash. 2d 814, 676 P.2d 419 (1984) (on remand, the Washington Supreme Court rejects the *Washington v. Chrisman* holding on state constitutional grounds).

To bring the *Payton* and *Steagald* warrant requirements into play, it is not always necessary that the police have entered closed quarters before effecting an arrest. Arrests on the threshold of a residence or just outside it are sufficient. *See, e.g., United States v. Allen*, 813 F.3d 76, 79, 85-86 (2d Cir. 2016) (defendant, who opened his apartment door at police officers' request and spoke to the officers from "'inside the threshold' while the officers stood on the sidewalk," "was under arrest" when "[t]he officers told Allen that he would need to come down to the police station to be processed for the assault," and the police thereby violated *Payton* even though the police had not yet physically entered the apartment: "While it is true that physical intrusion is the 'chief evil' the Fourth Amendment is designed to protect against, . . . we reject the government's contention that this fact requires that *Payton*'s warrant requirement be limited to cases in which the arresting officers themselves cross the threshold of the home before effecting an arrest. The protections of the home extend beyond instances of actual trespass. . . . By advising Allen that he was under arrest, and taking control of his further movements, the officers asserted their power over him *inside his home*."); *United States v. Nora*, 765 F.3d 1049, 1054, 1060 (9th Cir. 2014) ("The government properly concedes that the police arrested Nora 'inside' his home for purposes of the *Payton* rule. Although officers physically took Nora into custody outside his home in the front yard, they accomplished that feat only by surrounding his house and ordering him to come out at gunpoint. We've held that forcing a suspect to exit his home in those circumstances constitutes an in-home arrest under *Payton*." "Although Nora's arrest was supported by probable cause, the manner in which officers made the arrest violated *Payton*. Evidence obtained as a result of Nora's unlawful arrest must be suppressed."); *People v. Gonzales*, 111 A.D.3d 147, 148-50, 972 N.Y.S.2d 642, 643-44 (N.Y. App. Div., 2d Dep't 2013) (police who were told by a complainant that her cousin's boyfriend had assaulted her in a basement apartment went to the door of that apartment accompanied by the complainant; they knocked; "[w]hen the defendant opened the door, the police asked the complainant if he was the person who had assaulted her, and she said yes. The defendant, who had never left the apartment, even partially, tried to close the door, but the police pushed their way inside and handcuffed him. Minutes later, still inside the apartment, the defendant made an inculpatory statement. . . . ¶ In *Payton v. New York*, 445 U.S. 573 . . . the United States Supreme Court announced a clear and easily applied rule with respect to warrantless arrests in the home: 'the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant' The rule under the New York Constitution is the same (see N.Y. Const., art. 1, § 12; *People v. Levan*, 62 N.Y.2d 139, 144, 476 N.Y.S.2d 101, 464 N.E.2d 469). *Payton* and *Levan* require suppression of the defendant's statement under the clear, undisputed facts of this case.").

§ 23.20 WARRANTLESS ENTRY UNDER "EXIGENT CIRCUMSTANCES"

As mentioned earlier in § 23.19 *supra*, the police may make a warrantless entry for the purpose of effecting an arrest under "exigent circumstances" that preclude the acquisition of an arrest warrant. Thus, in *Warden v. Hayden*, 387 U.S. 294 (1967), the Court approved a building entry by officers without a warrant for the purpose of arresting a fugitive armed robbery suspect under circumstances of "hot pursuit": The police observed the defendant flee from the crime

scene, saw him enter the building, and reached the building less than five minutes after the defendant. *Cf. United States v. Santana*, 427 U.S. 38, 42-43 & n.3 (1976); *Steagald v. United States*, 451 U.S. 204, 218, 221-22 (1981) (dictum). In *Lange v. California*, 141 S. Ct. 2011 (2021), the Supreme Court left open the question whether *Hayden* and *Santana* establish a categorical rule allowing “hot pursuit” entries in all felony cases or whether the authority to follow a fleeing felon into a residence must be justified by exigency on a case-by-case basis. But the Court clarified that “the pursuit of a fleeing misdemeanor suspect” does not “always – or more legally put, categorically – qualif[y] as an exigent circumstance. . . . A great many misdemeanor pursuits involve exigencies allowing warrantless entry. But whether a given one does so turns on the particular facts of the case.” (141 S. Ct. at 2016.). “Under the . . . case-specific view, an officer can follow . . . [a fleeing] misdemeanant when, but only when, an exigency . . . allows insufficient time to get a warrant.” *Id.* at 2018. “When the totality of circumstances shows an emergency – such as imminent harm to others, a threat to the officer himself, destruction of evidence, or escape from the home – the police may act without waiting. And those circumstances . . . include the flight itself. But the need to pursue a misdemeanant does not trigger a categorical rule allowing home entry, even absent a law enforcement emergency. When the nature of the crime, the nature of the flight, and surrounding facts present no such exigency, officers must respect the sanctity of the home – which means that they must get a warrant.” *Id.* at 2021-22.

The more general “exception . . . for exigent circumstances . . . applies when ‘the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable.’ . . . The exception enables law enforcement officers to handle ‘emergenc[ies]’ – situations presenting a ‘compelling need for official action and no time to secure a warrant.’ . . . Over the years, this Court has identified several such exigencies. An officer, for example, may ‘enter a home without a warrant to render emergency assistance to an injured occupant[,] to protect an occupant from imminent injury,’ or to ensure his own safety. . . . So too, the police may make a warrantless entry to ‘prevent the imminent destruction of evidence’ or to ‘prevent a suspect’s escape.’ . . . In those circumstances, the delay required to obtain a warrant would bring about ‘some real immediate and serious consequences’ – and so the absence of a warrant is excused.” *Lange*, 141 S. Ct. at 2017. But “the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests” (*Welsh v. Wisconsin*, 466 U.S. 740, 749-50 (1984)). “Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries.” *Id.* at 750. *Accord, Vale v. Louisiana*, 399 U.S. 30, 34-35 (1970); *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 358-59 (1977); *Mincey v. Arizona*, 437 U.S. 385, 393-94 (1978); *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). “[I]n the absence of hot pursuit there must be at least probable cause to believe that [facts constituting exigent circumstances – such as the “‘imminent destruction of evidence, . . . or the need to prevent a suspect’s escape, or the risk of danger to the police or to other persons inside or outside the dwelling’” – are] . . . present.” *Minnesota v. Olson*, 495 U.S. 91, 100 (1990). *See, e.g., United States v. Collins*, 510 F.3d 697, 701 (7th Cir. 2007) (the government’s claim of “exigent circumstances” for a warrantless entry

of a dwelling, based on an asserted risk of destruction of evidence, is rejected because “[t]he government has failed to show that in this case the police had probable cause to believe that evidence was being, or was about to be, destroyed when they entered”); *United States v. Ramirez*, 676 F.3d 755, 762 (8th Cir. 2012) (hotel room occupant’s “attempt to shut the door once he became aware of the police presence outside [the] room” – by partially opening the door in response to an officer’s knocking and claiming to be housekeeping staff – did not provide a reasonable basis for believing that “the destruction of evidence was imminent”: the occupant “was under no obligation to allow the officers to enter the premises at that point and was likewise within his bounds in his attempt to close the door”); accord, *Williams v. Maurer*, 9 F.4th 416, 434-35 (6th Cir. 2021); *Lucibella v. Town of Oak Ridge*, 2023 WL 2822126 (11th Cir. 2023) (a report of gunshots in an area that included the defendant’s residence did not give rise to probable cause of an emergency situation justifying police entry into the back yard where the police could see, through a wrought-iron gate, the defendant and a companion (who was an off-duty police lieutenant) sitting with beverages on a patio); *United States v. Rodríguez-Pacheco*, 948 F.3d 1 (1st Cir. 2020) (police officers were dispatched to make a warrantless arrest of the defendant – a fellow officer – upon a complaint of domestic violence; local standard procedure called for retrieving an arrested officer’s service weapon before explaining the complaint to him and placing him under arrest; when the arresting officers arrived at the defendant’s residence, he came out the front door; they told him that they needed to retrieve his weapon; he offered to go in and get it; they insisted on accompanying him into the residence, where they found incriminating material that he moved before trial to suppress; the court rejects a claim that the exigent circumstances exception justified this entry: the domestic violence complaint did not involve the use of a weapon and the arresting officers had no reason to believe that the defendant would use his service weapon to resist arrest or for any other improper purpose.); *Turrubiate v. State*, 399 S.W.3d 147, 149, 154 (Tex. Crim. App. 2013) (an exigent circumstances exception is not supported by “probable cause to believe that illegal drugs are in a home coupled with an odor of marijuana from the home and a police officer making his presence known to the occupants”; there must be “additional evidence of . . . attempted or actual destruction based on an occupant’s movement in response to the police knock”); *People v. Hickey*, 172 A.D.3d 745, 746-47, 98 N.Y.S.3d 287, 288-89 (N.Y. App. Div., 2d Dep’t 2019) (the police could not rely on the exigent circumstances exception to enter and search the living room of the defendant’s home after the defendant “complied with the officers’ requests to come out [of the living room] with his hands up”: even though an officer had seen the defendant “reach[] into his waistband, remove[] an object, and toss[] it underneath a chair in the living room as he ducked behind a wall,” and even though the defendant’s psychiatrist had told a 911 operator that “the defendant was armed as a result of purchasing a shotgun and had a history of possessing firearms, making threats to police, and paranoia,” and the police knew from an “officer safety alert” that “the defendant previously had made threats to shoot a police officer and had a shotgun confiscated,” nonetheless the exigent circumstances exception did not apply because “any exigency abated once the defendant [exited the living room and] was detained”). *Compare Kentucky v. King*, 563 U.S. 452, 455, 462, 471 (2011) (if the police had a reasonable basis to believe that evidence in a dwelling was at risk of imminent destruction, which the Court “assume[s] for purposes of argument,” the exigent circumstances exception could justify a warrantless entry of the dwelling even though “the

police, by knocking on the door of a residence and announcing their presence, cause[d] the occupants to attempt to destroy evidence.” As long as “[t]he conduct of the police prior to their entry into the apartment was entirely lawful,” and “the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment,” “the exigent circumstances rule applies”), *with King v. Commonwealth*, 386 S.W.3d 119, 122 (Ky. 2012), *cert. denied*, 569 U.S. 954 (2013) (on remand of *Kentucky v. King* from the U.S. Supreme Court, the Kentucky Supreme Court holds that “the Commonwealth failed to meet its burden of demonstrating exigent circumstances justifying a warrantless entry” because “the sounds . . . [from inside the dwelling that the police] described at the suppression hearing [as evidencing efforts to destroy evidence] were indistinguishable from ordinary household sounds, and were consistent with the natural and reasonable result of a knock on the door”), and *State v. Campbell*, 300 P.3d 72, 74, 78-79 (Kan. 2013) (“the exigent circumstances exception does not apply in light of the officer’s unreasonable actions in creating the exigency” by not “simply knock[ing] on the door and wait[ing] for an answer . . . [or “announc[ing] his presence” but instead] covering the peephole and positioning himself to block the occupant’s ability to determine who was standing at the door,” thereby causing an occupant to “open[] the door about a third of the way” while visibly armed with a gun).

In *Welsh v. Wisconsin*, the Court held that in cases of arrest entries under a claim of exigent circumstances, “an important factor to be considered in determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made.” 466 U.S. at 753. Explaining that “application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense . . . has been committed,” *id.*, the Court in *Welsh* struck down a warrantless home entry to make an arrest for the offense of driving while intoxicated. The Court found that “the best indication of the State’s interest in precipitating an arrest” was the State’s classification of the offense as “a noncriminal, civil forfeiture offense” and refused to allow an arrest entry for such an offense, notwithstanding the risk that “evidence of the petitioner’s blood-alcohol level might have dissipated while the police obtained a warrant.” *Id.* at 754. The *Welsh* opinion did not go quite as far as holding that “warrantless entry to arrest a misdemeanor is never justified, but only that such entry should be rare.” *Stanton v. Sims*, 571 U.S. 3, 9 (2013) (per curiam). There is, however, language in the *Welsh* opinion that supports a categorical rule limiting warrantless arrest entries under exigent circumstances to felony arrests. *See Welsh v. Wisconsin*, 466 U.S. at 750 n.12, 752-53. At the very least, *Welsh* “counsel[s] that suspicion of minor offenses should give rise to exigencies only in the rarest of circumstances.” *White v. Stanley*, 745 F.3d 237, 240-41 (7th Cir. 2014) (“smell of burning marijuana” inside a house did not provide a basis for exigent-circumstances entry of the house); *Lange v. California*, 141 S. Ct. at 2020 (quoting *Welsh* to the effect that “[A]pplication of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense’ is involved.”); *O’Kelley v. Craig*, 781 Fed. Appx. 888 (11th Cir. 2019) (property owner’s misdemeanor “terroristic threat” against hunters who had trespassed on his property did not provide a basis for exigent-circumstances entry of the house). *See also Minnesota v. Olson*, 495 U.S. at 100-01 (holding that the lower court “applied essentially the correct standard in

determining . . . that in assessing the risk of danger, the gravity of the crime and likelihood that the suspect is armed should be considered,” and approving the lower court’s “fact-specific application of th[is] . . . proper legal standard . . . [to reject a claim of exigent circumstances even though the] grave crime [of murder] was involved . . . [because] respondent ‘was known not to be the murderer but thought to be the driver of the getaway car,’ . . . and . . . the police had already recovered the murder weapon”); *Harris v. O’Hare*, 770 F.3d 224, 235 (2d Cir. 2014). *Cf. Brigham City v. Stuart*, 547 U.S. at 405 (distinguishing *Welsh v. Wisconsin* on the ground that “*Welsh* involved a warrantless entry by officers to arrest a suspect for driving while intoxicated” and “the ‘only potential emergency’ confronting the officers was the need to preserve evidence (i.e., the suspect’s blood-alcohol level)” whereas “[h]ere, the officers were confronted with ongoing violence occurring within the home”); *compare Stanton v. Sims*, 571 U.S. at 8-9 (noting that in *Welsh* “there was no immediate or continuous pursuit of [Welsh] from the scene of a crime” and cautioning that “despite our emphasis in *Welsh* on the fact that the crime at issue was minor – indeed, a mere nonjailable civil offense – nothing in the opinion establishes that the seriousness of the crime is equally important *in cases of hot pursuit*”; the “federal and state courts nationwide are sharply divided on the question whether an officer with probable cause to arrest a suspect for a misdemeanor may enter a home without a warrant while in hot pursuit of that suspect,” *id.* at 6 (citing cases)), *with Coffey v. Carroll*, 933 F.3d 577, 586 (6th Cir. 2019) (sustaining a claim of violation of the Fourth Amendment when officers sought to justify a home entry under the “hot pursuit” rationale but the circumstances were “neither ‘hot’ nor in ‘pursuit,’ in any fair sense of those words. The sequence of events lacked an emergency. At most, Coffey had attempted (and failed) to commit a non-violent property crime earlier in the day, meaning that when the officers arrived at his house sometime later, their pursuit was lukewarm at best. Nor were the officers truly in pursuit of Coffey, as that term is understood in the case law. Pursuit is defined as an effort to catch and detain an individual following an attempted arrest and subsequent escape. . . . But here, the officers encountered Coffey for the first time *after* they entered the home; it was only then that they began to arrest him. In other words, this was not pursuit following a failed arrest. The district court thus correctly concluded that the search was not justified by an exigent emergency.”).

When the police make a valid arrest entry in “hot pursuit,” they may lawfully observe anything in the building that comes into “plain view” while they are seeking out the suspect and effecting his or her arrest, and they may seize objects in “plain view” if, but only if, there is probable cause to believe that the objects are contraband or crime-related. See § 23.22(b) *infra*. They may not search the premises more intensively or intrusively than is necessary to find the person sought to be arrested, *see Arizona v. Hicks*, 480 U.S. 321 (1987), except when that person is known to be armed. In *Warden v. Hayden*, the Court did allow police who entered a building in “hot pursuit” of an armed fugitive to make a warrantless search within the building to the extent necessary to find weapons. 387 U.S. at 298-300. *But see, e.g., People v. Jenkins*, 24 N.Y.3d 62, 65, 20 N.E.3d 639, 641, 995 N.Y.S.2d 694, 696 (2014) (although the police lawfully broke down the door of an apartment as they pursued an armed suspect into the apartment and also acted lawfully in searching the apartment and arresting the defendant and another man who were hiding under a bed, the officers’ subsequent search of a closed box – which was found to contain

a gun – was unlawful and therefore the gun should have been suppressed: “by the time [the] Officer . . . opened the box, any urgency justifying the warrantless search had abated” because “[t]he officers had handcuffed the men and removed them to the living room where they (and the two women) remained under police supervision,” and thus “the police ‘were in complete control of the house’” and “there was no danger that defendant would dispose of or destroy the weapon . . . , nor was there any danger to the public or the police”; accordingly, “the police were required to obtain a warrant prior to searching the box”).

In addition to “hot pursuit” arrest entries, law enforcement officers may make warrantless building entries in the “exigent circumstances” presented by a manifest need to render assistance to an occupant who is in physical danger or to prevent serious bodily injury. *See City and County of San Francisco v. Sheehan*, 575 U.S. 600, 611-12 (2015) (police officers, who were dispatched to a group home for mentally ill residents to help take a resident to a secure ward at a hospital, did not violate the Fourth Amendment by using a social worker’s key to enter the resident’s room when she did not respond to the officers’ knocking on her door, announcing their identity, and saying that they wanted to help her; the officers’ subsequent reentry of the apartment, after they initially retreated in the face of the resident’s approaching them with a knife and threatening to kill them, also was justified as “part of a single, continuous” entry in a “continuing emergency” in which the police “knew that delay could make the situation more dangerous”); *Michigan v. Fisher*, 558 U.S. 45, 47-49 (2009) (per curiam) (the “emergency aid exception” to the warrant requirement – which permits “law enforcement officials . . . [to] ‘enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury’” – justified a warrantless entry of a home by police officers who “respond[ed] . . . to a report of a disturbance” and, upon “arriv[ing] at the scene,” “encountered a tumultuous situation in the house,” “found signs of a recent injury, perhaps from a car accident, outside,” and “could see violent behavior inside” the house; the circumstances were sufficient to justify a reasonable belief on the officers’ part that an occupant “had hurt himself (albeit non-fatally) and needed treatment that in his rage he was unable to provide, or that [the occupant] was about to hurt, or had already hurt someone else.”); *Brigham City v. Stuart*, 547 U.S. at 403 (“law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury”); *Michigan v. Tyler*, 436 U.S. 499, 509-10 (1978) (firefighting officials require neither “a warrant [n]or consent before entering a burning structure to put out the blaze,” *id.* at 509; and, because “[f]ire officials are charged not only with extinguishing fires, but with finding their causes,” *id.* at 510, they “need no warrant [or consent] to remain in a building for a reasonable time to investigate the cause of a blaze after it has been extinguished,” *id.*). *See also, e.g., Ryburn v. Huff*, 565 U.S. 469, 474-77 (2012) (per curiam); *United States v. Barone*, 330 F.2d 543 (2d Cir. 1964); *United States v. Sanders*, 4 F.4th 672, 677-78 (8th Cir. 2021) (“Although the presence of a domestic violence suspect in a home with children cannot alone justify a warrantless entry, here the officers were confronted with ‘facts indicating that the suspect was a threat to the child[ren] or others.’”); *Mincey v. Arizona*, 437 U.S. at 392-93 (dictum), and authorities cited; *but see Carlson v. Fewins*, 801 F.3d 668 (6th Cir. 2015) (exigency dissipated). Officers alerted to an emergency situation in a particular residence must make a reasonable effort to assure that the residence they enter is the one in

which the emergency is believed to be occurring; they may not enter premises without “a reasonable effort to ascertain and identify the [correct] place intended to be searched.” *Gerhart v. Barnes*, 724 Fed. Appx. 316, 322 (5th Cir. 2018), quoting *Maryland v. Garrison*, 480 U.S. 79 (1987), referenced in § 23.17(b) *supra*.

In *dicta*, the Supreme Court has frequently suggested the existence of a more general “exigent circumstances” exception to the warrant requirement. *See, e.g., Johnson v. United States*, 333 U.S. 10, 14-15 (1948); *United States v. Jeffers*, 342 U.S. 48, 51 (1951); *Chapman v. United States*, 365 U.S. 610, 615 (1961); *Mincey v. Arizona*, 437 U.S. at 392-94; *Michigan v. Summers*, 452 U.S. 692, 702 n.17 (1981); *Birchfield v. North Dakota*, 579 U.S. 438, 456-57 (2016); *cf. Torres v. Puerto Rico*, 442 U.S. 465, 471 (1979); *New York v. Belton*, 453 U.S. 454, 457 (1981). However, the Court has never sustained a warrantless building entry on the “exigent circumstances” theory when the purpose of the entry was to make a *search* unassociated with an arrest or with the peacekeeping responsibilities of the police to provide emergency aid and to avert serious bodily injury. Probably the “exigent circumstances” exception extends no further than “hot pursuit” and “emergency assistance” cases, *see Vale v. Louisiana*, 399 U.S. at 34-35; *Mincey v. Arizona*, 437 U.S. at 392-93, although the tenor of some of the Supreme Court *dicta* does. *See State v. Vargas*, 213 N.J. 301, 305, 313-17, 321-26, 63 A.3d 175, 177, 182-84, 187-89 (2013) (reviewing relevant decisions of the U.S. Supreme Court and concluding that these decisions do not support treating the “community-caretaking” function of the police – as manifested here by the police officers’ seeking to “check on the welfare of a resident” in response to concerns expressed by the landlord – as “a justification for the warrantless entry and search of a home in the absence of some form of an objectively reasonable emergency”); *United States v. Curry*, 965 F.3d 313, 321, 322 (4th Cir. 2020) (en banc) (“[L]ike all exceptions to the warrant requirement, the exigent circumstances exception is a ‘narrow’ one that must be ‘well-delineated in order to retain [its] constitutional character.’ ¶ Though the ‘emergency-as-exigency approach . . .’ . . . may sound broad in name, it is subject to important limitations and thus is quite narrow in application. For example, the requirement that the circumstances present a true ‘emergency’ is strictly construed – that is, an emergency must be ‘enveloped by a sufficient level of urgency.’ . . . Indeed, standing alone, even a ‘possible homicide’ does not present an ‘emergency situation’ demanding ‘immediate [warrantless] action.’”).

§ 23.21 “KNOCK AND ANNOUNCE” REQUIREMENTS: RESTRICTIONS UPON THE MANNER OF POLICE ENTRY

The preceding sections deal with restrictions upon the *circumstances* under which building entries can be made. There are also legal restrictions upon the *manner* of police entry.

In most jurisdictions, “knock and announce” statutes require that the police announce their presence and identity as officers, explain the purpose of their intended entry, and request to be admitted peaceably, before they may break and enter. *See, e.g., Miller v. United States*, 357 U.S. 301 (1958) (construing 18 U.S.C. § 3109 and the local law of the District of Columbia). Although these statutes are commonly framed in terms of police “breaking” open a door, their

requirements are usually held to apply whenever the police open any door, whether locked or unlocked, forcibly or nonforcibly, *see Sabbath v. United States*, 391 U.S. 585 (1968), and in some jurisdictions the statutes are also applied to police entries through an already open door, *People v. Buckner*, 35 Cal. App. 3d 307, 313-14, 111 Cal. Rptr. 32, 36-37 (1973).

The statutes or cases construing the statutes usually provide for emergency exceptions to the “knock and announce” requirement. The exceptions commonly include situations in which there is reasonable ground to believe that an announcement would (i) jeopardize the safety of the entering officer, (ii) cause the destruction of evidence, or (iii) be a “useless gesture” because it is apparent from the surrounding circumstances that the occupants of the premises already know of the authority and purpose of the police. *See, e.g., Miller v. United States*, 357 U.S. at 308-10; *Sabbath v. United States*, 391 U.S. at 591; *cf. Dalia v. United States*, 441 U.S. 238, 247-48 (1979); *Washington v. Chrisman*, 455 U.S. 1, 10 n.7 (1982).

The Supreme Court has recognized that “knock and announce” requirements are embodied in the Fourth Amendment. *See Wilson v. Arkansas*, 514 U.S. 927 (1995) (the “common-law ‘knock and announce’ principle forms a part of the reasonableness inquiry under the Fourth Amendment”). *Accord, United States v. Banks*, 540 U.S. 31, 36-37 (2003); *United States v. Ramirez*, 523 U.S. 65, 70 (1998); *Richards v. Wisconsin*, 520 U.S. 385, 387 (1997); and *see Jones v. Kirchner*, 835 F.3d 74, 79-80 (D.C. Cir. 2016); *Terebesi v. Torresso*, 764 F.3d 217, 241-43 (2d Cir. 2014). *Cf. Carroll v. Carman*, 574 U.S. 13 (2014) (per curiam). The Court has held, however, that the exclusionary rule is not available to suppress evidence obtained in the course of a building entry that is unconstitutional solely because the entering officers violated the Fourth Amendment “knock and announce” rule. *Hudson v. Michigan*, 547 U.S. 586, 599-600, 602 (2006). *See id.* at 602-03 (Justice Kennedy, concurring in part and concurring in the judgment, thus supplying the vote necessary to produce a 5-Justice majority, but writing separately to “underscore[]” the following “[t]wo points”: “First, the knock-and-announce requirement protects rights and expectations linked to ancient principles in our constitutional order . . . [and] [t]he Court’s decision should not be interpreted as suggesting that violations of the requirement are trivial or beyond the law’s concern. Second, the continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt. Today’s decision determines only that in the specific context of the knock-and-announce requirement, a violation is not sufficiently related to the later discovery of evidence to justify suppression.”). Because *Hudson v. Michigan* concerned only the consequences of a federal Fourth Amendment violation, it does not preclude state courts from enforcing their respective state-law “knock and announce” requirements by exclusion and suppression. *See, e.g., State v. Jean-Paul*, 2013-NMCA-032, 295 P.3d 1072, 1076 (N.M. App. 2013) (adhering to New Mexico’s pre-*Hudson* exclusionary rule: “[W]hile both the federal and state constitutions include the knock-and-announce requirement, the remedies for a violation under the two constitutions are not the same.”); *State v. Rockford*, 213 N.J. 424, 453, 64 A.3d 514, 530 (2013) (reserving the question “whether the exclusionary rule is the appropriate remedy for an unconstitutional execution of a knock-and-announce warrant under our State Constitution” in the wake of *Hudson*); § 7.09 *supra*. For the reason stated in § 23.17 concluding paragraph *supra*, the case for state-law rejection of *Hudson* is a strong one.

See, e.g., State v. Cable, 51 So.3d 434 (Fla. 2010) (“[I]n *Benefield v. State*, 160 So.2d 706 (Fla.1964), . . . this Court held that a violation of Florida’s knock-and-announce statute vitiated the ensuing arrest and required the suppression of the evidence obtained in connection with the arrest.” *Id.* at 435. “[T]he [*Benefield*] Court noted that ‘[s]ection 901.19, Florida Statutes, . . . appears to represent a codification of the English common law . . . ¶ ‘Entering one’s home without legal authority and neglect to give the occupants notice have been condemned by the law and the common custom of this country and England from time immemorial. It was condemned by the yearbooks of Edward IV, before the discovery of this country by Columbus. . . . ¶ This sentiment has moulded our concept of the home as one’s castle as well as the law to protect it. The law forbids the law enforcement officers of the state or the United States to enter before knocking at the door, giving his name and the purpose of his call. There is nothing more terrifying to the occupants than to be suddenly confronted in the privacy of their home by a police officer decorated with guns and the insignia of his office. This is why the law protects its entrance so rigidly.’” *Id.* at 439. “[B]ecause *Hudson* does not address the remedy for state-created statutory violations, *Hudson* does not require us to recede from *Benefield*.” *Id.* at 442.); *Berumen v. State*, 182 P.3d 635 (Alaska App. 2008) (“[T]he issue before us is one of state law, so the United States Supreme Court’s decision in *Hudson* does not bind us.” *Id.* at 637. “The police officers in this case violated a longstanding requirement of Alaska law that is designed to protect the privacy and dignity of this state’s citizens. On the issue of whether the police must announce their claimed authority and purpose, and on the related issue of whether the police are allowed to break into a building if they have neither sought nor been refused admittance, the statute is written in clear and unambiguous terms. . . . ¶ . . . [T]he evidence found in the hotel room was ‘secured through such a flagrant disregard’ of the procedure specified by the Alaska legislature that it ‘cannot be allowed to stand without making the courts themselves accomplices in [willful] disobedience of [the] law.’” *Id.* at 642.).

Police entries that involve SWAT-squad tactics or other exercises of massive force can be challenged both as unreasonable searches under the Fourth Amendment and as violations of Due Process under the Fourteenth (*see, e.g., Estate of Smith v. Marasco*, 430 F.3d 140, 151-53 (3d Cir. 2005); *Milan v. Bolin*, 795 F.3d 726 (7th Cir. 2015); *Carlson v. Fewins*, 801 F.3d 668 (6th Cir. 2015); *Greer v. City of Highland Park, Michigan*, 884 F.3d 310 (6th Cir. 2018); *Campbell v. Cheatham County Sheriff’s Department*, 47 F.4th 468 (6th Cir. 2022); *Torres v. City of St. Louis*, 39 F.4th 494 (8th Cir. 2022)), and state law if they are excessively violent. *Hudson* should not withdraw the Fourth Amendment exclusionary remedy in such cases, because they would evoke the independent principle of *Rochin v. California*, 342 U.S. 165 (1952), which is, at its root, a prohibition against “convictions . . . brought about by methods that offend ‘a sense of justice’” (*id.* at 173 (emphasis added)) or governmental “conduct that shocks the conscience” (*id.* at 172). And see § 14.17 *supra* regarding the utility of police misconduct claims in urging prosecutors to drop or reduce charges or to make concessions in plea negotiation.

§ 23.22 SCOPE OF PERMISSIBLE POLICE ACTIVITY AFTER ENTERING THE PREMISES

§ 23.22(a) The Requisite Relationship Between Police Activity Inside the Dwelling and the Purpose of the Entry

The scope of an officer's investigatory powers, once inside a building, is defined by the circumstances that permitted his or her entry under the principles of §§ 23.16-23.20 *supra*. *United States v. King*, 227 F.3d 732, 750-54, 755 (6th Cir. 2000); *United States v. Sedaghaty*, 728 F.3d 885, 910-15 (9th Cir. 2013); *United States v. Angelos*, 433 F.3d 738, 746 (10th Cir. 2006). This is a corollary of the general rule that “the purposes justifying a police search strictly limit the permissible extent of the search.” *Maryland v. Garrison*, 480 U.S. 79, 87 (1987) (dictum). *Accord, id.* at 84 (“the scope of a lawful 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’”). *See also, e.g., Wilson v. Layne*, 526 U.S. 603, 611 (1999) (dictum) (“the Fourth Amendment . . . require[s] that police actions in execution of a warrant be related to the objectives of the authorized intrusion”); *New York v. Belton*, 453 U.S. 454, 457 (1981) (dictum) (“[t]he scope of [a] search must be ‘strictly tied to and justified by’ the circumstances which rendered its initiation permissible”); *Horton v. California*, 496 U.S. 128, 140 (1990) (dictum) (“[i]f the scope of the search exceeds that permitted by the terms of a validly issued warrant or the character of the relevant exception from the warrant requirement, the subsequent seizure is unconstitutional without more”). A search must be “carefully tailored to its justifications,” so as to avoid “tak[ing] on the character of the wide-ranging exploratory searches the Framers [of the Fourth Amendment] intended to prohibit.” *Maryland v. Garrison*, 480 U.S. at 84. *See also Maryland v. Buie*, 494 U.S. 325, 335-36 (1990). *Cf. United States v. Foster*, 100 F.3d 846, 849 (10th Cir. 2006) (“Under the law of this circuit, ‘even evidence which is properly seized pursuant to a warrant must be suppressed if the officers executing the warrant exhibit “flagrant disregard” for its terms.’ . . . The basis for blanket suppression when a search warrant is executed with flagrant disregard for its terms ‘is found in our traditional repugnance to “general searches” which were conducted in the colonies pursuant to writs of assistance.’ . . . To protect against invasive and arbitrary general searches, the Fourth Amendment mandates that search warrants ‘particularly describ[e] the place to be searched and the persons or things to be seized.’”).

Thus, as explained in § 23.17(g) *supra*, when the police enter a dwelling or other premises pursuant to a search warrant, the search ordinarily may not extend into areas that are not covered by the warrant or into areas that could not contain the objects specified in the warrant. If the entry was predicated upon the consent of a member of the household, the officers' movement within the home is limited by the scope of the consent that was given and the extent of the individual's authority to consent. *See* § 23.18 *supra*. If the entry was made for the purpose of effecting an arrest, whether with or without a warrant, the officers possess only the freedom of movement necessary to locate and to apprehend the person sought to be arrested (*see* § 23.19 *supra*), unless they can justify a further search of the premises as a “protective sweep” (*see* § 23.22(d) *infra*). If the entry was made in the exercise of the officers' peacekeeping functions, they may not undertake even the most minimal search beyond the needs of those functions. *Arizona v. Hicks*, 480 U.S. 321 (1987). *See, e.g., In the Matter of the Welfare of J.W.L.*, 732 N.W.2d 332, 339 (Minn. App. 2007) (police officer, who lawfully entered a dwelling without a

warrant under the exigent circumstances exception due to a 911 call from inside the dwelling, thereafter violated the Fourth Amendment by taking photographs of graffiti in a bedroom that were subsequently used to connect the respondent to graffiti incidents).

§ 23.22(b) Police Officers' Search and Seizure of Objects While Searching the Premises; The "Plain View" Exception to the Warrant Requirement

Often, while inside a building, dwelling unit, or other premises, police officers catch sight of an object that they believe to be contraband or evidence of a crime. The officer will then inspect the object further or will seize it.

As explained in § 23.15(d) *supra*, a respondent has a constitutionally protected interest against the search or seizure of an object that belongs to him or her, regardless of whether s/he is on the premises at the time the search or seizure takes place, and regardless of whether s/he has any privacy interest in the premises. Like other searches and seizures made without a warrant, "warrantless searches of such effects are presumptively unreasonable," *United States v. Jacobsen*, 466 U.S. 109, 114-15 (1984), and must be brought within one of the exceptions to the warrant requirement in order to be valid. *See United States v. Loines*, 56 F.4th 1099 (6th Cir. 2023) (police officers testified they peered through the closed windows of a parked car and observed a bag of dope in plain view in the car's center console; to support this testimony, the prosecution presented photographs that showed the view inside the vehicle from the purported position of the officers outside, but the Court of Appeals finds the photos too obscure to demonstrate anything relevant; police towed the car, made an inventory search of it without a warrant, and found various items of contraband; the Court of Appeals holds the search unconstitutional in an opinion that manifestly rests solely on the ground that the officers were lying about seeing a bag through the car window (although the district court judge who heard and denied the defendant's suppression motion must have believed the officers): the government's argument "that the bag with the narcotics was in plain view . . . has not been substantiated" (*id.* at 1106).

However, an officer's mere observation of an object from a location where the officer is entitled to be is not considered a "search" within the meaning of the Fourth Amendment. *See* § 23.16 *supra*. "[O]bjects falling in the plain view of an officer who has a right to be in the position to have that view" may be scrutinized without any further justification and without Fourth Amendment limitation. *Harris v. United States*, 390 U.S. 234, 236 (1968); *see Arizona v. Hicks*, 480 U.S. 321, 325 (1987) (dictum). As long as the officer's entry and movement to the location were justified by either a warrant or an exception to the warrant requirement, the "viewing of the object in the course of a lawful search is as legitimate as it would have been in a public place." *Id.* at 327.

Although simple observation of the object is not a constitutionally regulated "search," any action by the police that "meaningfully interfere[s]" with [a] respondent's possessory interest in [an object] . . . amount[s] to a seizure" within the Fourth Amendment. *Arizona v. Hicks*, 480 U.S.

at 324; *Horton v. California*, 496 U.S. at 136-37. And any physical manipulation of the object that reveals its hidden features or contents is a “search” of the object. *Bond v. United States*, 529 U.S. 334 (2000); *United States v. Johnson*, 43 F.4th 1100 (10th Cir. 2022). Thus, in *Hicks*, when officers who had entered a residence in an emergency peace-keeping situation observed what they suspected to be stolen stereo equipment, the Court acknowledged in *dictum* that their “mere recording” of a stereo component’s serial number would not constitute a search or seizure if the serial number was in plain view, 480 U.S. at 324, but the Court held that when the officers went beyond merely observing the stereo equipment and moved it slightly for the purpose of disclosing serial numbers that were *not* in plain view, their action constituted a “*search* of objects in plain view,” *id.* at 327. This was an “independent search,” “unrelated to the objectives of the authorized intrusion” into the residence, which “produce[d] a new invasion of respondent’s privacy,” and it consequently violated the Fourth Amendment in the absence of adequate justification. *Id.* at 325.

To justify a “seizure” or a “search” of an object which is in “plain view,” the prosecution must demonstrate that the following three conditions are satisfied:

(i) The officer must be lawfully in the location from which s/he observed the object. *See, e.g., Arizona v. Hicks*, 480 U.S. at 326 (“the initial intrusion that brings the police within plain view of such [evidence] [must be] . . . supported . . . by one of the recognized exceptions to the warrant requirement, . . . such as the exigent-circumstances [exception]”); *Collins v. Virginia*, 138 S. Ct. 1663, 1672 (2018) (“any valid warrantless seizure of incriminating evidence’ requires that the officer ‘have a lawful right of access to the object itself’”); *Horton v. California*, 496 U.S. at 137 (“[i]t is, of course, an essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed”); *State v. Kruse*, 306 S.W.3d 603 (Mo. App. 2010); *cf. Florida v. Jardines*, 569 U.S. 1 (2013); *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993), discussed in § 23.10 *supra* (police must be “lawfully in a position from which they view an object”).

(ii) The seizure or search of the object must be justified by “probable cause to believe the [object] . . . was stolen,” *Arizona v. Hicks*, 480 U.S. at 328, or is “contraband,” *id.* at 327 (*dictum*), or was an instrument or is evidence of a crime. *Cf. Minnesota v. Dickerson*, 508 U.S. at 375 (police must have “probable cause to believe that an object in plain view is contraband”). As the Court explained in *Arizona v. Hicks*, a seizure or search of an object discovered “during an unrelated search and seizure” must be justified under the same “standard of *cause*” that “would have been needed to obtain a warrant for that same object if it had been known to be on the premises.” *Id.* at 327. The “incriminating character [of the object] must . . . be ‘immediately apparent.’” *Horton v. California*, 496 U.S. at 136. *Cf. Minnesota v. Dickerson*, 508 U.S. at 375 (“If . . . the police lack probable cause to believe that an object in plain view is contraband without conducting some further search of the object – *i.e.*, if ‘its incriminating character [is not] ‘immediately apparent,’ . . . – the plain-view doctrine cannot justify its seizure.”). Thus, in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), the plain view exception did not justify a

police seizure of “two automobiles parked in plain view on the defendant’s driveway . . . [because even though] the cars were obviously in plain view, . . . their probative value remained uncertain until after the interiors were swept and examined microscopically.” *Horton v. California*, 496 U.S. at 134-37 (explaining the holding in *Coolidge*). Compare *id.* at 142 (upholding a police seizure of firearms and stun guns in plain view under circumstances in which “it was immediately apparent to the officer that they constituted incriminating evidence”). See also, e.g., *People v. Sanders*, 26 N.Y.3d 773, 775, 777-78, 47 N.E.3d 770, 771-72, 27 N.Y.S.3d 491, 492-93 (2016) (a police officer’s warrantless seizure of the hospitalized defendant’s clothes, which “were in a clear plastic bag that rested on the floor of a trauma room a short distance away from the stretcher on which defendant was situated in a hospital hallway,” was not justified by the plain view exception because, although the officer “knew defendant to have been shot,” the officer did not have “probable cause to believe that defendant’s clothes were the instrumentality of a crime” since the officer did not know at that time “that entry and exit wounds were located on an area of defendant’s body that would have been covered by the clothes defendant wore at the time of the shooting.”). If a police officer has probable cause to believe that a substance seized in plain view is a narcotic, then the additional seizure involved in destroying a minute amount of the substance in the course of a narcotic “field test” does not necessitate a search warrant. *United States v. Jacobsen*, 466 U.S. at 124-26.

(The probable-cause requirement just described is subject to a narrow exception under exigent circumstances when “the seizure is minimally intrusive and operational necessities render it the only practicable means of detecting certain types of crime.” *Arizona v. Hicks*, 480 U.S. at 327. The limits of this principle are discussed in the second paragraph of § 23.12 *supra*.)

(iii) In cases in which a police seizure of an object involves an invasion of the respondent’s interests above and beyond the initial observation of the object, the additional intrusion also must be constitutionally justified. “[N]ot only must the officer be lawfully located in a place from which the object can be plainly seen, but he or she must also have a lawful right of access to the object itself,” *Horton v. California*, 496 U.S. 128, 137 (1990). Cf. *Minnesota v. Dickerson*, 508 U.S. at 375 (“the officers [must] have a lawful right of access to the object”). Cf. *United States v. Saulsbury*, 878 F.3d 946 (10th Cir. 2017), summarized in § 23.08(c) *supra*. Thus, for example, “[i]ncontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure.” *Horton v. California*, 496 U.S. at 137 n.7. See, e.g., *People v. Vega*, 276 A.D.2d 414, 414, 714 N.Y.S.2d 291, 291-92 (N.Y. App. Div., 1st Dep’t 2000) (police officers, who observed contraband in the defendant’s room from the officers’ “lawful vantage point” in “the hallway in th[e] residential hotel” could not rely on the “plain view” doctrine to enter the room and seize the contraband: “it was still necessary to establish that the police had lawful access to the [interior of the defendant’s room] . . . either by way of a search warrant or some exception to the warrant requirement, such as exigent circumstances.”).

In *Coolidge v. New Hampshire*, a plurality of the Court concluded that the plain view doctrine should also be subject to a requirement that “the discovery of [the] evidence in plain view . . . be inadvertent,” 403 U.S. at 469. Subsequently, in *Horton v. California*, a majority of the Court rejected this rule, holding that “even though inadvertence is a characteristic of most legitimate ‘plain view’ seizures, it is not a necessary condition.” 496 U.S. at 130. However, in the two decades between the *Coolidge* and *Horton* decisions, state court decisions in 46 States had followed the *Coolidge* plurality’s approach of recognizing an “inadvertent discovery” requirement for “plain view” searches and seizures. *Horton*, 496 U.S. at 145 (dissenting opinion of Justice Brennan); *see id.* at 149-52, Appendix A (listing the state court decisions). In many of these States, it may be possible to persuade the state courts to retain the “inadvertent discovery” rule as a matter of state constitutional law. *See, e.g., State v. Meyer*, 78 Hawai’i 308, 314 & n.6, 893 P.2d 159, 165 & n.6 (1995); *Commonwealth v. Balicki*, 436 Mass. 1, 9-10, 762 N.E.2d 290, 298 (2002). *See generally* § 7.09 *supra*.

§ 23.22(c) Detention and Searches of Persons Found on the Premises

Sometimes, in executing a search warrant for a dwelling, the police detain and search one or more individuals who were on the premises at the time the police entered.

If the search warrant specifically names a certain person and authorizes the search of that person, then the police may conduct the search as long as the warrant and the search comply with the requirements described in § 23.17 *supra*. If the warrant does not authorize the search of individuals but merely authorizes a search of the premises to find certain objects, then the officers cannot extend their search of the premises to the individuals present on the premises. “[A] warrant to search a place cannot normally be construed to authorize a search of each individual in that place.” *Ybarra v. Illinois*, 444 U.S. 85, 92 n.4 (1979). *See also United States v. Watson*, 703 F.3d 684, 689-94 (4th Cir. 2013). If the police have specific and articulable facts giving rise to a reasonable belief that a particular individual on the premises is armed and dangerous, then the officers may conduct a *Terry* frisk of that individual. *See* § 23.10 *supra*. But “[t]he ‘narrow scope’ of the *Terry* exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked, even though that person happens to be on premises where an authorized . . . search is taking place.” *Ybarra v. Illinois*, 444 U.S. at 94.

In *Ybarra*, the Court struck down a police pat-down of a patron of a bar, who was on the premises during the execution of a search warrant for the bar and the bartender. The Court explained that “a person’s mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person.” 444 U.S. at 91. As several lower courts have recognized, the principles established in *Ybarra* necessarily apply not only to searches of patrons of a commercial establishment but also to searches of individuals who are visiting a private home at the time that the police effect an entry and search of the home. *See, e.g., United States v. Clay*, 640 F.2d 157, 161-62 (8th Cir. 1981); *People v. Tate*, 367 Ill. App. 3d 109, 853 N.E.2d 1249, 304 Ill. Dec. 883 (2006); *State v. Vandiver*, 257 Kan. 53, 891

P.2d 350 (1995); *Beeler v. State*, 677 P.2d 653 (Okla. Crim. App. 1984); *Lippert v. State*, 664 S.W.2d 712 (Tex. Crim. App. 1984). *Cf. Leveto v. Lapina*, 258 F.3d 156, 163-65 (3d Cir. 2001) (Alito, J.) (IRS agents executing a search warrant could not validly frisk a homeowner in the absence of justification for a *Terry* frisk). *See also Guy v. Wisconsin*, 509 U.S. 914, 914-15 (1993) (Justice White, dissenting from denial of *certiorari*) (describing a division of authority among lower courts with regard to “whether this Court’s holding in *Ybarra v. Illinois* . . . applies where a search warrant for drugs is executed in a private home”).

In *Michigan v. Summers*, 452 U.S. 692, 705 (1981), and *Muehler v. Mena*, 544 U.S. 93 (2005), the Court did hold that an owner or resident of premises may be detained and prevented from leaving the premises while the police execute a search warrant of the premises. *See also Bailey v. United States*, 568 U.S. 186 (2013); *Los Angeles County v. Rettele*, 550 U.S. 609 (2007) (per curiam); *Illinois v. McArthur*, 531 U.S. 326 (2001), discussed in § 23.06(c) *supra*. Using broad language, the Court stated in *Summers*, and reiterated in *Muehler*, that “a warrant to search for contraband . . . implicitly carries with it the limited authority to detain the occupants of the premises while a proper search [of the premises themselves] is conducted.” *Summers*, 452 U.S. at 705; *Muehler*, 544 U.S. at 98 (quoting *Summers*); *Los Angeles County v. Rettele*, 550 U.S. at 613 (quoting *Summers*); *Bailey*, 568 U.S. at 208 (quoting *Summers*). However, the facts of these cases and the reasoning of the opinions demonstrate that the phrase “occupant[] of the premises” is meant to refer solely to “residents” (terms that are used interchangeably by the *Summers* Court, *see id.* at 701-03; *see also Rettele*, 550 U.S. at 609, 615; *Muehler*, 544 U.S. at 106, 110 (Justice Stevens, concurring) (concurring opinion, representing the views of 4 Justices, describes occupants as “resident[s],” each of whom “had his or her or own bedroom”) and not to persons who happen to be visiting the premises at the time when the police effect their entry. In *Summers*, in which the Court announced the rule that an occupant may be detained while the police search a home pursuant to a warrant, the defendant owned the house that was searched and several of the Court’s rationales for upholding the detention were predicated upon the defendant’s status as the owner of the premises. The Court explained that the defendant, as owner of the house, could facilitate the search by “open[ing] locked doors or locked containers to avoid the use of force that is . . . damaging to property,” 452 U.S. at 703; the Court pointed out that “residents” like the defendant would ordinarily wish to “remain in order to observe the search of their possessions,” *id.* at 701; and it observed that since the place of detention was the detainee’s own residence, the seizure would “add only minimally to the public stigma associated with the search itself,” *id.* at 702. In *Muehler*, the Court did not revisit the reasoning for the rule, treating its earlier holding in *Summers* as “categorical[ly]” authorizing the detention of a resident who “was asleep in her bed” when the police executed the warrant and “entered her bedroom” (544 U.S. at 96, 98), and the Court focused on a new question presented by the facts of *Muehler*: whether the police improperly engaged in the additional intrusion of handcuffing this resident for the duration of the search. The Court concluded that handcuffing is permissible if this measure is necessitated by “inherently dangerous” circumstances such as those that existed in the *Muehler* case, where the “warrant authoriz[ed] a search for weapons and a wanted gang member reside[d] on the premises” and there was a “need to detain multiple occupants.” *Id.* at 100. *But cf. id.* at 102 (Justice Kennedy, concurring and thus supplying the vote necessary to produce a 5-Justice

majority: “[t]he restraint should . . . be removed if, at any point during the search, it would be readily apparent to any objectively reasonable officer that removing the handcuffs would not compromise the officers’ safety or risk interference or substantial delay in the execution of the search.”). In *Bailey*, the Court made clear that the *Summers* rule is strictly limited to “cases [in which] the occupants detained were found within or immediately outside a residence at the moment the police officers executed the search warrant” (568 U.S. at 193). “A spatial constraint defined by the immediate vicinity of the premises to be searched is . . . required for detentions incident to the execution of a search warrant. The police action permitted here – the search of a residence – has a spatial dimension, and so a spatial or geographical boundary can be used to determine the area within which both the search and detention incident to that search may occur. Limiting the rule in *Summers* to the area in which an occupant poses a real threat to the safe and efficient execution of a search warrant ensures that the scope of the detention incident to a search is confined to its underlying justification. Once an occupant is beyond the immediate vicinity of the premises to be searched, the search-related law enforcement interests are diminished and the intrusiveness of the detention is more severe.” (*Id.* at 201.) *Dicta* in the *Bailey* opinion use the term “occupant” without specifying the precise connection that it implies between the premises being searched and the individual whose detention is in question under *Summers* (*see id.* at 193-99), but the Court does describe the *Summers* rule as involving a “detention [that] occurs in the individual’s own home” (*id.* at 200), and the Court emphasized that the “exception [that *Summers* created] to the Fourth Amendment rule prohibiting detention absent probable cause must not diverge from its purpose and rationale” (*id.* at 194).

As some lower courts have concluded, the *Summers* rule cannot be construed as authorizing detentions of individuals who happen to be visiting the premises at the time of a police entry. *See, e.g., Lippert v. State*, 664 S.W.2d 712 (Tex. Crim. App. 1984); *State v. Broadnax*, 98 Wash. 2d 289, 654 P.2d 96 (1982). *See also Commonwealth v. Catanzaro*, 441 Mass. 46, 51-52 & n.10, 803 N.E.2d 287, 291 & n.10 (2004). In order to detain visitors, the police must have the specific and articulable facts necessary to conduct a *Terry* stop. *See* § 23.09 *supra*. Nor does the *Summers* rule authorize a *frisk* of anyone – visitor, resident or owner – in the course of executing a search warrant for premises. *See, e.g., Leveto v. Lapina*, 258 F.3d 156, 163-66 (3d Cir. 2001) (Alito, J.); *Denver Justice and Peace Committee, Inc. v. City of Golden*, 405 F.3d 923, 928-32 (10th Cir. 2005). As § 23.10 *supra* indicates, the power to detain an individual briefly for investigation, whether under *Terry* or under *Summers*, carries with it no automatic power to frisk that individual; any frisk must be justified by a particularized and objectively reasonable suspicion that the detainee is armed and dangerous. *See, e.g., id.* at 932.

§ 23.22(d) “Protective Sweep” of the Premises

“A ‘protective sweep’ is a quick and limited search of a premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding.” *Maryland v. Buie*, 494 U.S. 325, 327 (1990). When the police “effect[] the arrest of a suspect in his home pursuant to an arrest warrant, [the police] may conduct a warrantless protective sweep of all or part of the

premises . . . if the searching officer ‘possesse[s] . . . a reasonable belief based on “specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant[s] . . .” the officer in believing’ . . . that the area swept harbor[s] . . . an individual posing a danger to the officer or others.” *Id.* at 327-28. *See also id.* at 334, 335-37; *United States v. Serrano-Acevedo*, 892 F.3d 454 (1st Cir. 2018) (holding a putative “protective sweep” unconstitutional for lack of reasonable grounds for such a belief). The Court in *Buie* “emphasize[d] that such a protective sweep, aimed at protecting the arresting officers, if justified by the circumstances, is . . . not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found. . . . The sweep lasts no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises.” *Id.* at 335-36. *See, e.g., United States v. Hernandez-Mises*, 931 F.3d 134, 141-45 (1st Cir. 2019); *United States v. Green*, 231 A.3d 398, 407-08 (D.C. 2020); *United States v. Bagley*, 877 F.3d 1151 (10th Cir. 2017) (“Deputy U.S. Marshals obtained a search warrant allowing entry into a house solely to locate and arrest Mr. Bagley [“a convicted felon who was named in an arrest warrant for violating the terms of his supervised release”]. . . . When they arrived, Mr. Bagley was allegedly in the southeast bedroom. He eventually surrendered and was handcuffed near the front door. ¶ The deputy marshals then conducted a protective sweep of the entire house. In the southeast bedroom, deputy marshals found two rounds of ammunition and a substance appearing to be marijuana. . . . ¶ . . . Mr. Bagley may have been in the living room when the protective sweep began. . . . ¶ The government argues that it doesn’t matter where Mr. Bagley was at the time of the protective sweep because he had earlier been ‘arrested’ in the southeast bedroom. With this focus on the place of the purported earlier arrest, the government argues that the deputy marshals could enter the southeast bedroom because Mr. Bagley had announced his surrender when he was in the southeast bedroom, rendering him under ‘arrest’ at that time. . . . We disagree. . . . ¶ . . . The deputy marshals could conduct a protective sweep only if the protective sweep was justified at the time of the arrest; the deputy marshals could not conduct the arrest and later conduct a protective sweep based on an earlier arrest somewhere in the house.” *Id.* at 1153-55. Nor could the sweep be justified on the theory that some dangerous person other than Bagley may have been in the house. “When the deputy marshals entered the southeast bedroom, Mr. Bagley, his girlfriend, and her children had already left the house. The deputy marshals had no way of knowing, one way or another, whether anyone besides Mr. Bagley was still in the house. . . . ¶ . . . [L]ack of knowledge cannot constitute the specific, articulable facts required . . .” *Id.* at 1156.); *State v. Sanders*, 2008 WI 85, 311 Wis. 2d 257, 270-71, 752 N.W.2d 713, 720 (Wis. 2008) (officers accosted the defendant in his back yard, where he was observed holding a small cannister; he fled into his house and took refuge in a bedroom; after a minute, he came out of the bedroom and was arrested; the officers made a “protective sweep” of the bedroom; either then or thereafter, they retrieved and searched the cannister, which was hidden under the bed; on the assumption that the cannister was found during the “protective sweep,” the court orders its suppression as unjustified under *Buie*: “Accepting for the moment the State’s position that articulable facts exist to demonstrate that the officer had reasonable suspicion that other persons may be lurking in the defendant’s bedroom who would pose a danger to the officers and that a protective search of the bedroom was therefore justified, we nevertheless must conclude that . . .

[the] search of the canister and seizure of its contents clearly were not within the purpose of the protective sweep. The search of the canister and seizure of its contents were not part of a search for persons who might pose a danger to law enforcement officers or to others. No person could be hiding in the canister. Furthermore, the officers had no articulable suspicion that weapons were involved in the instant case. The search of the canister and seizure of its contents therefore do not fall within the ‘protective sweep’ exception to the search warrant requirement.”).

Part D. Automobile Stops, Searches, Inspections, and Impoundments

§ 23.23 THE THRESHOLD ISSUE: RESPONDENT’S INTEREST IN THE AUTOMOBILE OR EXPECTATION OF PRIVACY INSIDE IT

Just as a respondent who seeks to challenge a police entry and search of premises must have a constitutionally protected interest or legitimate expectation of privacy in the premises, see § 23.15 *supra*, so, too, a respondent who seeks to challenge a police stop or search of an automobile must have a sufficient possessory or privacy interest in the vehicle – or, alternatively, a sufficient personal interest in its unhindered movement – to complain about the particular police action in question.

A respondent has the requisite interest to complain of an unconstitutional automobile search in each of the following situations:

- (i) The automobile belongs to the respondent, even though it is out of his or her possession at the time of the search, *see, e.g., Cash v. Williams*, 455 F.2d 1227, 1229-30 (6th Cir. 1972); *United States v. Powell*, 929 F.2d 1190, 1196 (7th Cir. 1991) (an absentee owner has standing to challenge the search of a vehicle although s/he does not have standing to challenge the mere stopping of the vehicle for a purported traffic violation); *State v. Foldesi*, 131 Idaho 778, 963 P.2d 1215 (Idaho App. 1998), as long as the respondent has not given up possession of the vehicle in a manner that deprives him or her of any remaining legitimate expectation of privacy in it, *United States v. Jenkins*, 92 F.3d 430, 434-35 (6th Cir. 1996); *see generally Rakas v. Illinois*, 439 U.S. 128 (1978).
- (ii) The automobile is in the respondent’s lawful possession under circumstances that comport the possessor’s ordinary right to exclude undesired intrusions by others, *see Rakas v. Illinois*, 439 U.S. at 144 n.12 (dictum). This would certainly include situations in which the respondent is driving a family member’s or friend’s automobile with the permission of the owner. *See, e.g., United States v. Valdez Hocker*, 333 F.3d 1206 (10th Cir. 2003); *People v. Lewis*, 217 A.D.2d 591, 593, 629 N.Y.S.2d 455, 457 (N.Y. App. Div., 2d Dep’t 1995). *Cf. Minnesota v. Olson*, 495 U.S. 91, 96-100 (1990); *Jones v. United States*, 362 U.S. 257 (1960), as explained in *Rakas v. Illinois*, 439 U.S. at 141. It would also include situations in which the respondent has rented the vehicle from a car rental agency (*United*

States v. Walton, 763 F.3d 655 (7th Cir. 2014) (granting standing even though the renter’s driving license was suspended); *United States v. Cooper*, 133 F.3d 1394 (11th Cir. 1998) (granting standing even though the rental agreement had expired before the search); *United States v. Henderson*, 241 F.3d 638, 646-47 (9th Cir. 2000) (dictum) (same)) or is “listed on a rental agreement as an authorized driver” (*United States v. Walker*, 237 F.3d 845, 849 (7th Cir. 2001), and cases cited). It also includes persons to whom the renter has entrusted the vehicle, even if s/he does so in violation of terms in the rental agreement that restrict authorized drivers to designated individuals. *Byrd v. United States*, 138 S. Ct. 1518 (2018) (“[A]s a general rule, someone in otherwise lawful possession and control of a rental car has a reasonable expectation of privacy in it even if the rental agreement does not list him or her as an authorized driver.” *Id.* at 1524. “The Court sees no reason why the expectation of privacy that comes from lawful possession and control and the attendant right to exclude would differ depending on whether the car in question is rented or privately owned by someone other than the person in current possession of it.” *Id.* at 1528. “[T]he mere fact that a driver in lawful possession or control of a rental car is not listed on the rental agreement will not defeat his or her otherwise reasonable expectation of privacy.” *Id.* at 1531. A “car thief would not have a reasonable expectation of privacy in a stolen car” but anyone in “lawful possession” does (*id.* at 1529).

- (iii) The vehicle is a taxicab in which the respondent is a lawful passenger. *See Rios v. United States*, 364 U.S. 253, 262 n.6 (1960).
- (iv) The respondent is a lawful occupant of any vehicle at the time of the search, *United States v. Mosley*, 454 F.3d 249 (3d Cir. 2006) (“when a vehicle is illegally stopped by the police, no evidence found during the stop may be used by the government against any occupant of the vehicle unless the government can show that the taint of the illegal stop was purged,” *id.* at 251), and cases cited; *see also United States v. Kimball*, 25 F.3d 1, 5-6 (1st Cir. 1994), and the search invades an area of the vehicle in which, as a lawful occupant, the respondent has “any legitimate expectation of privacy,” *Rakas v. Illinois*, 439 U.S. at 150 n.17 (dictum). *See also Bond v. United States*, 529 U.S. 334, 338-39 (2000) (“a bus passenger [who] places a bag in an overhead bin” has a reasonable expectation that “other passengers,” “bus employees,” and police officers will not “feel the bag in an exploratory manner”); *accord, United States v. Johnson*, 43 F.4th 1100 (10th Cir. 2022).

A respondent can complain of an unconstitutional *stop* of an automobile if s/he was in the vehicle at the time of the stop. *Brendlin v. California*, 551 U.S. 249, 251, 257 (2007) (“When a police officer makes a traffic stop, the driver of the car is seized within the meaning of the Fourth Amendment. . . . We hold that a passenger is seized as well and so may challenge the constitutionality of the stop.”; “A traffic stop necessarily curtails the travel a passenger has

chosen just as much as it halts the driver”); *United States v. Grant*, 349 F.3d 192, 196 (5th Cir. 2003). If the respondent was not in the automobile at the time of the stop, s/he can nevertheless challenge the stop if s/he is the owner of the automobile, see *Cash v. Williams*, 455 F.2d at 1229-30, or if s/he has established a sufficient privacy interest in the automobile through repeated use to invoke the same rights as an owner. Cf. *Jones v. United States*, 362 U.S. 257 (1960), as explained in *Rakas v. Illinois*, 439 U.S. at 141; *Minnesota v. Olson*, 495 U.S. at 96-100.

Even when an individual has the requisite possessory interest or expectation of privacy in an automobile, s/he cannot claim any privacy rights with respect to the car’s Vehicle Identification Number (VIN) located on the dashboard “because of the important role played by the VIN in the pervasive governmental regulation of the automobile and the efforts by the Federal Government to ensure that the VIN is placed in plain view.” *New York v. Class*, 475 U.S. 106, 114 (1986). In *Class*, the Court held that the public nature of the VIN empowers the police to move papers obstructing the VIN, in order to view the number in the course of a valid stop for a traffic violation, at least under circumstances in which the driver on his or her own initiative leaves the vehicle and therefore is not in a position to accede to a lawful request to move the papers so that the number can be inspected. See *id.* at 114-16. *Contra*, *People v. Class*, 67 N.Y.2d 431, 494 N.E.2d 444, 503 N.Y.S.2d 313 (1986) (reaffirming, on state constitutional grounds, the opinion reversed in *New York v. Class*, *supra*). In cases in which an entry into a car was not justified by a traffic violation, some lower courts have ruled that the public nature of the VIN does not justify the opening of the vehicle for the purpose of inspecting the VIN. See *People v. Piper*, 101 Ill. App. 3d 296, 427 N.E.2d 1361, 56 Ill. Dec. 815 (1981); *State v. Simpson*, 95 Wash. 2d 170, 622 P.2d 1199 (1980); but see *United States v. Forrest*, 620 F.2d 446 (5th Cir. 1980).

For discussion of the “automatic standing” principle and of the evolution of the general concepts governing “standing” to challenge searches and seizures, see § 23.15 *supra*.

§ 23.24 EVIDENTIARY SEARCHES OF AUTOMOBILES: THE “AUTOMOBILE EXCEPTION” TO THE WARRANT REQUIREMENT

Automobiles are the subject of a specialized Fourth Amendment jurisprudence stemming from *Carroll v. United States*, 267 U.S. 132 (1925). As presently interpreted, *Carroll* permits warrantless stopping and search of moving vehicles if, but only if, the searching officers have probable cause to believe that seizable objects are concealed in the vehicle. *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973); *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 315 n.10 (1978) (dictum); *Wyoming v. Houghton*, 526 U.S. 295, 300-01 (1999); compare *Chambers v. Maroney*, 399 U.S. 42 (1970), and *Colorado v. Bannister*, 449 U.S. 1 (1980) (per curiam), and *Maryland v. Dyson*, 527 U.S. 465 (1999) (per curiam), with *Preston v. United States*, 376 U.S. 364 (1964), and *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216 (1968), and *United States v. Davis*, 997 F.3d 191 (4th Cir. 2021). See also *California v. Carney*, 471 U.S. 386 (1985) (extending the *Carroll* rule to a motor home parked in a downtown parking lot); *Florida v. White*, 526 U.S. 559, 565, 566 (1999) (the *Carroll* rule permitting search of a vehicle based on probable cause to

believe that it contains contraband may permit seizure of the car based on “probable cause to believe that the vehicle *itself* was contraband” as long as “the warrantless seizure . . . did not involve any invasion of respondent’s privacy” because, for example, the vehicle was in “a public area”); *Bell v. City of Chicago*, 835 F.3d 736, 739 (7th Cir. 2016) (rejecting a Fourth Amendment challenge to a municipal ordinance that authorizes seizure and impounding of vehicles upon probable cause to believe they have been “used in an illegal manner or in connection with an illegal act, such as possession of illegal drugs in a vehicle, drag racing, or solicitation of a prostitute”). Compare *Commonwealth v. Alexander*, 243 A.3d 177, 180-81 (Pa. 2020) (holding that the state constitution “affords greater protection to our citizens” than the “federal automobile exception”: “the Pennsylvania Constitution requires both a showing of probable cause and exigent circumstances to justify a warrantless search of an automobile”).

If there is probable cause to believe that seizable objects may be concealed in any part of the vehicle, then the police may search every part of the vehicle and every container within it which is capable of holding the seizable object. *Wyoming v. Houghton*, 526 U.S. at 307; *California v. Acevedo*, 500 U.S. 565, 580 (1991); *United States v. Ross*, 456 U.S. 798 (1982); *United States v. Johns*, 469 U.S. 478, 482-83 (1985). The only limitation on the scope of the search is that it may not extend into areas incapable of holding the object, including containers that are not “capable of concealing the object of the search.” *Wyoming v. Houghton*, 526 U.S. at 307 (dictum); *United States v. Ross*, 456 U.S. at 820-21, 823-24 (dictum).

The *Carroll* decision and its progeny establishing special rules for automobile searches and seizures are based in substantial part upon the inherent mobility of automobiles, which renders the securing of a warrant impracticable. See *Wyoming v. Houghton*, 526 U.S. at 304; *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996) (per curiam); *California v. Carney*, 471 U.S. at 390-91. (The caselaw also mentions two other factors that distinguish automobiles from buildings – the lesser degree of privacy that an automobile offers, e.g., *Pennsylvania v. Labron*, 518 U.S. at 940; *South Dakota v. Opperman*, 428 U.S. 364, 367 (1976), and the fact that automobiles are subject to extensive noncriminal regulation by the state, e.g., *Pennsylvania v. Labron*, 518 U.S. at 940; *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973). But the latter factors have never been invoked independently to uphold a warrantless police search that invades what privacy an automobile *does* afford, in a case where no noncriminal regulatory concern drew police attention to a particular vehicle.) Accordingly, in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), the Court held that an almost totally immobilized automobile could not be searched without a warrant. *Coolidge* arguably forbids the application of *Carroll*’s automobile exception to the warrant requirement in situations in which there are no reasonable grounds to apprehend that a vehicle may be moved before a warrant can be obtained. See *id.* at 462 (plurality opinion) (except “where ‘it is not practicable to secure a warrant,’ . . . the ‘automobile exception,’ despite its label, is simply irrelevant”); *Preston v. United States*, 376 U.S. 364 (1964); *United States v. Bradshaw*, 490 F.2d 1097 (4th Cir. 1974); *State v. LeJeune*, 276 Ga. 179, 182-83, 576 S.E.2d 888, 892-93 (2003) (alternative ground); *United States v. Bazinet*, 462 F.2d 982, 986 n.3 (8th Cir. 1972) (dictum); *United States v. McCormick*, 502 F.2d 281 (9th Cir. 1974); cf. *State v. Gonzales*, 236 Or. App. 391, 236 P.3d 834 (2010), *subsequent history in* 265 Or. App. 655, 337 P.3d 129

(2014). The *Carroll* rule applies, in other words, only “[w]hen a vehicle is being used on the highways, or if it is readily capable of such use and is found stationary in a place not regularly used for residential purposes – temporary or otherwise.” *California v. Carney*, 471 U.S. at 392. Compare *State v. Witt*, 223 N.J. 409, 447-48, 126 A.3d 850, 872-73 (2015) (“In . . . [*State v. Alston*, 88 N.J. 211, 233, 440 A.2d 1311 (1981)] we held that the automobile exception authorized the warrantless search of an automobile only when the police have probable cause to believe that the vehicle contains contraband or evidence of an offense and the circumstances giving rise to probable cause are unforeseeable and spontaneous. . . . ¶ Here, we part from the United States Supreme Court’s interpretation of the automobile exception under the Fourth Amendment and return to the *Alston* standard, this time supported by Article I, Paragraph 7 of our State Constitution. *Alston* properly balances the individual’s privacy and liberty interests and law enforcement’s investigatory demands. *Alston*’s requirement of ‘unforeseeability and spontaneity,’ . . . does not place an undue burden on law enforcement. For example, if a police officer has probable cause to search a car and is looking for that car, then it is reasonable to expect the officer to secure a warrant if it is practicable to do so. In this way, we eliminate the . . . fear that ‘a car parked in the home driveway of vacationing owners would be a fair target of a warrantless search if the police had probable cause to believe the vehicle contained drugs.’ . . . In the case of the parked car, if the circumstances giving rise to probable cause were foreseeable and not spontaneous, the warrant requirement applies.”); *State v. Smart*, 253 N.J. 156, 159-60, 172, 289 A.3d 469, 471, 478 (2023) (applying the state constitutional rule of *State v. Witt*, *supra*, to hold that a warrantless search of a vehicle after an investigative stop was unlawful, notwithstanding the parties’ “agree[ment that] the investigative stop was legal” and the officers’ reliance on a canine sniff of the exterior of the vehicle to establish probable cause that drugs were in the vehicle, because the “circumstances giving rise to probable cause were not ‘unforeseeable and spontaneous’” in that the police had received information “a month earlier from a confidential informant (CI) that helped link” the defendant and the vehicle to “narcotics trafficking in the area,” and, after the police observed the defendant enter the vehicle, they “surveilled it for almost an hour” before stopping the car: “the investigative stop was deliberate, orchestrated, and wholly connected with the reason for the subsequent seizure of the evidence”).

In *Collins v. Virginia*, 138 S. Ct. 1663 (2018) (summarized in § 23.15(c) *supra*), the Supreme Court held that a police officer violated the Fourth Amendment when, without a warrant, he entered the curtilage of a home to inspect a tarp-covered motorcycle parked in the driveway adjacent to the house. The Court rejected Virginia’s argument “that this Court’s precedent indicates that the automobile exception is a categorical one that permits the warrantless search of a vehicle anytime, anywhere, including in a home or curtilage” (*id.* at 1673). Because the Court’s *ratio decidendi* was that an illegal search occurred at the point at which the officer trespassed on the curtilage, it was unnecessary for the Court to reach the question whether the bike’s lack of mobility would have insulated it from warrantless search and seizure if it had been similarly parked and draped somewhere other than on private residential premises. There are, however, hints in the opinion which suggest that the answer to this question should be yes. The Court parsed the *Carroll* doctrine by saying: “The ‘ready mobility’ of vehicles served as the core justification for the automobile exception for many years. . . . Later cases then introduced an

additional rationale based on ‘the pervasive regulation of vehicles capable of traveling on the public highways.’” *Id.* at 1669-70. But the latter-day “additional rationale” would seem to be applicable to Collins’ motorcycle no matter where it was parked, and the Court does not discuss it further. (As noted above, no Supreme Court decision has ever sustained a warrantless vehicle search solely on the basis of the regulatory rationale.) By contrast, the *Collins* Court does recur to the “ready mobility” rationale in distinguishing *Scher v. United States*, 305 U. S. 251 (1938): “Whereas Collins’ motorcycle was parked and unattended when Officer Rhodes intruded on the curtilage to search it, the officers in *Scher* first encountered the vehicle when it was being driven on public streets, [and] approached the curtilage of the home only when the driver turned into the garage, and searched the vehicle.” *Id.* at 1674. Thus, the immobility of Collins’ bike played a significant albeit inexplicit role in the outcome. *And see Commonwealth v. Loughnane*, 643 Pa. 408, 173 A.3d 733 (2017), a pre-*Collins* decision also involving a warrantless police search of a vehicle parked in a residential driveway. The Pennsylvania Supreme Court invalidated the search not only out of concern for the vehicle’s proximity to the defendant’s residence, but because of the perceived inapplicability of *Carroll*’s mobility rationale. “Absent exigent circumstances, the concern about the inherent mobility of the vehicle does not apply, as the chance to search and/or seize the vehicle is not fleeting. . . . The vehicle is parked where the defendant lives and it will typically either remain there or inevitably return to that location.” *Id.* at 745. There is language in *id.* at 744, suggesting that a vehicle parked in a public parking lot differs from one parked in a residential driveway because a public parking facility “‘is typically an interim destination, but a home’s driveway is often the end of that day’s travels.’” Nevertheless, *Collins* and *Loughnane* justify counsel’s advocating the position that a warrantless search of an immobile, unattended vehicle in any location falls outside the *Carroll* “automobile exception” (*Collins*, 138 S. Ct. at 1669). *See also People v. Rorabaugh*, 74 Cal. App. 5th 296, 289 Cal. Rptr. 3d 393 (2022) (holding that the warrantless seizure, impoundment and search of a car which was located just inside the property line of a farm with permission of the farm owner (for whom the defendant did mechanical work in return for the farmer’s permission to leave the car on his property) violated the Fourth Amendment; in rejecting the state’s argument that the car was “readily mobile,” the court notes that the farmer did not have the keys to it and that the defendant, who did, had been arrested at another location and was already in custody at the time the police seized the vehicle).

When the police have probable cause to make a warrantless search of a vehicle under *Carroll* but, instead of searching it on the street, they lawfully impound it, they may exercise the *Carroll* prerogative to search it without a warrant later at the police station (*e.g.*, *Chambers v. Maroney*, 399 U.S. at 52; *Michigan v. Thomas*, 458 U.S. 259, 261-62 (1982) (per curiam); *Florida v. Meyers*, 466 U.S. 380 (1984) (per curiam); *and see United States v. Ross*, 456 U.S. at 807 n.9 (“if an immediate search on the street is permissible without a warrant, a search soon thereafter at the police station is permissible if the vehicle is impounded”)), at least when no additional invasion of privacy interests results from their delay in making the search and when the delay is not inordinate (*see United States v. Johns*, 469 U.S. at 487 (dictum), citing Justice White’s dissenting opinion in *Coolidge v. New Hampshire*, 403 U.S. at 525). The same rule permitting delayed searches applies to closed containers found in the vehicle. *United States v. Johns*, 469 U.S. at 482-83. *But see State v. Witt*, 223 N.J. at 448-49, 126 A.3d at 873 (“We also

part from federal jurisprudence that allows a police officer to conduct a warrantless search at headquarters merely because he could have done so on the side of the road. . . . ‘Whatever inherent exigency justifies a warrantless search at the scene under the automobile exception certainly cannot justify the failure to secure a warrant after towing and impounding the car’ at headquarters when it is practicable to do so. . . . Warrantless searches should not be based on fake exigencies. Therefore, under Article I, Paragraph 7 of the New Jersey Constitution, we limit the automobile exception to on-scene warrantless searches.”).

§ 23.25 INVENTORY SEARCHES OF IMPOUNDED VEHICLES; CONSENT SEARCHES OF VEHICLES

(A) The immediately preceding section dealt with the circumstances under which the police can conduct warrantless searches of automobiles “for the purpose of investigating criminal conduct, with the validity of the searches . . . dependent on the application of the probable cause and warrant requirements of the Fourth Amendment.” *Colorado v. Bertine*, 479 U.S. 367, 371 (1987). “By contrast, an inventory search may be ‘reasonable’ under the Fourth Amendment even though it is not conducted pursuant to warrant based upon probable cause.” *Id.*

The police may conduct an “inventory search” of the contents of an impounded automobile, including an examination of the contents of containers found in the automobile (*id.* at 374-75), if the inventory search complies with the following four requirements:

(i) The search must be conducted in accordance with “standardized procedures,” *id.* at 372, based upon “reasonable police regulations relating to inventory procedures,” *id. Accord, Florida v. Wells*, 495 U.S. 1, 4 (1990) (“standardized criteria . . . or established routine”); *South Dakota v. Opperman*, 428 U.S. 364, 366, 376 (1976). *See, e.g., Wells*, 495 U.S. at 4-5 (suppressing contraband found in the course of an alleged inventory search because “the Florida Highway Patrol had no policy whatever with respect to the opening of closed containers encountered during an inventory search . . . [and] absent such a policy, the instant search was not sufficiently regulated to satisfy the Fourth Amendment”).

(ii) The police must not be acting “in bad faith or for the sole purpose of investigation,” *Colorado v. Bertine*, 479 U.S. at 372. *See also id.* at 374 (speaking of “reasonable police regulations relating to inventory procedures administered in good faith”); *id.* at 376 (noting that “[t]here was no showing that the police chose to impound Bertine’s van in order to investigate suspected criminal activity”); *Florida v. Wells*, 495 U.S. at 4 (“an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence”); *South Dakota v. Opperman*, 428 U.S. at 376 (police had no “investigatory . . . motive”); *Cady v. Dombrowski*, 413 U.S. 433, 447 (1973) (officer conducting the search had no purpose to look for criminal evidence); *United States v. Woodard*, 5 F.4th 1148, 1150 (10th Cir. 2021) (“[w]hen the police use pretext to impound . . . [a] car, the Fourth Amendment typically prohibits introduction of the evidence obtained from the search”); *United States v. Del Rosario-Acosta*, 968 F.3d 123, 128 (1st Cir. 2020) (“All in all, it seems inescapable that the officers seized Del Rosario’s car so that they

could search it for evidence of a crime, and that they later sought to justify the search by invoking the community-caretaking exception. And while that exception might well apply even if there were also other motives for seizing the car, here the exception fits so poorly that it does not suffice to lift our eyes from the obvious conclusion that the seizure served no purpose other than facilitating a warrantless investigatory search under the guise of an impoundment inventory.”); *United States v. Johnson*, 889 F.3d 1120, 1125-26 (9th Cir. 2018) (“The government argues that, regardless what the officers’ personal motivations were for searching Johnson’s car, such motivations are simply not relevant to our Fourth Amendment inquiry. In most contexts, that is true. . . . ¶ However, in an opinion published after the district court’s decision in this case, our court held that administrative searches conducted without individualized suspicion – such as drunk-driving checkpoints or vehicular inventory searches – are an exception to this general rule. . . . Thus, an administrative search may be invalid where the officer’s ‘subjective purpose was to find evidence of crime.’ . . . However, the mere ‘presence of a criminal investigatory motive’ or a ‘dual motive – one valid, and one impermissible –’ does not render an administrative stop or search invalid; instead, we ask whether the challenged search or seizure ‘would . . . have occurred in the absence of an impermissible reason.’”). *Cf.* § 23.16 *supra*; and *see generally* *City of Indianapolis v. Edmond*, 531 U.S. 32, 45-46 (2000) (dictum) (discussing “inventory search” caselaw).

(iii) The automobile must be lawfully “in the custody of the police,” *Colorado v. Bertine*, 479 U.S. at 372, in the sense that an adequate justification exists for the police to impound the vehicle, *see South Dakota v. Opperman*, 428 U.S. at 365-66, 375; *Cady v. Dombrowski*, 413 U.S. at 443. “[T]he threshold question in inventory cases is whether the impoundment itself was proper. . . . [W]here the circumstances show that the police had no authority to impound the vehicle, or that police custodial care of the vehicle was not necessary, the inventory search was unlawful.” *Fair v. State*, 627 N.E.2d 427, 431 (Ind. 1993). *Accord*, *United States v. Rosario-Acosta*, 968 F.3d at 127, 128 (following the defendant’s arrest while running away from his car, which “was parked legally on a quiet residential street one street over from where . . . [he] lived with his family,” police impounded and searched the vehicle; the impounding and search are held unsustainable under the community caretaking function: “The only . . . factor favoring the government is that ostensibly there was no one else to move the car. But the relevance of that factor only arises when there is a need to move the car.”). “[W]hen the impoundment is not specifically directed by state law, the risk increases that a decision to tow will be motivated solely by the desire to conduct an investigatory search. . . . ¶ . . . [Thus] we hold that to prevail on the question of whether an impoundment was warranted in terms of the community caretaking function, the prosecution must demonstrate: (1) that the belief that the vehicle posed some threat or harm to the community or was itself imperiled was consistent with objective standards of sound policing, . . . and (2) that the decision to combat that threat by impoundment was in keeping with established departmental routine or regulation.” *Fair v. State*, 627 N.E.2d at 433. Depending upon state law, the police may be empowered to impound an automobile for traffic or parking violations, *South Dakota v. Opperman*, 428 U.S. at 365-66, 375; incident to the arrest of the driver, *Colorado v. Bertine*, 479 U.S. at 368 & n.1; and in connection with routine highway management duties, such as the removal of a disabled vehicle that was “a nuisance along the

highway,” *Cady v. Dombrowski*, 413 U.S. at 443. But the Fourth Amendment regulates the permissible duration of the impound. *Brewster v. Beck*, 859 F.3d 1194 (9th Cir. 2017) (although police could lawfully impound a vehicle on the ground that its owner’s driving license had been suspended, the protraction of the impound period under a state statute providing that a “vehicle so impounded shall be impounded for 30 days” (*id.* at 1195) violated the Fourth Amendment: “The exigency that justified the seizure vanished once the vehicle arrived in impound and Brewster showed up with proof of ownership and a valid driver’s license.” ¶ “A seizure is justified under the Fourth Amendment only to the extent that the government’s justification holds force. Thereafter, the government must cease the seizure or secure a new justification. Appellees have provided no justification here.” *Id.* at 1196-97.). *Compare Sandoval v. County of Sonoma*, 912 F.3d 509 (9th Cir. 2018) (holding that a California statute authorizing warrantless impounding of a vehicle operated by a driver without a valid state operator’s license cannot, consistently with the Fourth Amendment, be applied so as to justify the seizure or retention of a vehicle if the driver provides another person, who has such a license, to take over the driving), and *Commonwealth v. Goncalves-Mendez*, 484 Mass. 80, 138 N.E.3d 1038 (2020) (police violated the Fourth Amendment when they impounded and later searched a vehicle driven by the defendant who was validly stopped for a traffic violation and arrested on an outstanding warrant: a passenger in the car was a licensed driver; therefore the police were required to offer the defendant the alternative of having the passenger take the vehicle to a safe location of the defendant’s choice) with *United States v. Trujillo*, 993 F.3d 859, 864 (10th Cir. 2021) (“The search of Defendant’s vehicle was justified on two separate community caretaking grounds. First, impoundment of the vehicle was proper When an unoccupied vehicle would impede traffic and the registered owner cannot readily arrange for someone to drive it away, law-enforcement officers may impound the vehicle. Second, officers may take reasonable steps to protect the public by removing firearms (and searching for additional firearms) from unattended vehicles under their control in areas accessible to the public.”), and *United States v. Anderson*, 56 F.4th 748 (9th Cir. 2022) (applying the caretaking-function rationale to sustain the impounding and inventorying of a truck illegally parked in the driveway of a private residence whose owner told sheriff’s deputies that he wanted the truck removed; the driver had no valid driver’s license, had no passengers, was not from the area, and had a record as a career criminal), and *United States v. Treisman*, 2023 WL 4140018 (4th Cir. 2023) (applying the community-caretaking-function rationale to sustain the impounding and inventorying of a van that was parked overnight in a bank parking lot: the bank manager had phoned the police and the responding officers observed through the passenger-side window an assault rifle, a handgun box, an ammunition box, a container of pills and a suitcase; possession of these items was not illegal but the officers testified – credibly, the district court found – that (1) it would be unsafe to leave a van containing weapons unattended, and (2) the officers feared that someone might be living in the van and might be in heat distress in the rear area).

(iv) The search may not intrude into repositories of electronic information akin to those protected by the rule of *Riley v. California*, 573 U.S. 373 (2014) (discussed in § 23.08(b) *supra*). See *State v. Worsham*, 227 So.3d 602, 603 (Fla. App. 2017) (“Without a warrant, the police downloaded data from the ‘event data recorder’ or ‘black box’ located in Worsham’s impounded

vehicle. We affirm [the granting of Worsham’s suppression motion], concluding there is a reasonable expectation of privacy in the information retained by an event data recorder and downloading that information without a warrant from an impounded car in the absence of exigent circumstances violated the Fourth Amendment.”).

In approving an inventory search in *South Dakota v. Opperman*, the Court emphasized that the car’s owner was “not present to make other arrangements for the safekeeping of his belongings.” 428 U.S. at 375. In its subsequent decision in *Colorado v. Bertine*, the Court held that the Fourth Amendment does not require the police to forgo an inventory search in favor of the “less intrusive” procedure of offering a driver “the opportunity to make other arrangements for the safekeeping of his property.” 479 U.S. at 373. Arguably, *Bertine* means only that the police need not opt for “less intrusive” procedures in deciding whether to conduct an inventory search incident to impoundment, whereas *Opperman* implies that the police do have to consider less intrusive alternatives in determining whether it is necessary to impound the car in the first place. The *Bertine* opinion recognizes that impoundments must be based on “standardized criteria, related to the feasibility and appropriateness of parking and locking [the] . . . vehicle rather than impounding it,” 479 U.S. at 376, but because the only challenge made to the impoundment in *Bertine* was a claim that the applicable police regulation gave too much discretion to individual officers, *see id.* at 375-76, the Court there did not elaborate this parking-and-locking passage or consider what other constitutional requirements, if any, govern impoundments as a distinct species of Fourth Amendment “seizures” of automobiles. Some state courts have found impoundments to be unreasonable and violative of the Fourth Amendment when the sole purpose of the impoundment was safekeeping of the automobile while the driver was in custody and that goal could have been achieved by the less intrusive measures of turning the car over to an unarrested passenger, *Virgil v. Superior Court*, 268 Cal. App. 2d 127, 73 Cal. Rptr. 793 (1968), or leaving the car parked in a legal parking space if this would not be unduly time-consuming for the police and would not expose the car to undue risk of theft or vandalism, *State v. Slockbower*, 79 N.J. 1, 397 A.2d 1050 (1979); *State v. Simpson*, 95 Wash. 2d 170, 662 P.2d 1199 (1980).

If the police have the authority to impound an automobile and to conduct an inventory search of it, they can make the search at the scene, at the police station, or at other locations. *Colorado v. Bertine*, 479 U.S. at 373 (inventory search was not rendered unreasonable simply because the vehicle “was towed to a secure, lighted facility”). “[T]he security of the storage facility does not completely eliminate the need for inventorying; the police may still wish to protect themselves or the owners of the lot against false claims.” *Id.*

The state courts have been active in developing independent state constitutional restrictions upon inventory searches. *See, e.g., State v. Daniel*, 589 P.2d 408, 417 (Alaska 1979) (police cannot open “closed, locked or sealed luggage, containers, or packages contained within a vehicle” during an inventory search); *State v. Opperman*, 247 N.W.2d 673, 675 (S.D. 1976) (“noninvestigative police inventory searches of automobiles without a warrant must be restricted to safeguarding those articles which are within plain view of the officer’s vision”). This is an area

in which defense counsel is particularly advised to follow the suggestion of § 7.09 *supra* and invoke state-law principles as alternative grounds for challenging searches and seizures.

(B) Vehicles may also be searched without a warrant or cause if an authorized party consents to the search (e.g., *Florida v. Jimeno*, 500 U.S. 248 (1991); *State v. Akuba*, 2004 S.D. 94, 686 N.W.2d 406 (S.D. 2004)) – including a party other than the defendant who is contesting the search (e.g., *United States v. Dewilfond*, 54 F.4th 578 (8th Cir. 2022) (upholding the monitoring of a GPS device placed on a car belonging to a government informer who consented to its installation before lending it to the defendant for a drug buy); *People v. Mendoza*, 234 Ill. App. 3d 826, 599 N.E.2d 1375, 175 Ill. Dec. 361 (1992)) – provided that the search does not exceed the scope of the consent (see, e.g., *United States v. Neely*, 564 F.3d 346 (4th Cir. 2009) (a driver’s consent to search of his car’s trunk did not authorize searching the back passenger area); *United States v. Cotton*, 722 F.3d 271 (5th Cir. 2013) (a driver’s consent to search his luggage did not authorize searching areas of the car that could not contain luggage)).

§ 23.26 SEARCHES OF AUTOMOBILES INCIDENT TO THE ARREST OF THE DRIVER OR OCCUPANTS

Automobiles may be subjected to a warrantless search of limited scope incidental to the valid arrest of their drivers or occupants, under the doctrine of “search incident to arrest” (see § 23.08 *supra*), as modified by the Supreme Court in *Arizona v. Gant*, 556 U.S. 332 (2009) to account for certain “circumstances unique to the vehicle context” (*id.* at 343). These searches may be made without a warrant only at the immediate time and place of the arrest. See *Preston v. United States*, 376 U.S. 364 (1964); *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216 (1968); *Chambers v. Maroney* 399 U.S. 42, 47 (1970); *Cardwell v. Lewis*, 417 U.S. 583, 591-92 n.7 (1974); *id.* at 599 n.4 (Stewart, J., dissenting); *United States v. Chadwick*, 433 U.S. 1, 14-15 (1977). This “search incident to arrest” rule applies not only in “situations where the officer makes contact with the occupant [of a vehicle] while the occupant is inside the vehicle” but also “when the officer first makes contact with the arrestee after the latter has stepped out of his vehicle.” *Thornton v. United States*, 541 U.S. 615, 617 (2004). In accordance with the search-incident-to-arrest rule that applies to all situations including the automobile context, the search may “include ‘the arrestee’s person and the area “within his immediate control” – construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.’” *Arizona v. Gant*, 556 U.S. at 339. See also *id.* at 343 (narrowing *New York v. Belton*, 453 U.S. 454 (1981), to clarify that the customary search-incident-to-arrest rule “authorizes police to search a vehicle incident to a recent occupant’s arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search”). See *People v. Lopez*, 8 Cal. 5th 353, 453 P.3d 150, 255 Cal. Rptr. 3d 526 (2019), summarized in § 23.08(b) *supra*. In *Gant*, the Court responded to “circumstances unique to the vehicle context” by holding that police officers also may search a vehicle incident to the arrest of a “recent occupant” “when it is ‘reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.’” *Id.* See also *id.* at 343-44 (explaining that “[i]n many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the

vehicle contains relevant evidence,” “[b]ut in others, including *Belton* and *Thornton*, the offense of arrest will supply a basis for searching the passenger compartment of an arrestee’s vehicle and any containers therein”; the Court applies its new rule to hold a vehicle search unlawful because “Gant clearly was not within reaching distance of his car at the time of the search” and thus the search could not be justified under the customary search-incident-to-arrest rule, and “Gant was arrested for driving with a suspended license – an offense for which police could not expect to find evidence in the passenger compartment of Gant’s car”). *See also State v. Noel*, 236 W. Va. 335, 779 S.E.2d 877 (2015). *Compare State v. Snapp*, 174 Wash. 2d 177, 181-82, 275 P.3d 289, 291 (2012) (construing the state constitution to reject that portion of the *Gant* rule that allows a search of a vehicle incident to the arrest of a recent occupant when “it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle”).

When an automobile is stopped to ticket the driver for a traffic violation, a warrantless “search of the passenger compartment of [the] . . . automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief . . . that the suspect [driver or occupant] is dangerous and the suspect may gain immediate control of weapons [from the vehicle].” *Michigan v. Long*, 463 U.S. 1032, 1049 (1983). Unlike a search incident to arrest, which is authorized by the mere fact of a valid arrest, this latter sort of weapons search requires *both* a valid stop *and* reasonable grounds to believe that the driver or occupant is dangerous and may grab a weapon from the car to use against the officers. *Id.* at 1046-53 & nn.14, 16. *See, e.g., United States v. Hussain*, 835 F.3d 307, 314-17 (2d Cir. 2016).

So far as the Fourth Amendment is concerned, an officer who sees a driver violate the traffic laws may choose either to make an arrest and thereby acquire the full power of search incident to arrest or to issue a ticket or other form of summons and acquire only the relatively limited search power described in *Long*. *See Virginia v. Moore*, 553 U.S. 164, 176-77 (2008); *Knowles v. Iowa*, 525 U.S. 113, 114, 118-19 (1998); *United States v. Robinson*, 414 U.S. 218 (1973); *Gustafson v. Florida*, 414 U.S. 260 (1973). Even if state law categorizes the traffic infraction as one that must be handled by a ticket or other form of summons rather than a full-scale arrest, an arrest which thus violates state law does not give rise to a Fourth Amendment basis for suppressing evidence unless either the arrest or the search incident to that arrest violated the Fourth Amendment rules summarized in §§ 23.07(b)-23.08(d). *See Virginia v. Moore*, 553 U.S. 164, 167, 171, 177-78 (even though police officers’ arrest of Moore for driving on a suspended license violated Virginia state law, which restricted the officers to “issu[ing] Moore a summons instead of arresting him,” the arrest satisfied the applicable Fourth Amendment standard of “probable cause to believe a person committed . . . [a] crime in [the officer’s] presence,” and accordingly the contraband obtained by the police in a valid search incident to arrest was not suppressible under the Fourth Amendment). Suppression in such cases may be available, however, on state constitutional grounds. *See, e.g., Commonwealth v. Hernandez*, 456 Mass. 528, 531-32, 924 N.E.2d 709, 711-12 (2010); and see § 7.09 *supra*.

§ 23.27 “TERRY STOPS” OF AUTOMOBILES AND ATTENDANT SEARCHES

“The law is settled that in Fourth Amendment terms a . . . stop [of a moving vehicle] entails a seizure of the driver [and any passengers in the vehicle] ‘even though the purpose of the stop is limited and the resulting detention quite brief.’” *Brendlin v. California*, 551 U.S. 249, 255 (2007). *See also Arizona v. Johnson*, 555 U.S. 323, 327 (2009). *Cf. United States v. Delaney*, 955 F.3d 1077, 1080, 1083, 1085 (D.C. Cir. 2020) (“a seizure occurred when the officers pulled into the parking lot, [and] partially blocked Delaney’s vehicle” – “stopp[ing] their [police] cruiser near the parking lot’s entrance, ‘more than 3 feet away from the nose of the [defendant’s] Jeep,’” and, “[a]lthough ‘the marked police car did not completely block the Jeep from exiting the parking lot, . . . it would have taken some maneuvering, a number of turns for the Jeep to get out of the parking lot’” – “and [the police also] activated their take-down light”: “‘officers need not totally restrict a citizen’s freedom of movement in order to convey the message that walking away is not an option’”); *People v. Suttles*, 171 A.D.3d 1454, 1455, 98 N.Y.S.3d 682, 683 (N.Y. App. Div., 4th Dep’t 2019) (“police officers effectively seized the [parked] vehicle” in which the defendant was seated in the passenger seat “when their two patrol cars entered the parking lot in such a manner as to prevent the vehicle from being driven away”). By analogy to the *Terry* stop doctrine (§ 23.09 *supra*), “law enforcement agents may briefly stop a moving automobile to investigate a reasonable suspicion that its occupants are involved in criminal activity.” *United States v. Hensley*, 469 U.S. 221, 226 (1985); *see, e.g., Kansas v. Glover*, 140 S. Ct. 1183 (2020); *United States v. Sharpe*, 470 U.S. 675 (1985); *Delaware v. Prouse*, 440 U.S. 648 (1979) (dictum). In limited circumstances, the police can also conduct a *Terry* stop of an automobile “to investigate past criminal activity.” *United States v. Hensley*, 469 U.S. at 228. *See* § 23.09 *supra*. Neither sort of investigative stop may be made in the absence of “reasonable suspicion.” *Brendlin v. California*, 551 U.S. at 254 n.2, 255-56. *See also United States v. Feliciana*, 974 F.3d 519 (4th Cir. 2020), summarized in § 23.09 *supra*; *United States v. Mosley*, 454 F.3d 249 (3d Cir. 2006). The standard of “reasonable suspicion” for an automobile stop is the same as that for a pedestrian stop, discussed in § 23.09 *supra*. *See, e.g., United States v. Uribe*, 709 F.3d 646, 649-50 (7th Cir. 2013); *United States v. Cohen*, 481 F.3d 896 (6th Cir. 2007); *State v. Teamer*, 151 So.3d 421, 427-30 (Fla. 2014). *And see Kansas v. Glover, supra*, holding that standard satisfied when a police officer ran a license plate check on a moving vehicle and learned that the vehicle was registered to an individual whose driver’s license had been revoked. “The fact that the registered owner of a vehicle is not always the driver of the vehicle does not negate the reasonableness of . . . [the officer’s] inference. Such is the case with all reasonable inferences. The reasonable suspicion inquiry “falls considerably short” of 51% accuracy, . . . for, as we have explained, ‘[t]o be reasonable is not to be perfect . . .’” 140 S. Ct. at 1188. However, “the presence of additional facts might dispel reasonable suspicion For example, if an officer knows that the registered owner of the vehicle is in his mid-sixties but observes that the driver is in her mid-twenties, then the totality of the circumstances would not ‘raise a suspicion that the particular individual being stopped is engaged in wrongdoing.’” (*id.* at 1191). *Compare United States v. Forjan*, 66 F.4th 739, 746-47 (8th Cir. 2023) (considered dictum) (“[T]he district court found . . . that Deputy Hook was mistaken in his belief that Forjan’s license plate sticker revealed he had an expired registration. However, after finding the relevant Missouri statutes ambiguous and Deputy Hook’s testimony regarding his mistaken belief credible, the district court determined that Deputy Hook’s mistake was objectively reasonable. We disagree. . . . Taken

together, Missouri statutes and regulations contain no ambiguity: a registration is valid through the month and year displayed on the tag of the vehicle’s license plate. Thus, a license plate bearing a December 2016 tag means that the vehicle’s registration is not expired until the first day of January 2017. ¶ The district court noted that its decision that Deputy Hook’s mistake was reasonable was based on Deputy Hook’s credibility. . . . But ‘[t]he Fourth Amendment tolerates only reasonable mistakes, and those mistakes – whether of fact or of law – must be objectively reasonable. We do not examine the subjective understanding of the particular officer involved.’ *Heien v. North Carolina*, 574 U.S. 54, 66 (2014). Regardless of Deputy Hook’s understanding, it was not objectively reasonable for an officer in his position to believe that a tag bearing the date December 2016 was expired on December 20, 2016. See *id.* at 67. (‘[A]n officer can gain no Fourth Amendment advantage through a sloppy study of the laws he is duty bound to enforce.’). The license plate tag bearing that registration date thus did not provide reasonable suspicion to initiate the traffic stop.”).

Whether an unmovable vehicle has been “stopped” for purposes of *Terry*’s reasonable-suspicion requirement is a vexed issue. As cases like *Delaney* and *Suttles*, cited in the preceding paragraph, illustrate, a “stop” is ordinarily found where the vehicle was motionless at the time when the police arrived on the scene if they position themselves or a police car so as to restrict the vehicle’s movement. *Accord*, *United States v. Jones*, 562 F.3d 768 (6th Cir. 2009); *United States v. Gross*, 662 F.3d 393 (6th Cir. 2011); *United States v. Cloud*, 994 F.3d 233 (4th Cir. 2021) (considered dictum). The Pennsylvania and California Supreme Courts have found a “stop” when a police car pulls up beside or behind a parked vehicle and activates its emergency lights. *Commonwealth v. Livingstone*, 644 Pa. 27, 174 A.3d 609 (2017); *People v. Brown*, 61 Cal. 4th 968, 353 P.3d 305, 190 Cal. Rptr. 3d 583 (2015) (considered dictum); *accord*, *In re Edgerrin J.*, 57 Cal. App. 5th 752, 271 Cal. Rptr. 3d 610 (2020) (alternative ground). The Fourth Circuit has analyzed as a vehicle “stop” the actions of an officer who initially approached a parked car for a “welfare check” (to determine whether the driver needed assistance) and then, observing a holstered handgun on the front seat, detained the driver for about an hour. *Hicks v. Ferreyra*, 64 F.4th 156, 170 (4th Cir. 2023), summarized in § 23.07(d) *supra*. See also *United States v. Campbell*, 549 F.3d 364 (6th Cir. 2008) (apparently assuming that a “stop” occurred when an officer in a patrol car, seeing a vehicle parked on a dark, secluded, privately owned railway access road, activated the patrol car’s flasher, spot lights and siren). The Eighth Circuit has found no “stop” in a case factually indistinguishable from the California and Pennsylvania Supreme Court cases, *United States v. Cook*, 842 F.3d 597 (8th Cir. 2016); the Tenth Circuit has found no “stop” when a police car pulls up in front of a parked vehicle – but without blocking the vehicle’s path – and activates its takedown lights (as distinguished from its emergency flasher), *United States v. Tafuna*, 5 F.4th 1197 (10th Cir. 2021); and the First Circuit has found no “stop” when a police car pulls up at the scene of a vehicle which has crashed into a snow bank. *United States v. Howard*, 66 F.4th 33 (1st Cir. 2023). See also *the fractured panel decision in United States v. Robertson*, 864 F.3d 1118 (10th Cir. 2017).

“[A]s in the case of a pedestrian reasonably suspected of criminal activity,” the *Terry* frisk doctrine permits “a patdown of the driver or a passenger [of a lawfully stopped vehicle]

during a . . . [vehicle] stop” if the police have “reasonable suspicion that the person subjected to the frisk is armed and dangerous.” *Arizona v. Johnson*, 555 U.S. at 327. Also by analogy to *Terry*, police who validly stop a vehicle may search some areas of it for weapons if the officers possess a reasonable belief, based on specific and articulable facts, that a detained suspect is dangerous and that s/he can gain immediate control of weapons from the vehicle. *Michigan v. Long*, 463 U.S. 1032, 1049 (1983). The search must, however, be “limited to those areas [of the vehicle] in which a weapon may be placed or hidden.” *Id.* In the absence of reasonable grounds to believe that the vehicle or its occupants conceal a weapon, any police intrusion into the vehicle constitutes an unconstitutional search. *United States v. Ngumezi*, 980 F.3d 1285, 1288, 1289 (9th Cir. 2020) (“We . . . consider whether police officers who have reasonable suspicion sufficient to justify a traffic stop – but who lack probable cause or any other particularized justification, such as a reasonable belief that the driver poses a danger – may open the door to a vehicle and lean inside. We conclude they may not.”; “Although the intrusion here may have been modest, the Supreme Court has never suggested that the magnitude of a physical intrusion is relevant to the Fourth Amendment analysis. . . . [W]e apply a bright-line rule that opening a door and entering the interior space of a vehicle constitutes a Fourth Amendment search.”).

§ 23.28 TRAFFIC STOPS AND ATTENDANT SEARCHES

Automobiles may, of course, be stopped for traffic violations (*see United States v. Robinson*, 414 U.S. 218 (1973); *Whren v. United States*, 517 U.S. 806 (1996)) if – but only if – the police have “reasonable suspicion” to justify the traffic stop. *See Arizona v. Johnson*, 555 U.S. 323, 327 (2009); *Brendlin v. California*, 551 U.S. 249, 254 n.2, 255-56 (2007); *Heien v. North Carolina*, 574 U.S. 54, 60 (2014). (*Heien* also holds that a police officer’s “objectively reasonable” mistake of law – a plausible interpretation of an ambiguous traffic-code provision which is subsequently construed by a state appellate court in a manner contrary to the officer’s “reasonably, even if mistakenly” advised reading of it (*id.* at 59) – does not invalidate the “reasonable suspicion” required for a traffic-violation stop if the officer’s visual observations of the vehicle bring it, factually, within his mistaken reading. *See* § 23.03 concluding paragraph *supra.*) *See also Melendres v. Arpaio*, 695 F.3d 990 (9th Cir. 2012), *permanent injunctions affirmed in relevant part in Melendres v. Arpaio*, 784 F.3d 1254 (9th Cir. 2015) and in *Melendres v. Maricopa County*, 897 F.3d 1217 (9th Cir. 2018) (racial profiling of Hispanics for automobile stops by county police officers in a border State violated the Fourth Amendment: “[B]ecause mere unauthorized presence [of an alien in the United States] is not a criminal matter, suspicion of unauthorized presence alone does not give rise to an inference that criminal activity is ‘afoot.’” 695 F.3d at 1001. “[U]nlike illegal entry, mere unauthorized presence . . . is not a crime.” 695 F.3d at 1000. “Absent suspicion that a ‘suspect is engaged in, or is about to engage in, criminal activity,’ law enforcement may not stop or detain an individual.” *Id.*); *United States v. Paniagua-Garcia*, 813 F.3d 1013, 1014 (7th Cir. 2016) (“The government failed to establish that the officer [who stopped the defendant’s car] had probable cause or a reasonable suspicion that Paniagua was violating the no-texting [while driving] law. The officer hadn’t seen any texting; what he had seen was consistent with any one of a number of lawful uses of cellphones.”); *Campbell v. Mack*, 777 Fed. Appx. 122, 131 (6th Cir. 2019) (allegations that an

officer stopped a motorist for a license plate violation although a temporary plate was taped to the back window of his vehicle in a manner that was clearly visible stated a claim for violation of the Fourth Amendment: “We apply different standards for ascertaining whether a traffic stop comports with the Constitution depending on the nature of the alleged infraction. . . . Generally, an officer needs probable cause to stop a vehicle for a civil infraction and only reasonable suspicion to stop a vehicle for a criminal violation.”); *United States v. Murphy*, 703 F.3d 182, 188 (2d Cir. 2012) (the trial court did not err in rejecting, as incredible, a police officer’s testimony at a suppression hearing that he observed the defendant’s car exit the interstate without signaling and thus in violation of traffic laws); *State v. Kooima*, 833 N.W.2d 202, 210 (Iowa 2013) (“Cases decided by us and other courts require a personal observation of erratic driving, other facts to substantiate the allegation the driver is intoxicated, or details not available to the general public as to the defendant’s future actions in order to spawn a reasonable inference . . . [that an anonymous] tipster had the necessary personal knowledge that a person was driving while intoxicated and the stop comports with the requirements of the Fourth Amendment. To hold otherwise would cause legitimate concern because such tips would let the police stop persons on anonymous tips that might have been called in for vindictive or harassment purposes or based solely on a hunch or rumor.”); *People v. Mott*, 389 Ill. App. 3d 539, 906 N.E.2d 159, 329 Ill. Dec. 314 (2009) (finding that an officer lacked the reasonable suspicion necessary to stop a driver for material obstruction of her front windshield); *Commonwealth v. Long*, 485 Mass. 711, 713, 152 N.E.3d 725, 731 (2020) (construing the state constitution’s Equal Protection Clause to establish a standard for suppressing the fruits of a “racially motivated traffic stop[]”: if the defendant’s suppression motion “point[s] to specific facts” supporting “a reasonable inference that the officer’s decision to initiate the stop was motivated by race or another protected class,” then “the defendant is entitled to a hearing at which the Commonwealth would have the burden of rebutting the inference,” and “[a]bsent a successful rebuttal, any evidence derived from the stop would be suppressed”); *People v. Hinshaw*, 35 N.Y.3d 427, 432-34, 156 N.E.3d 812, 815-17, 132 N.Y.S.3d 90, 93-95 (2020) (holding that New York law requires that “an officer . . . have probable cause to stop a vehicle for a traffic infraction,” and explaining that “New York . . . provides greater protections than does federal law for traffic infraction vehicle stops” to ensure that “[d]iscriminatory law enforcement has no place in our law,” and that “when a traffic violation, not a crime, is the predicate of an officer’s forcible stop of a motorist, greater scrutiny is required to prevent ‘a policemen’s badge . . . [from] be[ing] considered a license to oppress”).

An officer making a traffic-violation stop may order the driver out of the car, whether the officer proposes to arrest the driver or merely to give the driver a summons. *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (per curiam). In the former case, the officer may conduct a complete search of the driver’s person and may also search the passenger compartment of the car incident to the driver’s arrest, to the extent indicated in § 23.26 *supra*; in the latter, the officer may frisk the driver and search the passenger compartment of the car for weapons if, but only if, the requisite conditions for a *Terry* frisk (see §§ 23.10, 23.26 *supra*) are met. If the officer invokes the *Mimms* doctrine to order the driver out of the car, the officer can detain the driver outside the car for the period necessary to conduct an inquiry and inspect the Vehicle

Identification Number. *New York v. Class*, 475 U.S. 106, 115-16 (1986); *Arizona v. Johnson*, 555 U.S. at 333; see § 23.23 *supra*. See also *Rodriguez v. United States*, 575 U.S. 348, 355 (2015) (traffic stops often “include[] ‘ordinary inquiries incident to [the traffic] stop,’” which “[t]ypically . . . involve checking the driver’s license, determining whether there are outstanding warrants against the driver, and inspecting the automobile’s registration and proof of insurance”; an officer may conduct these checks but “may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual.”). Compare *Sharp v. United States*, 132 A.3d 161, 169-70 (D.C. 2016) (when “the encounter does not begin with a stop for a traffic violation” – as in this case of a defendant who was seated behind the wheel of a lawfully parked car – an officer cannot ask the driver to exit the vehicle in a manner that would appear to a reasonable person to foreclose “a genuine choice to decline the request and stay in the car,” absent “reasonable articulable suspicion to justify the seizure”); *State v. Keaton*, 222 N.J. 438, 442, 448, 450, 119 A.3d 906, 908, 912, 913 (2015) (a police officer does not have “a legal right to enter an overturned car in order to obtain registration and insurance information for the vehicle, without first requesting permission, or allowing defendant an opportunity to retrieve the documents himself”; although a police officer who conducts a lawful traffic stop “may search the car for evidence of ownership” “[i]f the vehicle’s operator is unable to produce proof of registration,” such a “warrantless search of a vehicle is only permissible after the driver has been provided the opportunity to produce his credentials and is either unable or unwilling to do so.”). Regarding DWI sobriety testing, see § 23.14 subdivision (a) *supra*.

The *Mimms* doctrine also allows “an officer making a traffic stop . . . [to] order passengers to get out of the car pending completion of the stop.” *Maryland v. Wilson*, 519 U.S. 408, 415 (1997). See *Arizona v. Johnson*, 555 U.S. at 333 (“The temporary seizure of driver and passengers ordinarily continues, and remains reasonable, for the duration of the stop.”); *but see Maryland v. Wilson*, 519 U.S. at 415 n.3 (expressly reserving the question whether “an officer may forcibly detain a passenger for the entire duration of the stop”); *and cf. United States v. Hensley*, 469 U.S. 221, 235-36 (1985); *People v. Porter*, 136 A.D.3d 1344, 1345, 24 N.Y.S.3d 470, 472 (N.Y. App. Div., 4th Dep’t 2016) (the police unlawfully detained the passenger of a lawfully stopped car, who had “asked whether he could leave the scene,” by telling him that “he must remain present with them until the inventory search [of the arrested driver’s car] was complete”; “the justification for th[e] stop [of the car and for detaining the passenger pursuant to that stop] ended once the driver had been arrested for th[e] [traffic] offense.”). The officer also can conduct a protective “patdown of . . . a passenger during a [lawful] traffic stop” under the customary *Terry* frisk standard if the officer has a “reasonable suspicion that the person subjected to the frisk is armed and dangerous.” *Arizona v. Johnson*, 555 U.S. at 327, 333; see § 23.10 *supra*. Search activity exceeding the scope of a *Terry* frisk is not permitted; and when an officer, during a traffic stop, requests and receives permission from a passenger to conduct a search of his or her possessions for evidence unrelated to the traffic violation that justified the stop, the request has been held impermissible, the consent tainted, and the ensuing search and seizure unconstitutional. *State v. Smith*, 286 Kan. 402, 184 P.3d 890 (2008). See also *Harris v. Klare*, 902 F.3d 630 (6th Cir. 2018), summarized in § 23.37 subdivision (d) *infra*.

Because “[t]emporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a [Fourth Amendment] ‘seizure’ of ‘persons’” (*Whren v. United States*, 517 U.S. at 809), and because “a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution’s shield against unreasonable seizures,” a “seizure justified only by a police-observed traffic violation . . . ‘become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission’ of issuing a ticket for the violation.” *Rodriguez v. United States*, 575 U.S. at 350-51. “Authority for the seizure . . . ends when tasks tied to the traffic infraction are – or reasonably should have been – completed.” *Id.* at 349. “On-scene investigation into other crimes . . . detours [*that’s a verb*] from that mission,” as do “safety precautions taken in order to facilitate such detours.” *Id.* at 356. Accordingly, the Court held in *Rodriguez* that a dog sniff of a car stopped for a traffic infraction, which resulted in the dog’s alerting to the presence of drugs and an ensuing search of the car and seizure of drugs violated the Fourth Amendment because it was “conducted after completion of . . . [the] traffic stop” and thus “‘prolonged [the traffic stop] beyond the time reasonably required to complete th[e] mission’ of issuing a ticket for the violation.” *Id.* at 350-51. *See also United States v. Bowman*, 884 F.3d 200 (4th Cir. 2018); *Millan-Hernandez v. Barr*, 965 F.3d 140, 149 (2d Cir. 2020) (*per curiam*) (the immigration judge improperly denied Millan-Hernandez an evidentiary hearing to establish a *prima facie* case for suppression of the fruits of a traffic stop on the ground that “her prolonged detention [during a traffic stop of a vehicle in which she was a passenger] was unlawful and that the reason for the prolongation was her race or ethnicity”: “the officer’s words (‘You’re not legal, right?’) and his request for the passenger’s ‘papers,’ . . . coupled with the absence of probable cause to suspect that Millan-Hernandez (or, for that matter, the driver) had committed any crime, . . . strongly suggest that a racial or ethnic impetus could have been the reason for the detention”).

If the police request and receive valid consent from a driver before the expiration of the allowable period for a stop, they may search the driver’s person and the vehicle to the extent – but only to the extent – authorized by that consent. *See Commonwealth v. Ortiz*, 478 Mass. 820, 820, 90 N.E.3d 735, 736-37 (2018), summarized in § 23.18 *supra*. For additional restrictions upon the power of the police to obtain consent in this setting, *see State v. Smith, supra; Harris v. Klare*, summarized in § 23.37 subdivision (d) *infra; State v. Shaw*, 237 N.J. 588, 619, 207 A.3d 229, 246 (2019) (“New Jersey’s Constitution also provides greater protections than the federal constitution when it comes to consent searches. . . . Law enforcement must have a ‘reasonable and articulable suspicion to believe that an errant motorist or passenger has engaged in, or is about to engage in, criminal activity,’ before officers may ask for consent to search a vehicle. . . . This prophylactic rule protects the public from the unjustified extension of motor vehicle stops and from fishing expeditions unrelated to the reason for the initial stop.”). *See also Demarest v. City of Vallejo, California*, 44 F.4th 1209 (9th Cir. 2022) (holding that the City’s systematic addition of driver’s license examinations at a sobriety checkpoint is permissible).

Concerning breath and blood tests of drivers of vehicles stopped and suspected of DWI, *see* §§ 23.14, 23.18(a) *supra*.

§ 23.29 LICENSE CHECKS; STOPS OF AUTOMOBILES AT ROADBLOCKS AND CHECKPOINTS

In *Delaware v. Prouse*, 440 U.S. 648 (1979), the Court condemned the previously widespread practice of “stop checks” of vehicles selected by roving patrols. The Court in *Prouse* held that the Fourth Amendment does not permit the flagging down of selected automobiles for the purpose of “check[ing] [the] . . . driver’s license and the registration of the automobile” unless “there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered.” 440 U.S. at 663.

The Court in *Prouse* suggested, however, that it might sustain other “methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion” by police officers. *Id.* It included “[q]uestioning of all oncoming traffic at roadblock-type stops [as] . . . one possible [constitutional] alternative.” *Id.* In the subsequent case of *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990), the Court upheld the constitutionality of “a State’s use of highway sobriety checkpoints” (*id.* at 447), in which motorists passing through selected sites were “briefly stopped” (*id.* at 455), “briefly examined for signs of intoxication” (*id.* at 447), and asked some questions (*id.*), in accordance with established “guidelines setting forth procedures governing checkpoint operations [and] . . . site selection” (*id.*). “The average delay for each vehicle was approximately 25 seconds.” *Id.* at 448. The Court acknowledged that “a Fourth Amendment ‘seizure’ occurs when a vehicle is stopped at a checkpoint.” *Id.* at 450. *Accord*, *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000) (“It is well established that a vehicle stop at a highway checkpoint effectuates a seizure within the meaning of the Fourth Amendment.”). The *Sitz* Court concluded, however, that “the balance of the State’s interest in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped” (496 U.S. at 455) provided the requisite constitutional justification for the use of the sobriety checkpoint procedure. The Court emphasized that the “‘objective’ intrusion [upon seized motorists], measured by the duration of the seizure and the intensity of the investigation, [w]as minimal” (*id.* at 452) and that the procedure did not suffer from the same “degree of ‘subjective intrusion’ and . . . potential for generating fear and surprise [on the part of seized motorists]” (*id.*) as did the roving-patrol stops condemned in *Prouse* (*see Sitz*, 496 U.S. at 452-53). The Court in *Sitz* further distinguished the sobriety checkpoint procedure from the roving-patrol stops on the grounds that the “checkpoints are selected pursuant to . . . guidelines, and uniformed police officers stop every approaching vehicle” (*id.* at 453), thereby avoiding the “‘kind of standardless and unconstrained discretion [which] is the evil the Court has discerned . . . in previous cases’” (*id.* at 454 (quoting *Prouse*, 440 U.S. at 661)) and the state in *Sitz* presented “empirical data” (*id.*) demonstrating that the checkpoint procedure made at least some measurable contribution to controlling “the drunken driving problem” (*id.* at 451; *see id.* at 454-55). Finally, the Court in *Sitz* took pains to make clear “what our inquiry is *not* about.” *Id.* at 450. Explaining that the issue “address[ed] [was] only the initial stop of each motorist passing through a checkpoint and the associated preliminary questioning and observation by checkpoint officers[,]” the Court noted that “[d]etention of particular motorists for more extensive field sobriety testing may require satisfaction of an

individualized suspicion standard.” *Id.* at 450-51. The Court further cautioned that “[n]o allegations are before us of unreasonable treatment of any person after an actual detention at a particular checkpoint.” *Id.* at 450.

Thereafter, in *City of Indianapolis v. Edmond*, the Court struck down a “highway checkpoint program whose primary purpose . . . [was] the discovery and interdiction of illegal narcotics” (531 U.S. at 34), in which the police stopped a predetermined number of vehicles, conducted a license and registration check, and walked around each stopped car with a narcotics-detection dog (*see id.* at 34-35). In holding this practice to be unconstitutional, the Court distinguished *Sitz* and also an earlier decision that had upheld the routine stopping of vehicles and the brief questioning of their occupants by immigration authorities at designated checkpoints near an international border (*United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), discussed in § 23.30 *infra*). “In none of these cases,” the Court explained, “did we indicate approval of a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing.” *Edmond*, 531 U.S. at 38. Emphasizing that “our checkpoint cases have recognized only limited exceptions to the general rule that a seizure must be accompanied by some measure of individualized suspicion” (*id.* at 41), the Court declared that “[w]e decline to suspend the usual requirement of individualized suspicion where the police seek to employ a checkpoint primarily for the ordinary enterprise of investigating crimes” (*id.* at 44). *See also id.* at 34, 41-42, 48; *Singleton v. Commonwealth*, 364 S.W.3d 97, 104-06 (Ky. 2012) (applying *Edmond* to strike down a traffic checkpoint that was designed to catch violators of a city ordinance requiring that motor vehicles display a “city sticker” that shows residence or employment within city limits).

The Court returned to these issues in *Illinois v. Lidster*, 540 U.S. 419 (2003), rejecting a Fourth Amendment challenge to “a highway checkpoint where police stopped motorists to ask them for information about a recent hit-and-run accident.” *Id.* at 421. The Court distinguished *Edmond* on the ground that that case “involved a checkpoint at which police stopped vehicles to look for evidence of drug crimes committed by occupants of those vehicles” (*id.* at 423) whereas the “primary law enforcement purpose [of the checkpoint in *Lidster*] was *not* to determine whether a vehicle’s occupants were committing a crime, but to ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others [and] . . . [t]he police expected the information elicited to help them apprehend, not the vehicle’s occupants, but other individuals.” *Id.* at 423. Applying the criteria the Court had previously employed in *Sitz*, the Court upheld the checkpoint in *Lidster* because “[t]he relevant public concern was grave” in that “[p]olice were investigating a crime that had resulted in a human death . . . [a]nd the stop’s objective was to help find the perpetrator of a specific and known crime, not of unknown crimes of a general sort”; “[t]he stop advanced this grave public concern to a significant degree” in that “[t]he police appropriately tailored their checkpoint stops to fit important criminal investigatory needs”; and, “[m]ost importantly, the stops interfered only minimally with liberty of the sort the Fourth Amendment seeks to protect,” in that “each stop required only a brief wait in line – a very few minutes at most,” “[c]ontact with the police lasted only a few seconds,” “[p]olice contact consisted simply of a request for information and the distribution of a flyer,” and, “[v]iewed subjectively, the contact provided

little reason for anxiety or alarm” since “[t]he police stopped all vehicles systematically” and “there is no allegation here that the police acted in a discriminatory or otherwise unlawful manner while questioning motorists during stops.” *Id.* at 427-28.

In addition to approving the checkpoints in *Sitz* and *Lidster* and border stops by immigration authorities in *Martinez-Fuerte*, the Court has indicated that it is likely to accept standardized checkpoint procedures in other settings if the stops are not protracted, do not involve any physical searches of the car or occupants, and are not made solely at the discretion of officers in the field. In *Texas v. Brown*, 460 U.S. 730 (1983), the Court and all parties appear to have assumed the constitutionality of a “routine driver’s license checkpoint.” *See id.* at 733 (plurality opinion). And in *Prouse*, the Court noted that its holding did not “cast doubt on the permissibility of roadside truck weigh-stations and inspection checkpoints, at which some vehicles may be subject to further detention for safety and regulatory inspection than are others.” 440 U.S. at 663 n.26.

In light of the Court’s opinions in these cases, the validity of various spot-check practices (for example, pollution emission tests, agricultural produce inspections, and game wardens’ inspections, as well as driver’s license and registration inspections) involving the brief stopping of vehicles without a reasonable suspicion that the particular vehicle stopped is being operated in violation of an applicable regulatory law appears to turn upon four considerations:

First is whether the “primary purpose [of the checkpoint program] was to detect evidence of ordinary criminal wrongdoing” (*City of Indianapolis v. Edmond*, 531 U.S. at 41) by one or more of the “vehicle’s occupants” (*Illinois v. Lidster*, 540 U.S. at 423). Such situations are governed by “an *Edmond*-type rule of automatic unconstitutionality.” *Id.* at 424. The Court stated in *dicta* in *Edmond* that an exception to this rule may apply to “emergency” situations, such as where the police set up “an appropriately tailored roadblock . . . to thwart an imminent terrorist attack or to catch a dangerous criminal who is likely to flee by way of a particular route.” *Edmond*, 531 U.S. at 44. But, in the absence of such “exigencies” (*id.*), *Edmond* prohibits a checkpoint “program whose primary purpose is ultimately indistinguishable from the general interest in crime control,” except when, as in *Lidster*, “[t]he stop’s primary law enforcement purpose was *not* to determine whether a vehicle’s occupants were committing a crime, but to ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others” and “[t]he police expected the information elicited to help them apprehend, not the vehicle’s occupants, but other individuals” (*Lidster*, 540 U.S. at 423).

Second is the extent to which some sort of spot check is necessary and will likely be effective to enforce the regulatory scheme in question. *See Illinois v. Lidster*, 540 U.S. at 427; *Michigan Department of State Police v. Sitz*, 496 U.S. at 451; *Delaware v. Prouse*, 440 U.S. at 658-61. Counsel challenging a checkpoint stop should contend that the standard of necessity is high. In approving the use of sobriety checkpoints in *Sitz*, the Court cited statistical and anecdotal evidence of the extent of “alcohol-related death and mutilation on the Nation’s roads” (496 U.S.

at 451 & n.*) and observed that “[n]o one can seriously dispute the magnitude of the drunken driving problem or the States’ interest in eradicating it.” *Id.* at 451; *accord, id.* at 455-56 (Justice Blackmun, concurring). Similarly, in sustaining immigration checkpoint stops in border regions, see § 23.30 *infra*, the Supreme Court has repeatedly emphasized “the enormous difficulties of patrolling a 2,000-mile open border,” *United States v. Cortez*, 449 U.S. 411, 418 (1981), and the vital national importance of patrolling it effectively. *See, e.g., Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878-79, 881 (1975); *United States v. Martinez-Fuerte*, 428 U.S. at 551-57. And, in upholding a “highway checkpoint where police stopped motorists to ask them for information about a recent hit-and-run accident,” the Court in *Illinois v. Lidster* explained that “[t]he relevant public concern was grave . . . [in that] [p]olice were investigating a crime that had resulted in a human death . . . [and] [t]he stop advanced this grave public concern to a significant degree.” 540 U.S. at 421, 427. *See also id.* at 425 (“voluntary requests [of “members of the public in the investigation of a crime”] play a vital role in police investigatory work”). With regard to the assessment of “the degree to which . . . [a checkpoint procedure] advances the public interest” (*Sitz*, 496 U.S. at 453), the Court has made clear that reviewing courts may not strike down a law enforcement technique that is a reasonable means of dealing with the problem simply because some “[e]xperts in police science” might view a different technique as “preferable” [sic] (*id.*). However, a procedure may be found to violate the Fourth Amendment if the state fails to present empirical data justifying the procedure (*see Sitz*, 496 U.S. at 454-55) or if the procedure falls below an as yet unspecified threshold of effectiveness (*see Sitz*, 496 U.S. at 454-55 (finding that the sobriety checkpoint procedure under review sufficiently advanced the state’s interest in controlling drunk driving because it resulted in arrests of “approximately 1.6 percent of the drivers passing through the checkpoint,” which compared favorably with the “0.5 percent” “ratio of illegal aliens detected to vehicles stopped” by the immigration checkpoint procedure approved in *Martinez-Fuerte*)).

Third is the extent to which the visibility and regularity of the spot-check practice are likely to reduce motorists’ apprehensions of danger and the feeling that they are being singled out for official scrutiny. *See Illinois v. Lidster*, 540 U.S. at 425, 427-28; *Michigan Department of State Police v. Sitz*, 496 U.S. at 452-53; *Delaware v. Prouse*, 440 U.S. at 657.

Fourth is the extent to which the spot-check procedures limit and control the exercise of discretion by individual officers in determining which vehicles to stop and which ones to detain for longer or shorter periods. *See Michigan Department of State Police v. Sitz*, 496 U.S. at 452-53; *Delaware v. Prouse*, 440 U.S. at 653-55, 661-63. This latter factor is probably the most significant, for the Supreme Court’s Fourth Amendment decisions have increasingly recognized that restricting police discretion in the execution of the search-and-seizure power is the Amendment’s central purpose. *See, e.g., Johnson v. United States*, 333 U.S. 10, 13-17 (1948); *McDonald v. United States*, 335 U.S. 451, 455-56 (1948); *Beck v. Ohio*, 379 U.S. 89, 97 (1964); *See v. City of Seattle*, 387 U.S. 541, 545 (1967); *United States v. United States District Court for the Eastern District of Michigan*, 407 U.S. 297, 316-17 (1972); *United States v. Martinez-Fuerte*, 428 U.S. at 558-59, 566; *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 357 (1977); *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 323-24 (1978); *Mincey v. Arizona*, 437 U.S. 385, 394-

95 (1978); *Brown v. Texas*, 443 U.S. 47, 51 (1979); *Steagald v. United States*, 451 U.S. 204, 220 (1981); *Donovan v. Dewey*, 452 U.S. 594, 599, 601, 605 (1981); *New York v. Burger*, 482 U.S. 691, 703 (1987) (dictum). As in other fields of constitutional law in which excessive discretion embodied in a statutorily or administratively prescribed procedure may void it, factual evidence of divergent and particularly of discriminatory police practices in the administration of the procedure should be admissible and persuasive on this last issue. *See, e.g., Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969).

§ 23.30 BORDER SEARCHES

The “border search” doctrine allows customs and immigration officials to stop and search all vehicles (or persons or articles) entering the United States from abroad. “Routine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant, and first-class mail 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 U.S. 531, 538 (1985). “This court has held that the border-search exception applies not only to entrants into the country but also to those departing.” *United States v. Tenorio*, 55 F.4th 465, 468 (5th Cir. 2022); *accord, United States v. Xiang*, 67 F.4th 895, 899 (8th Cir. 2023) (“it blinks at reality to assert that CBP’s seizure and search of the electronic devices Xiang was about to carry abroad was not a ‘border search’”). This unfettered search power is, however, limited to the “border itself [or] . . . its functional equivalents” (*Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973)). *See also United States v. Flores-Montano*, 541 U.S. 149, 154 (2004) (“the expectation of privacy is less at the border than it is in the interior”). And even at border points of entry, the power may be limited in the case of particularly intrusive search techniques. The federal circuits are divided as to whether the principle of *Riley v. California*, 573 U.S. 373 (2014) [discussed in § 23.08(b) *supra*], has any application at the border and therefore whether technological searches of cell phones and other digital devices by border officials must be justified by individualized reasonable suspicion of illegality or need no justification. *Compare United States v. Aigbekaen*, 943 F.3d 713 (4th Cir. 2019), and *United States v. Cano*, 934 F.3d 1002 (9th Cir. 2019), with *United States v. Tousef*, 890 F.3d 1227, 1231 (11th Cir. 2018) (alternative ground); and *Alasaad v. Mayorkas*, 988 F.3d 8 (1st Cir. 2021); *cf. United States v. Williams*, 942 F.3d 1187 (10th Cir. 2019). Although “[t]he circuits are divided over whether reasonable suspicion is required for a forensic search of a cell phone at the border . . . every circuit to have addressed the issue has agreed that no individualized suspicion is required for the government to undertake a manual border search of a cell phone.” *United States v. Castillo*, 2023 WL 4056492, at *1 (5th Cir. 2023).

Other than at the border and its functional equivalents, customs and immigrations searches of automobiles may not be made without a warrant or probable cause. *Almeida-Sanchez*

v. United States, 413 U.S. at 274-75 (condemning a warrantless “roving patrol” search without probable cause); *United States v. Ortiz*, 422 U.S. 891 (1975) (condemning a warrantless “fixed check point” search without probable cause). Roving patrols of customs or immigration agents are permitted to make brief warrantless stops of vehicles in regions near the border on the basis of “reasonable suspicion” that a particular vehicle contains smuggled goods or illegal aliens. *United States v. Brignoni-Ponce*, 422 U.S. 873, 880-84 (1975); *United States v. Villamonte-Marquez*, 462 U.S. 579, 587-88 (1983) (dictum) (discussing the border-search doctrines applicable to automobiles while developing a somewhat different rule for ships “located in waters offering ready access to the open sea”). These roving-patrol stops are akin to domestic *Terry* stops and are governed by similar rules. See §§ 23.04-23.06, 23.09, 23.27 *supra*. “The officer may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause.” *United States v. Brignoni-Ponce*, 422 U.S. at 881-82.

Equally limited stops of all or selected vehicles may be made routinely at fixed checkpoints in the border area, without a warrant, probable cause, or “reasonable suspicion.” *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). But the “claim that a particular exercise of [administrative] discretion in locating or operating a checkpoint is unreasonable is subject to post-stop judicial review.” *Id.* at 559. Routine checkpoint stops, like roving-patrol stops made upon “reasonable suspicion,” must be restricted to “brief questioning” and may not include either prolonged detention or search in the absence of “consent or probable cause.” *Id.* at 566-67. *See also United States v. Flores-Montano*, 541 U.S. at 155 n.2 (reserving “the question ‘whether, and under what circumstances, a border search might be deemed “unreasonable” because of the particularly offensive manner in which it is carried out’”).

The opinions in *Ortiz* and *Brignoni-Ponce* purport to reserve the question whether searches and more extensive detentions in connection with immigration stops (either by roving patrols or at fixed checkpoints) may be made without reasonable suspicion or probable cause concerning the individual vehicle stopped, under the authorization of a search warrant “issued to stop cars in a designated area on the basis of conditions in the area as a whole,” *Brignoni-Ponce*, 422 U.S. at 882 n.7; *see also Ortiz*, 422 U.S. at 897 n.3. This question was generated by Justice Powell’s concurring opinion in *Almeida-Sanchez*, which adopts the concept of an “area” search warrant from the Supreme Court’s building-code cases (*see Camara v. Municipal Court*, 387 U.S. 523 (1967)) and suggests that such a warrant might validate immigration searches in border areas. Because Justice Powell’s concurrence was necessary to make up a 5-4 majority in *Almeida-Sanchez* and the Court has not become more sympathetic to Fourth Amendment rights since his departure, the likelihood is strong that “area” search warrants will be sustained in border-region immigration cases. *See also United States v. Martinez-Fuerte*, 428 U.S. at 555, 564 n.18.

The “border search” principles described in this section are limited to *international* borders and do not apply to interstate boundary lines. *Torres v. Puerto Rico*, 442 U.S. 465, 472-

73 (1979); *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 702 (1965) (by implication); see also *United States v. Flores-Montano*, 541 U.S. at 152 (“The Government’s interest in preventing the entry of unwanted persons and effects is at its zenith at the international border.”); *United States v. Montoya De Hernandez*, 473 U.S. 531, 538 (1985) (“the Fourth Amendment’s balance of reasonableness is qualitatively different at the international border than in the interior”); *id.* at 544 (“at the international border, . . . the Fourth Amendment balance of interests leans heavily to the Government”).

Part E. Probable Cause or Articulable Suspicion Based on Information Obtained from Other Police Officers or Civilian Informants

§ 23.31 POLICE ACTION BASED ON INFORMATION LEARNED FROM OTHER POLICE OFFICERS

Frequently, Officer *A* concludes that a person is guilty of an offense and conveys that conclusion to Officer *B* – directly or through some form of police bulletin or dispatch or “wanted flyer” – in connection with a request or directive that the person be arrested or held for questioning. Some courts were inclined to sustain *B*’s arrest or stop of the person in this situation, even though *A* lacked probable cause or articulable suspicion for *A*’s conclusion, on the theory that *B* had probable cause or articulable suspicion generated by a communication from an apparently reliable informant – namely, fellow officer *A*. This bootstrap has, however, been firmly rejected by the Supreme Court on the obvious ground that “an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest.” *Whiteley v. Warden*, 401 U.S. 560, 568 (1971). Accord, *United States v. Hensley*, 469 U.S. 221, 230 (1985). Police dispatches gain no credibility from the mere fact of their internal transmission. *Cf. Franks v. Delaware*, 438 U.S. at 163-64 n.6.

Thus, when police officers rely on a flyer or dispatch to make an arrest, the admissibility of evidence uncovered during a search incident to that arrest “turns on whether the officers who issued the flyer [or dispatch] possessed probable cause to make the arrest.” *United States v. Hensley*, 469 U.S. at 231 (dictum); *United States v. Balsler*, 2023 WL 4038648 (1st Cir. 2023). See, e.g., *People v. Powell*, 101 A.D.3d 756, 758, 955 N.Y.S.2d 608, 610 (N.Y. App. Div., 2d Dep’t 2012). Similarly, in cases of *Terry* stops based on a flyer or dispatch, “[i]f the flyer [or dispatch] has been issued in the absence of a reasonable suspicion, then a stop in the objective reliance upon it violates the Fourth Amendment.” *United States v. Hensley*, 469 U.S. at 232. Of course, this adequacy of the underlying information is only the necessary condition – not a sufficient condition – for the validity of a detention based upon internal police communications. In addition, the officer who effects the detention must be aware of the communication and must be able to identify the person detained as the individual sought. See *State v. Gardner*, 2012-Ohio-5683, 135 Ohio St. 3d 99, 104-05, 984 N.E.2d 1025, 1029-30 (2012) (even if there is a valid arrest warrant for an individual, a police seizure of that individual cannot be predicated on the existence of the warrant unless the arresting officer “knew that there was a warrant for the individual’s arrest”). If the circumstances give rise to questions about the reliability of the

communication or the identity of a suspect as the individual sought, police officers are obliged to take reasonable measures to verify the information and their conclusions before taking action. *See, e.g., Mareska v. Bernalillo County*, 804 F.3d 1301, 1310-12 (10th Cir. 2015) (a police officer who arrested a truck’s occupants based upon an erroneously-received stolen vehicle report for a different vehicle was obliged to “confirm the accuracy of her information in light of the disparity between the vehicle described on the stolen vehicle report and that driven by the Marescas”; “[I]n determining whether there is probable cause, officers are charged with knowledge of any ‘readily available exculpatory evidence’ that they unreasonably fail to ascertain. . . . [T]he probable cause standard of the Fourth Amendment requires officers to reasonably interview witnesses readily available at the scene, investigate basic evidence, or otherwise inquire if a crime has been committed at all before invoking the power of warrantless arrest and detention.”).

When arrests are made or ordered by two or more officers, prosecutors sometimes invoke a so-called “collective knowledge” or “fellow officer” doctrine to argue that facts known to some of the officers but not to others can be aggregated to add up to the probable cause required for an arrest or to the reasonable suspicion required for a *Terry* stop. This should be impermissible because the only way in which the probable-cause and reasonable-suspicion standards for any warrantless police action can be enforced is to insist that some single officer be responsible for making the determination that the factual information at hand satisfies the applicable standard. For an excellent discussion of this subject, *see United States v. Massenburg*, 654 F.3d 480, 491-96 (4th Cir. 2011); *and see, e.g., United States v. Hussain*, 835 F.3d 307, 316 n.8 (2d Cir. 2016) (“we decline to extend the collective [police] knowledge doctrine to cases where, as here, there is no evidence that an officer has communicated his suspicions with the officer conducting the search, even when the officers are working closely together at a scene”); Derik T. Fettig, *Who Knew What When: A Critical Analysis of the Expanding Collective Knowledge Doctrine*, 82 U. MO. KAN. CITY L. REV. 663 (2014). *Cf. Furlow v. Belmar*, 52 F.4th 393, 402 (8th Cir. 2022) (dictum) (“[b]ecause the Wanted System routinely imputes a single officer’s finding of probable cause to officers potentially anywhere in the country – without any showing of a joint investigation – this Wanted System cannot be saved under the collective knowledge doctrine”).

Information obtained from law-enforcement databases may be so unreliable that it fails to provide an adequate factual basis for a determination of probable cause. In these cases, arresting officers’ uncritical reliance on the information, without independently verifying it, will render an arrest or an application for an arrest warrant susceptible to Fourth Amendment challenge. *See Hart v. Hillsdale County, Michigan*, 973 F.3d 627 (6th Cir. 2020).

§ 23.32 POLICE ACTION BASED ON INFORMATION LEARNED FROM A CIVILIAN INFORMANT

§ 23.32(a) The General Standard

Unless a police officer witnessed the crime or some objective manifestation of criminal

conduct, police action – whether it be an arrest, a search, a *Terry* stop or a *Terry* frisk – will usually depend upon information learned from civilians. The source of the information may be either an ordinary citizen (a complainant or an eyewitness) or a “police informer” who is trading the information for cash or leniency on criminal charges to which s/he is subject. The identity of the source of the information may not even be known to the police, as in the case of an anonymous phone tip or an informant relaying information that s/he heard “on the street” without revealing the precise source of the information.

Defense attorneys usually confront the issue of informants’ tips in either of two contexts: (i) when the officer presented the information to a magistrate in support of a request for a search warrant or arrest warrant and defense counsel is challenging a search or arrest made pursuant to the resulting warrant, or (ii) when the officer relied on the informant’s tip in making a warrantless arrest, search, stop, or frisk. If the officer acted pursuant to a warrant, the scope of review of the magistrate’s reliance upon information derived from nonpolice informants will be quite limited under Fourth Amendment doctrine, although it may be more expansive under state constitutional law. See § 23.17 *supra*. Essentially, the issue in warrant cases is whether the informant’s information, as presented in the police affidavit in support of the warrant, was “so lacking in indicia of probable cause as to render” the issuance of a warrant manifestly unreasonable. *United States v. Leon*, 468 U.S. 897, 923 (1984); see § 23.17(a) *supra*.

In cases in which the officer acted without a warrant, the reviewing court must engage in a far more piercing examination of the reliability and sufficiency of the informant’s communications to the police. Judicial review of police reliance on information from informants was formerly governed by a two-pronged test of “veracity” and “basis of knowledge” established in *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969). The *Aguilar-Spinelli* standard has been preserved in several States as a matter of state constitutional law, *see, e.g., Commonwealth v. Upton*, 394 Mass. 363, 476 N.E.2d 548 (1985); *People v. Johnson*, 66 N.Y.2d 398, 405-07, 488 N.E.2d 439, 444-45, 497 N.Y.S.2d 618, 623-24 (1985); *State v. Jackson*, 102 Wash. 2d 432, 443, 688 P.2d 136, 143 (1984), but federal Fourth Amendment doctrine is now controlled by the opinion in *Illinois v. Gates*, 462 U.S. 213 (1983). Although the *Gates* case itself involved a warrant, its rules have generally been accepted as governing warrantless police action based on hearsay information.

Under the *Gates* opinion, the question whether information received from an informant supplies the requisite predicate for a search and seizure (whether that predicate be probable cause or articulable suspicion) is to be determined by the “totality of the circumstances,” including, *inter alia*, the “informant’s ‘veracity,’ ‘reliability,’ and ‘basis of knowledge.’” 462 U.S. at 230-39. Whereas the *Aguilar-Spinelli* standard treated “veracity” and “basis of knowledge” as separate criteria, both of which had to be satisfied, the *Gates* standard treats them as intertwined aspects of a “totality-of-the-circumstances analysis” in which “a deficiency in one [aspect] may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability.” 426 U.S. at 233. In *Gates*, the Court concluded that it was possible to overlook the lack of direct evidences of “veracity” and “basis of knowledge” of

an anonymous letter because the information in the letter was so detailed as to imply that the informant must be highly knowledgeable and accurate, and “independent investigative work” by the police had corroborated substantial portions of the details relating to conduct by the suspects which “at least suggested” criminal activity. *Id.* at 243-46. *See also Navarette v. California*, 572 U.S. 393, 395, 398-401, 404 (2014) (an anonymous 911 call reporting that “a vehicle had run [the caller] . . . off the road” “bore adequate indicia of reliability for the officer to credit the caller’s account” and to rely on this information in conducting a traffic stop because (1) the caller’s report that “she had been run off the road by a specific vehicle – a silver Ford F-150 pickup, license plate 8D94925 – . . . necessarily claimed eyewitness knowledge of the alleged dangerous driving” and “[t]hat basis of knowledge lends significant support to the tip’s reliability”; (2) police confirmation of “the truck’s location near mile marker 69 (roughly 19 highway miles south of the location reported in the 911 call) at 4:00 p.m. (roughly 18 minutes after the 911 call) . . . suggests that the caller reported the incident soon after she was run off the road,” and “[t]hat sort of contemporaneous report has long been treated as especially reliable”; and (3) “the caller’s use of the 911 emergency system,” which has “features that allow for identifying and tracing callers,” is an additional “indicator of veracity,” although this is not “to suggest that tips in 911 calls are *per se* reliable”; the Court majority in this 5-4 decision acknowledges that “this is a ‘close case.’”). *Compare Florida v. J.L.*, 529 U.S. 266, 270, 271-72 (2000) (an anonymous tip that a certain individual at a particular location was in possession of a gun did not provide the police with an adequate basis for a stop and frisk, even though the police found a person matching the description at that precise location, because “an anonymous tip alone seldom demonstrates the informant’s basis of knowledge or veracity” and, although “there are situations in which an anonymous tip, suitably corroborated, exhibits ‘sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop,’” the “unknown, unaccountable informant . . . neither explained how he knew about the gun nor supplied any basis for believing he had inside information about [the subject]” and the police confirmation of the accuracy of the tipster’s “description of [the] subject’s readily observable location and appearance . . . does not show that the tipster has knowledge of concealed criminal activity”: “The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.”); *United States v. Freeman*, 735 F.3d 92, 94, 97-103 (2d Cir. 2013) (an anonymous caller’s two calls to 911 reporting that an individual “‘is possibly armed with a firearm’ and was ‘arguing with a female’” and describing this individual’s appearance in detail and giving his precise location “did not provide the police with the reasonable suspicion needed to stop Freeman”: “[t]he fact that the call was recorded and that the caller’s apparent cell phone number is known does not alter the fact that the identity of the caller is still unknown, leaving no way for the police (or for the reviewing court) to determine her credibility and reputation for honesty”; the detailed information about the individual’s appearance and location “does nothing to ‘show that the tipster has knowledge of concealed criminal activity’”; and “the facts that the stop occurred at night in a ‘high crime’ area” do not “enhance the reliability of the phone call by confirming in it some individualized detail.”); *United States v. Martinez*, 486 F.3d 855, 863 (5th Cir. 2007) (finding no reasonable suspicion where the “police had verified information that the person in the car they stopped was the ‘Angel’ whom the informant desired to accuse” but “had no verified information . . . that linked

Martinez to any criminal behavior” and “[t]he informant also provided no verifiable predictive information about Martinez’s future behavior that would have indicated any ‘inside knowledge’ about Martinez”); *United States v. Brown*, 448 F.3d 239, 252 (3d Cir. 2006) (concluding that “an excessively general description, combined with an honest but unreliable location tip [*i.e.*, a tip by a citizen whose identity is known but whose reliability is not known to the police,] in the absence of corroborating observations by the police, does not constitute reasonable suspicion under the ‘narrowly drawn authority’ of *Terry v. Ohio*”); *State v. Kooima*, 833 N.W.2d 202, 210-11 (Iowa 2013) (“we hold a bare assertion [of drunk driving] by an anonymous tipster, without relaying to the police a personal observation of erratic driving, other facts to establish the driver is intoxicated, or details not available to the general public as to the defendant’s future actions does not have the requisite indicia of reliability to justify an investigatory stop. Such a tip does not meet the requirements of the Fourth Amendment.”).

The pre-*Gates* caselaw applying the *Aguilar-Spinelli* test contains extensive discussion of the concepts of “veracity” and “basis of knowledge” with respect to informants’ tips. Although *Gates* overrules the *Aguilar-Spinelli* approach of treating these factors as separate and independent criteria, it acknowledges the relevance of both and does not undermine the earlier judicial analyses of “veracity” and “basis of knowledge.”

§ 23.32(b) “Veracity” of the Informant

The “veracity” inquiry examines whether there are facts showing either that the informant is generally credible or that the information that s/he gave on this particular occasion is reliable. *Aguilar v. Texas*, 378 U.S. at 114-15. Information from an informant of unknown or doubtful reliability is worth little. *E.g.*, *Wong Sun v. United States*, 371 U.S. 471, 480-81 (1963); *Taylor v. Alabama*, 457 U.S. 687, 688-89 (1982); *Florida v. J.L.*, 529 U.S. at 270-71. *See, e.g.*, *United States v. Glover*, 755 F.3d 811, 815-16 (7th Cir. 2014) (“Officer Brown’s affidavit did not include any available information on Doe’s credibility. . . . ¶ . . . The complete omission of information regarding Doe’s credibility is insurmountable, and it undermines the deference we would otherwise give the decision of the magistrate to issue the search warrant.”). “Even a known informant’s information may require corroboration if an affidavit supplies little information concerning that informant’s reliability.” *United States v. Clay*, 630 Fed.Appx. 377, 385 (6th Cir. 2015).

“[T]he ordinary citizen who has never before reported a crime to the police” is generally viewed as “more reliable than one who supplies information on a regular basis.” *United States v. Harris*, 403 U.S. 573, 599 (1971) (Harlan, J., dissenting). If the source of information is an informant who “supplies information on a regular basis,” then a critical question is whether the information supplied in prior cases proved to be accurate. *See, e.g.*, *McCray v. Illinois*, 386 U.S. 300, 303-04 (1967); *United States v. Ross*, 456 U.S. 798, 817 n.22 (1982). Mere conclusory allegations about the accuracy of the informant in prior cases are insufficient, *see Gates*, 462 U.S. at 239; *Aguilar v. Texas*, 378 U.S. at 114-15; details must be supplied concerning the number of times the informant has provided information in the past and the extent to which that information

led to arrests and convictions. *See, e.g., State v. Robinson*, 2009 VT 1, 185 Vt. 232, 239, 969 A.2d 127, 132 (2009) (“The mere statement that the informant had in the past provided unspecified, albeit purportedly ‘credible,’ ‘accurate,’ or ‘reliable’ information that ‘concerned’ drug deals or dealers does not establish the informant’s inherent credibility”); *United States v. Neal*, 577 Fed. Appx. 434, 441 (6th Cir. 2014) (“This Court has repeatedly held that an affidavit that furnishes details of an informant’s track record of providing reliable tips to the affiant can substantiate the informant’s credibility, such that other indicia of reliability may not be required when relying on the informant’s statements. ¶ However, where the affidavit does not aver facts showing the relationship between the affiant and the informant, or detail the affiant’s knowledge regarding the informant providing prior reliable tips that relate to the same type of crimes as the current tip concerns, this Court has generally found that other indicia of reliability must be present to substantiate the informant’s statements.”). *Compare McCray v. Illinois*, 386 U.S. at 303-04 (credibility of an informant was sufficiently established by the informant’s having supplied information on fifteen to twenty prior occasions that proved accurate and resulted in numerous arrests and convictions), *with State v. Betts*, 2013 VT 53, 194 Vt. 212, 224-25, 75 A.3d 629, 638-39 (2013) (trooper’s affidavit, which “indicated that the confidential informant [who was the source of the information upon which the police relied] had ‘provided . . . information in the past that has led to the arrest of at least three separate individuals for various narcotics offenses’” – but which “contain[ed] no indication as to the actual nature of the informant’s cooperation or information in the past, how the information ‘led’ to the alleged arrests, or the final outcome of any of the cases in which he or she was involved” – failed to provide the reviewing court with a sufficient “basis upon which to discharge its constitutional duty to independently analyze the informant’s credibility”). In cross-examining a police officer on the issue of prior performance of an informant, defense counsel should try to pin down precisely how many *bad* tips the informant has given in the past. Although the courts have not squarely confronted the question of how high a “batting average” is necessary to establish the credibility of an informant and although it certainly is not “required that informants used by the police be infallible,” *Illinois v. Gates*, 462 U.S. at 245 n.14, there will be a point at which the number of prior instances of inaccuracy tips the scales in favor of a finding of unreliability. *See id.* at 234 (courts must engage in “a balanced assessment of the relative weights of all the various indicia of reliability (and unreliability) attending an informant’s tip”); *Massachusetts v. Upton*, 466 U.S. 727, 732 (1984) (*per curiam*) (*dictum*) (same).

Apart from the general credibility of the informant, information given on a particular occasion gains reliability if it is an admission against penal interest. *See, e.g., United States v. Harris*, 403 U.S. at 583-85 (plurality opinion); *Spinelli v. United States*, 393 U.S. at 425 (Justice White, concurring); *United States v. Ruiz*, 623 Fed. Appx. 378 (9th Cir. 2015). Conversely, when the informant is known to have an incentive to give incriminating information – when, for example, the informant was paid for the information – there is reason to distrust the information. *See, e.g., Rutledge v. United States*, 392 A.2d 1062, 1066 (D.C. 1978) (“the expectation of reward for services is an ambiguous variable which very well could furnish reason to be honest and accurate in the hope of being utilized again or, conversely, reason to distort or fabricate, in order to earn at least one payment”). For an excellent enumeration and analysis of the factors to

be considered in evaluating the veracity of a citizen informant, *see United States v. Brown*, 448 F.3d 239, 249-51 (3d Cir. 2006).

The necessary showing of veracity “requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.” *Florida v. J.L.*, 529 U.S. 266, 272 (2000) (“Florida contends that the tip was reliable because its description of the suspect's visible attributes proved accurate: There really was a young black male wearing a plaid shirt at the bus stop. . . . These contentions misapprehend the reliability needed for a tip to justify a Terry stop. ¶ An accurate description of a subject’s readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. . . . Cf. 4 W. LaFave, *Search and Seizure* § 9.4(h), p. 213 (3d ed.1996) (distinguishing reliability as to identification, which is often important in other criminal law contexts, from reliability as to the likelihood of criminal activity, which is central in anonymous-tip cases).”

§ 23.32(c) The Informant’s “Basis of Knowledge”

“It is axiomatic that a proper finding of probable cause requires the affidavit to show not only the affiant's knowledge but also that the affiant has sufficient basis for the knowledge.” *State v. Schubert*, 2022-Ohio-4604, 2022 WL 17836574, at *3 (Ohio 2022). Whereas the “veracity” inquiry focuses on whether the informant is likely to be telling the truth, the inquiry into the informant’s “basis of knowledge” is concerned with whether the informant has a sufficient basis for knowing the information s/he relates, even assuming that s/he is telling the truth. In *Aguilar v. Texas*, the Court held that one of the principal defects in a police officer’s affidavit was its failure to reveal “some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were.” 378 U.S. at 114.

The “basis of knowledge” concern is satisfied whenever the informant asserts a direct perceptual basis for knowing the facts: when, for example, the informant personally saw criminal behavior or contraband, *see, e.g., United States v. Bruner*, 657 F.2d 1278, 1297 (D.C. Cir. 1981), or was a participant in the crime, *see, e.g., United States v. Estrada*, 733 F.2d 683, 686 (9th Cir. 1984). Mere conclusory recitations, such as that “the informant had personal knowledge,” will not suffice, *United States v. Long*, 439 F.2d 628, 630-31 (D.C. Cir. 1971); *People v. Leftwich*, 869 P.2d 1260, 1266-67 (Colo. 1994); *State v. Baca*, 1982-NMSC-016, 97 N.M. 379, 381, 640 P.2d 485, 487 (1982): There must be some concrete, factual indication of the basis for the informant’s “personal knowledge.” *See, e.g., United States v. Wall*, 277 Fed. Appx. 704 (9th Cir. 2008).

The Court explained in *Spinelli v. United States*, *supra*, that “[i]n the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused’s criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the

underworld or an accusation based merely on an individual's general reputation" (393 U.S. at 416). When testing this sort of "self-verifying detail" (*United States v. Gifford*, 727 F.3d 92, 99 (1st Cir. 2013)), the courts must critically consider whether the details are such that they must have been derived from direct observation or insider information, as distinguished from scuttlebutt. *See id.* at 100 ("While the Government offers the informant's statements regarding the contemporaneous state of the marijuana grow as well as the autumn grow as self-authenticating, without any statements as to the informant's basis of knowledge, there is no means of determining whether that information was obtained first-hand or through rumor. The information is not so specific and specialized that it could only be known to a person with inside information. Further, information about Gifford's former and current occupation are not so self-verifying to establish the reliability of the informant."). *See also, e.g., United States v. Martinez*, 486 F.3d 855, 861-64 (5th Cir. 2007) (finding no reasonable suspicion where an informant "provided no verifiable predictive information . . . that would have indicated any 'inside knowledge'"); *United States v. Bush*, 647 F.2d 357, 364 & n.6 (3d Cir. 1981) (the informant's statement that two men had flown to New York to obtain heroin and would return that evening was not an adequate "self-verifying detail," since it was not the type of fact that "arguably would only be known to someone with reliable information" and it was "surely equally probable that the informant was merely repeating a rumor overheard on the street"); *Shivers v. State*, 258 Ga. App. 253, 573 S.E.2d 494 (2002); *West v. State*, 137 Md. App. 314, 768 A.2d 150 (2000).

§ 23.32(d) Partial Corroboration of the Informant's Statement Through Police Investigation

In upholding reliance on the informant's tip in *Illinois v. Gates*, the Court stressed that the information "had been corroborated in major part" as a result of police investigation. 462 U.S. at 243. The Court explained that "[t]he corroboration of the letter's predictions that the Gateses' car would be in Florida, that Lance Gates would fly to Florida in the next day or so, and that he would drive the car north toward Bloomingdale all indicated, albeit not with certainty, that the informant's other assertions also were true." *Id.* at 244. These events, though not necessarily dispositive of criminal activity, were viewed by the Court as "suggestive of a prearranged drug run." *Id.* at 243. In contrast, in *Florida v. J.L.*, the Court held that an anonymous tip that a certain individual at a particular location was in possession of a gun did not provide the police with an adequate basis for stopping and frisking that individual, even though the police observations corroborated that there was a person matching the description at that precise location, because the corroborating observations must support the reliability of the tip's "assertion of illegality," not just the reliability of its "identif[ication] [of] a determinate person." 529 U.S. at 272; see § 23.22(b) concluding paragraph *supra*. Thus, in gauging whether an informant's tip has been adequately corroborated through police investigation, the courts have been careful to require that the activity witnessed by the police be at least "suspicious," *Rutledge v. United States*, 392 A.2d 1062, 1066-67 (D.C. 1978), or "suggestive of . . . criminal activity," *People v. Elwell*, 50 N.Y.2d 231, 241, 406 N.E.2d 471, 477, 428 N.Y.S.2d 655, 662 (1980). *See also, e.g., United States v. Reaves*, 512 F.3d 123, 127-28 (4th Cir. 2008).

In some circumstances, the corroboration can come from prior reports of criminal activity. Thus, in *Massachusetts v. Upton*, 466 U.S. 727 (1984), the Court found that an informant’s tip describing stolen goods concealed in her former boyfriend’s motor home was partially corroborated by police reports of recent burglaries in which the descriptions of certain of the items stolen “tallied with” the informant’s descriptions of the stolen goods. *See id.* at 733-34. The police observations offered by the prosecution as corroborating an informant must be sufficiently specific and factually detailed to support the conclusion that the behavior observed is criminal, not innocent. *See, e.g., State v. Novembrino*, 105 N.J. 95, 127-28, 519 A.2d 820, 839 (1987) (applying the state constitution to find corroboration inadequate: (“[T]he affidavit is utterly devoid of specific facts witnessed by the officers from which the judge could have independently concluded that their suspicions were reasonable. The affidavit does not state with particularity what the officers observed or why the officers believed that drugs were being sold. It does not inform the judge in what respect the transactions observed by the officers differed from routine service station transactions. The only specific allegation offered is that an identification check was made with respect to one vehicle that entered the service station that day – after its occupant completed ‘a transaction’ with defendant – and the check revealed that the vehicle’s owner had been arrested on charges related to drugs. That factual insertion is insufficient to overcome the deficiencies in detail and substance to which we have averted. ¶ . . . [T]his affidavit, read tolerantly and nontechnically, simply does not pass constitutional muster. . . . The conclusory allegations of the officers are even less certain and less persuasive than the conclusory and vague allegations of the informant. Our common-sense review of these circumstances leads to the conclusion that the officers, after an abbreviated investigation, were uncertain whether they had seen drug sales and their informant was vague about what he had seen and silent as to when he had seen it. Read together, the allegations of the informant and of the officers did not provide the issuing judge with sufficient facts on which to base an independent determination as to the existence of probable cause.”).

§ 23.32(e) Disclosure of the Informant’s Name at the Suppression Hearing

In cases in which a search or seizure was based either wholly or partly on an informant’s tip, defense counsel almost invariably will want to obtain the informant’s name from the police or the prosecutor, so as to be able to make an independent investigation of the informant’s prior “track record,” the informant’s “basis of knowledge,” and any bias that the informant may have against the respondent. Disclosure of the informant’s identity is not available as a matter of right, but can be ordered in the discretion of the judge presiding at a suppression hearing. *See, e.g., Schmid v. State*, 615 P.2d 565, 570-71 (Alaska 1980). The so-called “informer’s privilege” and its effect upon the respondent’s right to disclosure of the names of confidential informants at a suppression hearing is discussed in § 9.10(a) *supra*.

Part F. School Searches and Seizures

§ 23.33 APPLICABILITY OF FOURTH AMENDMENT PROTECTIONS TO THE SCHOOL SETTING

It has always been clear that the Fourth Amendment applies to searches and seizures made by police officers inside a school building. *See, e.g., Piazzola v. Watkins*, 316 F. Supp. 624, 626-27 (M.D. Ala. 1970), *aff'd*, 442 F.2d 284 (5th Cir. 1971). It is equally clear that if a school official conducts a search or seizure of a student at the behest of the police, the school official is acting as an “agent” of the police and is subject to the same restrictions that would govern police conduct under the circumstances. *See* § 23.36 *infra*.

Prior to *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), there was some debate about whether school officials were subject to the restrictions of the Fourth Amendment in conducting searches and seizures on their own initiative without any instigation by the police. In *T.L.O.*, the Court concluded that the Fourth Amendment’s “prohibition on unreasonable searches and seizures applies to searches conducted by public school officials.” *Id.* at 333. The *T.L.O.* opinion decisively rejects the argument that school officials’ *in loco parentis* status confers the untrammelled search prerogatives of parents, saying:

“Today’s public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies. . . . In carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents’ immunity from the strictures of the Fourth Amendment.” (*Id.* at 336-37.)

Accord, Safford Unified School District # 1 v. Redding, 557 U.S. 364, 377 (2009) (“difference” between “[p]arents” and “school official[s]” “is that the Fourth Amendment places limits on the official”); *Vernonia School District 47J v. Acton*, 515 U.S. 646, 655 (1995).

Although holding that the Fourth Amendment governs school officials’ searches, the Court in *T.L.O.* did not demand that such searches comply with the same rules that regulate police searches. The rules for assessing the validity of a school official’s search of a student’s person are discussed in § 23.34 *infra*. The topic of school officials’ searches of students’ desks and lockers is taken up in § 23.35 *infra*. *Compare J.P. ex rel. A.P. v. Millard Public Schools*, 285 Neb. 890, 892, 905, 908-09, 830 N.W.2d 453, 457, 465, 466-67 (2013) (“*T.L.O.*[’s] school-needs exception . . . for the search of students on school grounds” did not apply to a school official’s search of a student’s truck that was “parked on a public street across from the school” and thus “was not in the school environment or under the dominion and control of the school”). Finally, § 23.36 *infra* examines the standards that must be applied when a school official acts at the behest of the police rather than on his or her own initiative. *See generally* Barry C. Feld, *T.L.O. and Redding’s Unanswered (Misanswered) Fourth Amendment Questions: Few Rights and Fewer Remedies*, 80 Miss. L.J. 847 (2011); Annot., *Search conducted by school official or teacher as violation of Fourth Amendment or equivalent state constitutional provision*, 31 A.L.R.5th 229 (1995, updated). The lower courts are divided on whether school security officers (sometimes called “school resource officers” or “school safety officers”) should be classified as

“school officials” or “law enforcement officers” for purposes of the *T.L.O.* doctrine. *See, e.g., State v. Meneese*, 174 Wash. 2d 937, 947, 282 P.3d 83, 88 (2012) (discussing the caselaw of other jurisdictions and holding under the federal and state constitutions that the “school search exception” of *T.L.O.* did not apply to a school resource officer’s search of a student’s backpack because the officer was “a fully commissioned law enforcement officer employed by the Bellevue Police Department who has no ability to discipline students” and who “was seeking to obtain evidence for criminal prosecution, not evidence for informal school discipline”). *See generally* Josh Gupta-Kagan, *Reevaluating School Searches Following School-to-Prison Pipeline Reforms*, 87 *FORDHAM L. REV.* 2013 (2019).

It should be noted that the Court in *T.L.O.* expressly declined to address the question whether “the exclusionary rule applies to the fruits of unlawful searches conducted by school authorities.” *T.L.O.*, 469 U.S. at 333 n.3. It was unnecessary for the Court to reach this issue because the Court found the search of *T.L.O.* constitutionally valid. However, as the lower courts have concluded in applying the substantive rules announced in *T.L.O.*, the interests served by the exclusionary rule necessarily call for the exclusion of evidence unlawfully seized by school officials. *See, e.g., In re William G.*, 40 Cal. 3d 550, 567 n.17, 709 P.2d 1287, 1298 n.17, 221 Cal. Rptr. 118, 129 n.17 (1985); *R.S.M. v. State*, 911 So.2d 283 (Fla. App. 2005); *In re Doe*, 104 Hawai’i 403, 91 P.3d 485 (2004), *partially overruled on another issue, In re Doe*, 105 Hawai’i 505, 100 P.3d 75 (2004); *State v. Pablo R.*, 139 N.M. 744, 137 P.3d 1198 (N.M. App. 2006); *In the Interest of Dumas*, 357 Pa. Super. 294, 515 A.2d 984 (1986). Although the goal of deterring police misconduct is not implicated in this context, the exclusionary rule’s other goals of assuring that individuals’ rights to privacy are protected and of preserving “that judicial integrity so necessary in the true administration of justice” (*Mapp v. Ohio*, 367 U.S. 643, 660 (1961)) can only be effectuated by excluding unlawfully seized evidence from juvenile delinquency trials. *In re William G.*, 40 Cal. 3d at 567 & n.17, 709 P.2d at 1298 & n.17, 221 Cal. Rptr. at 129 & n.17. And because school officials are “state actors” charged with heeding the “strictures of the Fourth Amendment,” *T.L.O.*, 469 U.S. at 336-37, and simultaneously charged with disciplinary responsibilities that may tempt them to disregard those strictures, there is much the same constitutional need to deter their misconduct as there is to deter police misconduct. *See, e.g., State v. Baccino*, 282 A.2d 869, 871 (Del. Super. 1971). Moreover, as Justice Stevens pointed out in an opinion concurring in part and dissenting in part in *New Jersey v. T.L.O.*, “[i]n the case of evidence obtained in school searches, the ‘overall educative effect’ of the exclusionary rule adds important symbolic force to this utilitarian judgment. . . . Schools are places where we inculcate the values essential to the meaningful exercise of rights and responsibilities by a self-governing citizenry. If the Nation’s students can be convicted through the use of arbitrary methods destructive of personal liberty, they cannot help but feel that they have been dealt with unfairly.” 469 U.S. at 373-74.

T.L.O.’s special rules for searches and seizures inside a school building may apply as well to external areas that are clearly part of the school grounds, but *T.L.O.*’s applicability presumably ends at the boundary line between school property and public-use areas adjacent to a school. *Compare Gonzalez v. Huerta*, 826 F.3d 854, 855, 858-59 (5th Cir. 2016) (a school district police

officer, who was sued for detaining a school employee’s husband in the school parking lot for refusing to show identification, was entitled to qualified immunity notwithstanding two “prior Supreme Court cases [that] have held that police may not detain an individual solely for refusing to provide identification,” because “neither of those cases dealt with incidents occurring on school property,” and “[t]his is no small distinction, as the Supreme Court has routinely reconsidered the scope of individual constitutional rights in a school setting.”), with *J.P. ex rel. A.P. v. Millard Public Schools*, 285 Neb. 890, 830 N.W.2d 453 (2013) (“*T.L.O.*[’s] school-needs exception . . . for the search of students on school grounds” (*id.* at 905, 830 N.W.2d at 465) did not apply to a school official’s “search of a student’s pickup truck that was parked on a public street across from the school” (*id.* at 892, 830 N.W.2d at 457) and thus “was not in the school environment or under the dominion and control of the school” (*id.* at 909, 830 N.W.2d at 467). Although some courts “have expanded *T.L.O.*’s reasonable suspicion standard to a school’s search of a student’s vehicle parked on school grounds” and some courts have “extend[ed] the *T.L.O.* standard to school searches conducted while a student was attending a school-sponsored class or activity that was held off campus,” the court explains that “none of these cases, nor any that we have found, recognize a right of school officials to conduct off-campus searches of a student’s person or property which are unrelated to school-sponsored activities. To the contrary, courts have held that school officials lack authority to conduct such searches.” (*Id.* at 900-01, 830 N.W.2d at 462.)).

§ 23.34 SEARCHES OF THE STUDENT’S PERSON BY SCHOOL OFFICIALS

In developing a standard to regulate school officials’ searches of students, the Court in *T.L.O.* balanced “the child’s interest in privacy” against “the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds.” *T.L.O.*, 469 U.S. at 339. The Court concluded that “the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject,” *id.* at 340, including the warrant requirement and the probable cause requirement. *Id.* at 340-41. *Accord*, *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 828-30 (2002); *Vernonia School District 47J v. Acton*, 515 U.S. 646, 653 (1995). *See also* *Shuman ex rel. Shertzer v. Penn Manor School District*, 422 F.3d 141, 147 (3d Cir. 2005) (extending the *T.L.O.* standard for “searches in public schools” to “seizures in that context,” and holding that a student was “‘seized’ within the meaning of the Fourth Amendment” when an assistant principal “told [him] to remain in the conference room under [the assistant principal’s] direction for several hours,” and that “reasonableness is the appropriate benchmark to determine whether [such] a seizure in the public school context survives Fourth Amendment scrutiny”).

Under the standard adopted in *T.L.O.*, “the legality of a search of a student . . . depend[s] simply on the reasonableness, under all the circumstances, of the search.” *T.L.O.*, 469 U.S. at 341. The determination of “the reasonableness of any search involves a two-fold inquiry: first, one must consider ‘whether the . . . action was justified in its inception,’ . . .; second, one must determine whether the search as actually conducted ‘was reasonably related in scope to the circumstances which justified the interference in the first place.’” *Id.*

“Under ordinary circumstances, a search of a student by a teacher or other school official will be “justified at its inception” when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.” (*New Jersey v. T.L.O.*, 469 U.S. at 341-42 (footnotes omitted).)

See also Safford Unified School District # 1 v. Redding, 557 U.S. 364, 371 (2009) (“Perhaps the best that can be said generally about the required knowledge component of probable cause for a law enforcement officer’s evidence search is that it raise a ‘fair probability,’ . . . or a ‘substantial chance,’ . . . of discovering evidence of criminal activity. The lesser standard for school searches could as readily be described as a moderate chance of finding evidence of wrongdoing.”); *id.* at 372 n.1 (“[w]hen the object of a school search is the enforcement of a school rule,” “the rule’s legitimacy” also may be at issue because a search can be found to be “unreasonable owing to some defect or shortcoming of the rule it was aimed at enforcing”).

Applying the standard to the facts of the *T.L.O.* case, the Court concluded that (i) the school vice-principal’s “decision to open T.L.O.’s purse was reasonable,” *id.* at 347, because a teacher had observed T.L.O. smoking cigarettes in the girls’ bathroom in violation of school rules and it was therefore reasonable to suspect that T.L.O. had cigarettes in her purse, *id.* at 345-46; (ii) when the vice-principal, in opening and removing a pack of cigarettes, observed a package of rolling papers, the “reasonable suspicion that T.L.O. was carrying marihuana as well as cigarettes in her purse . . . justified further exploration of T.L.O.’s purse, which turned up more evidence of drug-related activities: a pipe, a number of plastic bags of the type commonly used to store marihuana, a small quantity of marihuana, and a fairly substantial amount of money,” *id.* at 347; and (iii) “[u]nder these circumstances, it was not unreasonable to extend the search to a separate zippered compartment of the purse; and when a search of that compartment revealed an index card containing a list of ‘people who owe me money’ as well as two letters, the inference that T.L.O. was involved in marihuana trafficking was substantial enough to justify [the vice-principal] . . . in examining the letters to determine whether they contained any further evidence.” *Id.* Thus school searches, like all other searches, are subject to the general rule that each increasing level of intrusiveness must be justified by additional facts warranting the intensification of the intrusion.

In applying the *T.L.O.* standard in *Safford Unified School District # 1 v. Redding*, the Court similarly scrutinized the record carefully to determine whether the facts known to the school officials justified the initial intrusion and the subsequent level of additional intrusion. The Court concluded that (i) an assistant principal had adequate “suspicion . . . to justify a search of [a student’s] . . . backpack and outer clothing” in the student’s “presence and in the relative privacy of [the assistant principal’s] . . . office,” based upon information from other students giving rise to a reasonable suspicion that the student was “giving out contraband pills” in violation of a school rule and that the student was “carrying [such pills] . . . on her person and in

the [backpack]”; but that (ii) when the school nurse and an administrative assistant thereafter conducted a more intrusive search of the student’s person in the nurse’s office, directing the student to “remove her clothes down to her underwear, and then ‘pull out’ her bra and the elastic band on her underpants,” “thus exposing her breasts and pelvic area to some degree,” this “quantum leap from outer clothes and backpacks to exposure of intimate parts” violated the Fourth Amendment because the facts known to the school officials did not indicate that there was “danger to the [other] students from the power of the drugs [that the student was “reasonably suspected of carrying”] or their quantity, . . . [or] any reason to suppose that . . . [the student] was carrying pills in her underwear.” *Safford*, 557 U.S. at 368-69, 373-77. *Accord*, *Littell v. Houston Independent School District*, 894 F.3d 616, 623 (5th Cir. 2018) (“the Supreme Court has ‘ma[d]e it clear’ that a search of a student’s underwear is impermissibly intrusive unless the school officials reasonably suspect either that the object of the search is dangerous, or that it is actually likely to be hidden in the student’s underwear”); *T.R. by and through Brock v. Lamar County Board of Education*, 25 F.4th 877, 885 (11th Cir. 2022) (allegations that strip searches of a student by school officials stated a clearly established claim of violation of the Fourth Amendment; “Here, the district court reasoned that because school officials could not find marijuana in T.R.’s backpack, then they had reason to suspect that they would find marijuana in T.R.’s underwear or bra. Thus, according to the district court, the school officials had sufficient reason to suspect T.R. contained drugs under her clothing, which made this case factually distinguishable from *Safford*. However, this type of reasoning is of the sort that the Supreme Court expressly forbade in *Safford*. There, the court rejected the school’s argument that ‘as a truth universally acknowledged . . . students . . . hide contraband in or under their clothing[.]’ . . . The Court classified this reasoning as a ‘general background possibilit[y]’ that a student could be hiding contraband under their clothing. . . . This type of general possibility is insufficient when considering ‘the categorically extreme intrusiveness of a search down to the body of an adolescent.’”).

In challenging school searches, defense counsel should argue that the *T.L.O.* standard incorporates the *Terry* “articulable suspicion” requirement, see § 23.09 *supra*. Significantly, when the Court applied the first prong of its *T.L.O.* test – the inquiry into whether there are “reasonable grounds for suspecting that the search will turn up evidence” (*id.* at 342) – the Court relied on *Terry* and its progeny to define the requisite quantum of suspicion. *Id.* at 346 (saying that the inquiry demands more than the type of “‘inchoate and unparticularized suspicion or ‘hunch’”” condemned in *Terry* and equating the required level of certainty with the *Terry*-level showing called for in *United States v. Cortez*, 449 U.S. 411 (1981)). *See also Safford Unified School District # 1 v. Redding*, 557 U.S. at 370 (reiterating *T.L.O.*’s ruling that “searches by school officials” are to be judged “‘by a Fourth Amendment standard of reasonableness that stops short of probable cause’” and then referencing prior Fourth Amendment caselaw on probable cause in the adult criminal context to observe that “[p]erhaps the best that can be said generally about the required knowledge component of probable cause for a law enforcement officer’s evidence search is that it raise a ‘fair probability,’ . . . or a ‘substantial chance,’ . . . of discovering evidence of criminal activity” while “[t]he lesser standard for school searches could as readily be described as a moderate chance of finding evidence of wrongdoing”); *id.* at 373-74 (scrutinizing

the record carefully to determine whether the specific facts known to school officials were sufficient to “justify a search of [the student’s] backpack and outer clothing” based upon “reasonable suspicion” that the student was “carrying . . . [“contraband pills”] on her person and in the carryall”); *id.* at 370 (summarizing the *T.L.O.* rule by saying that “[w]e have . . . applied a standard of reasonable suspicion to determine the legality of a school administrator’s search of a student”).

In applying *T.L.O.*, the lower courts have analyzed school officials’ actions under this *Terry* standard of justification. *See, e.g., G.C. v. Owensboro Public Schools*, 711 F.3d 623, 633-34 (6th Cir. 2013) (in a decision issued even before the Supreme Court’s announcement of strict privacy protections for cell phones’ digital content in *Riley v. California*, 573 U.S. 373 (2014), the court of appeals holds that school officials’ search of a cell phone confiscated from a student violated *T.L.O.*, notwithstanding the school officials’ “background knowledge of [G.C.’s] drug abuse . . . [and] depressive tendencies” because “there is no evidence in the record to support the conclusion . . . that the school officials had any specific reason at the inception of the . . . search to believe that G.C. then was engaging in any unlawful activity or that he was contemplating injuring himself or another student”); *In re William G.*, 40 Cal. 3d 550, 566, 709 P.2d 1287, 1297, 221 Cal. Rptr. 118, 128 (1985) (the *T.L.O.* “standard is more stringent than other ‘less than probable cause’ standards . . . because it depends on objective and articulable facts”); *In the Interest of Dumas*, 357 Pa. Super. 294, 298, 515 A.2d 984, 986 (1986) (striking down a school search under the *T.L.O.* standard because the assistant principal “was unable to articulate any reasons for []his suspicion” that the student who had been caught smoking cigarettes was “involved with marijuana”).

Counsel should further argue that factors such as “furtive gestures” and refusal to answer questions should be accorded no greater weight in the school setting than in the context of a *Terry* stop and frisk. *See, e.g., William G.*, 40 Cal. 3d at 567, 709 P.2d at 1297, 221 Cal. Rptr. at 128 (citing *Terry* caselaw for the conclusion that a student’s “furtive gestures” in trying to hide his calculator case from [school official’s] view cannot, standing alone, furnish sufficient cause to search”); *see id.* (citing *Terry* caselaw for the proposition that “William’s demand for a warrant did not create a reasonable suspicion upon which to base the search. Such conduct merely constitutes William’s legitimate assertion of his constitutional right to privacy and to be free from unreasonable searches and seizures. There are many reasons why a student might assert these rights, other than an attempt to prevent disclosure of evidence that one has violated a proscribed activity. A student cannot be penalized for demanding respect for his or her constitutional rights.”). For discussion of the relevance of these factors in the *Terry* context, see § 23.11 *supra*.

In litigating under the *T.L.O.* standard, counsel can also draw upon the caselaw dealing with a police officer’s right to rely on hearsay information in conducting a *Terry* stop or frisk, see §§ 23.31-23.32 *supra*. *See Safford Unified School District # 1 v. Redding*, 557 U.S. at 370-71 (recognizing that the Court’s prior decisions on probable cause, including cases dealing with police reliance on hearsay, “have an implicit bearing on the reliable knowledge element of

reasonable suspicion” even though “these factors cannot rigidly control” the “lesser standard” governing “the required knowledge component” of reasonable suspicion for any particular school search since “the standards are ‘fluid concepts that take their substantive content from the particular contexts’ in which they are being assessed”); *id.* at 381-82 (Justice Ginsburg, concurring in part and dissenting in part) (disagreeing with the majority’s conclusion that an assistant principal who conducted an unconstitutional search had qualified immunity, and explaining that the unreasonableness of the school official’s actions is shown by, *inter alia*, his reliance “on the bare accusation of another student whose reliability the Assistant Principal had no reason to trust”). Thus, as a state court concluded in applying a general-reasonableness standard to a school search in a pre-*T.L.O.* case, there must be scrutiny of “the probative value and reliability of the information used as a justification for the search.” *Doe v. State*, 88 N.M. 347, 352, 540 P.2d 827, 832 (N.M. App. 1975).

Counsel should insist that the reviewing court strictly enforce the second prong of the *T.L.O.* standard – that the “scope” of a search be “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.” *T.L.O.*, 469 U.S. at 342. The Court’s analysis of the *T.L.O.* record under this prong can be used to illustrate the limitations it imposes on the scope of search. When the vice-principal knew nothing more than that a highly reliable source, a teacher, had observed a student smoking cigarettes in violation of a school rule, the vice-principal was permitted to take the limited step of opening the student’s purse and removing the cigarettes. *See id.* at 344-46. When that action revealed evidence of the criminal act of possession of marijuana, the vice-principal could engage in “further exploration” of the purse. *See id.* at 347. It was only after the discovery of marijuana itself – a discovery that in the police context would justify an arrest and a full-scale search incident to arrest – that the vice-principal was permitted to make the additional intrusion of examining the interior of the zippered compartment. *See id.* Finally, it was only after this intrusion revealed evidence of the far more serious crime of narcotics sale that the vice-principal was permitted to take the ultimate step of reading *T.L.O.*’s letters. *See id.* Compare, e.g., *In the Interest of Doe*, 77 Hawai’i 435, 442-43, 887 P.2d 645, 652-53 (1994) (principal’s search of a student’s handbag conformed to *T.L.O.* standard because the principal had “reasonable grounds to suspect that Minor may be concealing marijuana in her purse” and “the search ceased” after the student emptied her purse, disclosing a bag of marijuana), and *State v. Drake*, 139 N.H. 662, 667, 662 A.2d 265, 268 (1995) (principal’s search of a student’s knapsack complied with *T.L.O.* because the principal had reasonable grounds to believe that the student was “likely using, and possibly distributing, drugs” and would have drugs with him in school that day, and the principal first asked the student to empty his pockets, resulting in the discovery of a rolling paper package with what appeared to be marijuana on it, whereupon the principal asked the student to open his knapsack and thereby found several bags of marijuana), with *Coronado v. State*, 835 S.W.2d 636, 637, 641 (Tex. Crim. App. 1992) (although “the first prong of *T.L.O.* is met” in that the assistant principal had “reasonable grounds to suspect that [the student] was violating school rules by ‘skipping’” class and leaving school early, the assistant principal’s “searches of [the student’s] clothing and person, locker, and vehicle were excessively intrusive in light of the infraction of skipping school,” notwithstanding the assistant principal’s reasons for suspecting that the student

was selling drugs to other students).

In its post-*T.L.O.* decision in *Safford Unified School District # 1 v. Redding*, the Court elaborated upon *T.L.O.*'s general statements about “excessive[] intrus[ions]” by addressing the criteria that apply when school officials engage in a search that involves “exposure of [a student’s] intimate parts.” 557 U.S. 364, 370, 374-77 (2009). In *Safford*, a school nurse and an administrative assistant “directed [the student] to remove her clothes down to her underwear, and then ‘pull out’ her bra and the elastic band on her underpants,” which “necessarily exposed her breasts and pelvic area to some degree.” *Id.* at 374. The Court characterized such a search as a “quantum leap” beyond less intrusive searches of “outer clothes and backpacks” (*id.* at 377), and explained:

“[B]oth subjective and reasonable societal expectations of personal privacy support the treatment of such a search [that exposes a student’s “intimate parts”] as categorically distinct [from less intrusive searches], requiring distinct elements of justification on the part of school authorities for going beyond a search of outer clothing and belongings.

“[Student] Savana’s subjective expectation of privacy against such a search is inherent in her account of it as embarrassing, frightening, and humiliating. The reasonableness of her expectation (required by the Fourth Amendment standard) is indicated by the consistent experiences of other young people similarly searched, whose adolescent vulnerability intensifies the patent intrusiveness of the exposure. . . . The common reaction of these adolescents simply registers the obviously different meaning of a search exposing the body from the experience of nakedness or near undress in other school circumstances. Changing for gym is getting ready for play; exposing for a search is responding to an accusation reserved for suspected wrongdoers and fairly understood as so degrading that a number of communities have decided that strip searches in schools are never reasonable and have banned them no matter what the facts may be, see, e.g., New York City Dept. of Education, Reg. No. A-432, p. 2 (2005), online at <http://docs.nycenet.edu/docushare/dsweb/Get/Document-21/A-432.pdf> (“Under no circumstances shall a strip-search of a student be conducted”).

“The indignity of the search does not, of course, outlaw it, but it does implicate the rule of reasonableness as stated in *T.L.O.*, that “the search as actually conducted [be] reasonably related in scope to the circumstances which justified the interference in the first place.” 469 U.S., at 341 (internal quotation marks omitted). The scope will be permissible, that is, when it is “not excessively intrusive in light of the age and sex of the student and the nature of the infraction.” *Id.*, at 342. . . .

“. . . The meaning of such a search [which exposes “intimate parts” of the student’s body], and the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions.” (*Safford*, 557 U.S. at 374-77.)

See also *id.* at 380 (Justice Stevens, concurring in part and dissenting in part) (“I have long believed that “[i]t does not require a constitutional scholar to conclude that a nude search of a 13-year-old child is an invasion of constitutional rights of some magnitude.”” (quoting *Doe v. Renfrow*, 631 F.2d 91, 92-93 (7th Cir. 1980))); *id.* at 381-82 (Justice Ginsburg, concurring in part and dissenting in part) (“humiliating stripdown search” of the 13-year-old student “was abusive”); *T.L.O.*, 469 U.S. at 382 n.25 (Justice Stevens, concurring in part and dissenting in part) (*T.L.O.*’s prohibition of excessively intrusive searches of students precludes “the shocking strip searches that are described in some cases that have no place in the schoolhouse”); *Tarter v. Raybuck*, 742 F.2d 977, 982-83 (6th Cir. 1984) (body cavity search of student would be *per se* unreasonable). In *Safford*, the Court held that the school officials’ “quantum leap from outer clothes and backpacks to exposure of intimate parts” violated the Fourth Amendment because the facts known to the school officials did not indicate that there was “danger to the [other] students from the power of the drugs [that the student was “reasonably suspected of carrying”] or their quantity, . . . [or] any reason to suppose that . . . [the student] was carrying pills in her underwear.” *Safford*, 557 U.S. at 374, 376-77.

In cases involving older students, especially students close to the age of eighteen, defense counsel should argue that *T.L.O.*’s requirement that searches be tempered according to the “age . . . of the student,” *T.L.O.*, 469 U.S. at 342, stringently restricts the authority of school officials in searching students whose privacy interests are more closely akin to adults’. Counsel can point out that the greater maturity of an older student renders it less justifiable to subordinate the student’s privacy rights to the needs of the school. Cf. *Smyth v. Lubbers*, 398 F. Supp. 777, 785-86 (W.D. Mich. 1975) (college’s assertion of the right to search students’ dormitory rooms is rejected in part because the adult status of the students precludes their being denied the same privacy rights as adults outside the educational institution).

A question reserved in *T.L.O.* was “whether individualized suspicion is an essential element of the reasonableness standard . . . for searches by school authorities.” 469 U.S. at 342 n.8. The Court explained that “[b]ecause the search of T.L.O.’s purse was based upon an individualized suspicion that she had violated school rules, . . . we need not consider the circumstances that might justify school authorities in conducting searches unsupported by individualized suspicion.” *Id.* See also *Vernonia School District 47J v. Acton*, 515 U.S. at 653 (“The school search we approved in *T.L.O.*, while not based on probable cause, was based on individualized *suspicion* of wrongdoing.”). Thereafter, the Court has, on two occasions, upheld a program of random drug testing, without individualized suspicion, of students who voluntarily participated in extracurricular activities. See *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 536 U.S. at 830-38 (school district’s policy of random drug testing of students voluntarily participating in competitive extracurricular activities is upheld by applying a three-pronged standard – which considers the nature of privacy interest affected; the character of the intrusion; and the nature and immediacy of the government’s concerns and the efficacy of the policy in meeting them – and concluding that (1) the privacy interests of the children were diminished because they voluntarily chose to participate in extracurricular activities which were highly regulated; (2) urinalysis was a “negligible” intrusion,

especially given that the test results were not turned over to law enforcement officials, the only consequence of refusing to participate in drug testing was nonparticipation in the extracurricular activity, and students did not face expulsion or suspension or any other school-related sanctions even if they tested positive; and (3) there was sufficient evidence of student use of drugs to justify the need for the drug testing program.); *Vernonia School District 47J v. Acton*, 515 U.S. at 646, 648, 654-65 (school district’s policy of “random urinalysis drug testing of students who participate in the District’s school athletics programs” is upheld by applying the same three-pronged analytic apparatus employed in *Earls*, and concluding that (1) the very nature of school sports results in a lesser degree of privacy, and student athletes “voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally”; (2) the urinalysis testing process, as administered under the district’s guidelines, involved a “negligible” degree of intrusion; and (3) there was concrete evidence of a significant increase in the use of drugs by the student body, “particularly those involved in interscholastic athletics,” and there was a basis for concluding that “drug use by school athletes” gives rise to a “particularly high” “risk of immediate physical harm to the drug user or those with whom he is playing his sport.”). As the Court’s analyses in *Acton* and *Earls* make clear, the constitutionality of a search of students without individualized suspicion turns upon a balancing of context-specific facts and circumstances. *See, e.g., Doe ex rel. Doe v. Little Rock School District*, 380 F.3d 349, 351, 354-56 (8th Cir. 2004) (rejecting a school district’s attempt to apply *Acton* and *Earls* to justify a district practice of “subject[ing] secondary public school students to random, suspicionless searches of their persons and belongings,” and explaining that, “[u]nlike the suspicionless searches of participants in school sports and other competitive extracurricular activities that the Supreme Court approved in *Vernonia* and *Earls*, in which ‘the privacy interests compromised by the process’ of the searches were deemed ‘negligible,’ . . . the type of search at issue here invades students’ privacy interests in a major way”; “[i]n sharp contrast to these cases, the fruits of the searches at issue here are apparently regularly turned over to law enforcement and are used in criminal proceedings against students whose contraband is discovered”; and the district had failed to present the kinds of “particularized evidence” offered by the school districts “[i]n both *Vernonia* and *Earls* . . . to ‘shore up’ their assertions of a special need to institute administrative search programs for extracurricular-activity participants.”); *B.C. v. Plumas Unified School District*, 192 F.3d 1260, 1268 & nn.10-11 (9th Cir. 1999) (rejecting a school district’s attempt to apply *Acton* to justify the use of a drug-sniffing dog to sniff all of the students in a classroom for drugs, and explaining that, “[i]n contrast [to *Acton*], the search in this case took place in a classroom where students were engaged in compulsory, educational activities,” and that, “[i]n sharp contrast” to *Acton*, “the record here does not disclose that there was any drug crisis or even a drug problem” at the school at the time of the search); *Kittle-Aikeley v. Strong*, 844 F.3d 727, 741 (8th Cir. 2016) (“We conclude that the district court properly applied [*National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989)] when it conducted a program-by-program analysis. The category of students who may be drug tested as a condition of attending Linn State is composed only of those students who enroll in safety-sensitive educational programs. By requiring all incoming students to be drug tested, Linn State defined the category of students to be tested more broadly than was necessary to meet the valid special need of deterring drug use among students enrolled in safety-sensitive programs.”). *See also York v. Wahkiakum School*

District No. 200, 163 Wash. 2d 297, 299, 178 P.3d 995, 997 (2008) (rejecting *Vernonia School District 47J v. Acton* on state constitutional grounds and holding that “warrantless random and suspicionless drug testing of student athletes violates the Washington State Constitution”).

§ 23.35 SEARCHES OF STUDENTS’ LOCKERS OR DESKS BY SCHOOL OFFICIALS

T.L.O. expressly reserved “the question, not presented by this case, whether a schoolchild has a legitimate expectation of privacy in lockers, desks, or other school property provided for the storage of school supplies,” and what “standards (if any) govern[] searches of such areas by school officials or by other public authorities acting at the request of school officials.” 469 U.S. at 337 n.5.

A number of lower court decisions have concluded that students have a reasonable expectation of privacy in their lockers, at least in the absence of an express school policy or state regulation that could render such an expectation unreasonable. *See, e.g., State v. Jones*, 666 N.W.2d 142, 147-48 (Iowa 2003) (citing caselaw from other jurisdictions); *Commonwealth v. Snyder*, 413 Mass. 521, 526, 597 N.E.2d 1363, 1366 (1992) (citing caselaw from other jurisdictions). In situations involving a school policy or state regulation establishing a school’s right of access to the contents of students’ lockers, some courts have found that students lacked a reasonable expectation of privacy in their lockers, *see, e.g., In Interest of Isiah B.*, 176 Wis. 2d 639, 649-50, 500 N.W.2d 637, 641 (Wis. 1993) (there was a written school policy “retaining ownership and possessory control of school lockers . . . , and notice of the locker policy is given to students”), or had a reduced expectation of privacy in the locker, *see, e.g., Commonwealth v. Cass*, 551 Pa. 25, 38-39, 709 A.2d 350, 356-57 (1998) (given that the Code of Student Conduct “forewarned [students] that their lockers are subject to a search by school officials without prior warning” and that “school officials . . . possess a master key that can open all combination locks” and “are constantly in the student lockers to make general repairs as needed, without first giving notice to the students,” the students – although “possess[ing] a legitimate expectation of privacy in their assigned lockers” – had only a “minimal” “privacy expectation”), while other courts have held that students possess an undiminished expectation of privacy in their lockers even when a school policy or state regulation purports to render such a privacy expectation unreasonable, *see, e.g., State v. Jones*, 666 N.W.2d 142, 147-48 (Iowa 2003) (a student “maintained a legitimate expectation of privacy in the contents of his locker” even though both “school district policy . . . and state law . . . clearly contemplate and regulate searches of school lockers”).

Defense counsel can draw on language in the *T.L.O.* opinion to mount a persuasive argument that students should be viewed as having a privacy interest in lockers and desks assigned to them for the storage of personal belongings. The Court observed:

“Although this Court may take notice of the difficulty of maintaining discipline in the public schools today, the situation is not so dire that students in the schools may claim no legitimate expectations of privacy. . . . Nor does the State’s suggestion that children have no legitimate need to bring personal property into the schools seem well anchored in

reality. Students at a minimum must bring to school not only the supplies needed for their studies, but also keys, money, and the necessities of personal hygiene and grooming. In addition, students may carry on their persons or in purses or wallets such nondisruptive yet highly personal items as photographs, letters, and diaries. Finally, students may have perfectly legitimate reasons to carry with them articles of property needed in connection with extracurricular or recreational activities. In short, schoolchildren may find it necessary to carry with them a variety of legitimate, noncontraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them onto school grounds.” (469 U.S. at 338-39.)

See also Safford Unified School District # 1 v. Redding, 557 U.S. 364, 374 n.3 (2009) (“it is common ground that [a 13-year-old student] . . . had a reasonable expectation of privacy covering the personal things she chose to carry in her backpack”).

In rebutting the argument that the school’s proprietary interest in the locker or desk confers the right to search at will, defense counsel can analogize the student’s privacy interest in his or her locker or desk to the privacy interest of a government employee in a locker or a desk provided by a governmental employer for the employee’s exclusive use in a government building. In *O’Connor v. Ortega*, 480 U.S. 709 (1987), a plurality of the Court concluded that considerations similar to those involved in *T.L.O.*’s analysis of schoolhouse searches of students were pertinent to “workplace” searches of a public employee’s desk and filing cabinet by his or her governmental employer. *See id.* at 719-26. Although there was a 4-1-4 split on several issues in *O’Connor*, five Justices agreed that the government employee in that case had a constitutionally protected privacy interest in his office; all nine Justices agreed that he had such an interest in his desk and file cabinets; and all nine agreed that a government employee *could* acquire a constitutionally protected privacy interest in the whole of an office assigned for his or her exclusive use despite its physical location in a government-owned building. *Id.* at 714-19 (plurality opinion); *id.* at 731 (concurring opinion of Justice Scalia) (“I would hold . . . that the offices of government employees, and *a fortiori* the drawers and files within those offices, are covered by Fourth Amendment protections as a general matter”); *id.* at 741 (dissenting opinion of Justice Blackmun) (“Dr. Ortega clearly had an expectation of privacy in his office, desk, and file cabinets, particularly with respect to the type of investigatory search involved here”). The plurality in *O’Connor* applied a *T.L.O.* standard to gauge the reasonableness of a search of the employee’s desk and file cabinets, *see id.* at 725-26, and approvingly cited lower court caselaw applying a similar standard to an employer’s search of an employee’s locker. *See id.* at 721, citing *United States v. Bunkers*, 521 F.2d 1217 (9th Cir. 1975). Thus counsel can argue that the opinions in *O’Connor* demonstrate that the *T.L.O.* standard should apply to a teacher’s or principal’s search of a student’s locker or desk, at least when the locker or desk is set aside for the student’s personal use, the student stores “personal items” in the locker or desk, and the school has not published regulations discouraging students from storing personal items in their lockers and desks. *See O’Connor*, 480 U.S. at 718-19; *see also Vernonia School District 47J v. Acton*, 515 U.S. 646, 665 (1995) (analogizing the issues that arise in a school search “when the government acts as guardian and tutor” of students to the issues that arise “when the government

conducts a search in its capacity as employer (a warrantless search of an absent employee’s desk to obtain an urgently needed file, for example),” and citing *O’Connor v. Ortega*; *United States v. Speights*, 557 F.2d 362 (3d Cir. 1977) (police officer had a legitimate expectation of privacy in a locker at the stationhouse); *Commonwealth v. Gabrielle*, 269 Pa. Super. 338, 409 A.2d 1173 (1979) (employee had legitimate expectation of privacy in a workplace locker).

§ 23.36 SEARCHES BY SCHOOL OFFICIALS AT THE BEHEST OF THE POLICE

The Supreme Court in *T.L.O.* also reserved the “question of the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies.” 469 U.S. at 341 n.7.

With virtual unanimity the lower courts have held that when school officials act in cooperation with the police in conducting a search, the search must be judged under the ordinary rules that govern police searches, including the warrant requirement and the probable cause standard. *See, e.g., Picha v. Wielgos*, 410 F. Supp. 1214, 1219-21 (N.D. Ill. 1976); *Piazzola v. Watkins*, 316 F. Supp. 624, 626-27 (M.D. Ala. 1970), *aff’d*, 442 F.2d 284 (5th Cir. 1971); *M.J. v. State*, 399 So.2d 996 (Fla. App. 1981); *State v. Heirtzler*, 147 N.H. 344, 349-52, 789 A.2d 634, 638-41 (2001). *Contra, Doe v. Renfrow*, 475 F. Supp. 1012 (N.D. Ind. 1979), *remanded in part on other grounds*, 631 F.2d 91 (7th Cir. 1980) (school search conducted by school officials in conjunction with police officers was not subject to the full protections of the Fourth Amendment because the school officials had initiated the search and invited the participation of the police and the police had agreed that no arrests would be made as a result of finding drugs on students). *See generally* Josh Gupta-Kagan, *Reevaluating School Searches Following School-to-Prison Pipeline Reforms*, 87 FORDHAM L. REV. 2013 (2019); Michael Pinard, *From the Classroom to the Courtroom: Reassessing Fourth Amendment Standards in Public School Searches Involving Law Enforcement Authorities*, 45 ARIZ. L. REV. 1067 (2003).

The caselaw holding that the involvement of the police calls forth the full panoply of Fourth Amendment protections is consistent with the long-established doctrine that even a search or seizure by a private citizen, normally not regulated at all by the Fourth Amendment, *United States v. Jacobsen*, 466 U.S. 109, 113-15 (1984); *Burdeau v. McDowell*, 256 U.S. 465 (1921), will be subject to Fourth Amendment restrictions if:

(i) The search was ordered or requested by a government official, *see, e.g., United States v. Hardin*, 539 F.3d 404, 417-20 (6th Cir. 2008) (apartment building “manager was acting as an agent of the government” when he entered the defendant’s apartment at the request of police officers); *Corngold v. United States*, 367 F.2d 1 (9th Cir. 1966) (alternative ground) (customs agent asked an airline transportation agent to open a package placed with the airline for shipment); *People v. Barber*, 94 Ill. App. 3d 813, 419 N.E.2d 71, 50 Ill. Dec. 204 (1981) (police officers requested that landlord enter tenant’s apartment); *Commonwealth v. Dembo*, 451 Pa. 1, 301 A.2d 689 (1973) (police officer seeking evidence of criminal conduct asked postal authorities to open package; postal authorities had contractual authority to open any package to

verify shipping rate); compare *United States v. Jacobsen*, 466 U.S. at 115 n.10 (in holding that Federal Express employee’s opening of package was private action not subject to Fourth Amendment restrictions, the Court points out that “the lower courts found no governmental involvement in the private search”); or

(ii) The search was a “joint endeavor” of a private individual and the police, in that: (A) the police conducted the search jointly with the private citizen, *see, e.g., State v. Scrotsky*, 39 N.J. 410, 189 A.2d 23 (1963) (detective and defendant’s landlady entered suspect’s apartment together to recover landlady’s stolen goods); *Nicaud v. State ex rel. Hendrix*, 401 So.2d 43 (Ala. 1981) (police accompanied shipyard foreman onto shrimp boat); or (B) the officer tacitly encouraged the private citizen to conduct the search, *see, e.g., Moody v. United States*, 163 A.2d 337 (D.C. 1960); *State v. Becich*, 13 Or App. 415, 509 P.2d 1232 (1973); *Commonwealth v. Borecky*, 277 Pa. Super. 244, 419 A.2d 753 (1980). (It should be noted that although the probation officer’s search of a probationer’s home in *Griffin v. Wisconsin*, 483 U.S. 868 (1987), involved a police escort, *id.* at 871 – apparently requested by the probation officer in light of his articulable suspicion that the probationer possessed a handgun, *see id.* – the Court’s opinion treats the search as having been “carried out entirely by the probation officers,” *id.* Accordingly, the *Griffin* decision does not have any implications for the “joint endeavor” doctrine.)

Part G. Derivative Evidence: Fruits of Unlawful Searches and Seizures

§ 23.37 THE CONCEPT OF “DERIVATIVE EVIDENCE”: EVIDENCE THAT MUST BE SUPPRESSED AS THE FRUITS OF AN UNLAWFUL SEARCH OR SEIZURE

When government agents have violated the restrictions of the Fourth Amendment or state constitutional or statutory protections against unlawful searches or seizures, the court must suppress not only evidence directly obtained by the violation but also “derivative evidence,” that is, evidence to which the police are led “by the exploitation of that illegality.” *Wong Sun v. United States*, 371 U.S. 471, 488 (1963); *see also Brown v. Illinois*, 422 U.S. 590, 597-603 (1975); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920); *Oregon v. Elstad*, 470 U.S. 298, 305-06 (1985) (dictum); *Vega v. Tekoh*, 142 S. Ct. 2095, 2103 (2022) (dictum). “Under the Court’s precedents, the exclusionary rule encompasses both the ‘primary evidence obtained as a direct result of an illegal search or seizure’ and . . . ‘evidence later discovered and found to be derivative of an illegality,’ the so-called “‘fruit of the poisonous tree.’”” *Utah v. Strieff*, 579 U.S. 232, 237 (2016) (dictum).

“*Wong Sun* . . . articulated the guiding principle for determining whether evidence derivatively obtained from a violation of the Fourth Amendment is admissible against the accused at trial: ‘The exclusionary prohibition extends as well to the indirect as the direct products of such invasions.’ 371 U.S., at 484. . . . As subsequent cases have confirmed, the exclusionary sanction applies to any ‘fruits’ of a constitutional violation – whether such evidence be tangible, physical material actually seized in an illegal search, items observed or words overheard in the course of the unlawful activity, or confessions or statements of the accused

obtained during an illegal arrest and detention.” *United States v. Crews*, 445 U.S. 463, 470 (1980) (dictum). *See, e.g., United States v. Garcia*, 974 F.3d 1071 (9th Cir. 2020). It also applies to the testimony of witnesses that has a sufficiently close “causal connection” to the constitutional violation, *United States v. Ceccolini*, 435 U.S. 268, 274 (1978); *see id.* at 274-75 (dictum); *Jones v. United States*, 168 A.3d 703, 723-26 (D.C. 2017), although in order to exclude “live-witness testimony . . . , a closer, more direct link between the illegality and that kind of testimony is required,” *id.* at 278; *see also id.* at 280, except perhaps “where the search was conducted by the police for the specific purpose of discovering potential witnesses,” *id.* at 276 n.4; *see also id.* at 279-80.

The possible chains of causal connection may be elaborate, *e.g., Smith v. United States*, 344 F.2d 545 (D.C. Cir. 1965); *United States v. Tane*, 329 F.2d 848 (2d Cir. 1964), and counsel should be alert to follow them out. “[T]he question” determining the excludability of any particular piece of evidence is said to be “whether the chain of causation proceeding from the unlawful conduct has become so attenuated or has been interrupted by some intervening circumstance so as to remove the ‘taint’ imposed upon that evidence by the original illegality.” *United States v. Crews*, 445 U.S. at 471. *Accord, Utah v. Strieff*, 579 U.S. at 237-38; *compare Dunaway v. New York*, 442 U.S. 200, 216-19 (1979), and *Taylor v. Alabama*, 457 U.S. 687 (1982), with *Rawlings v. Kentucky*, 448 U.S. 98, 106-10 (1980); and *see United States v. Ceccolini*, 435 U.S. at 276 (“we have declined to adopt a ‘*per se* or “but for” rule’ that would make inadmissible any evidence, whether tangible or live-witness testimony, which somehow came to light through a chain of causation that began with an illegal arrest”); *id.* at 273-74.

Categories of derivative evidence that have been held tainted by a respondent’s unconstitutional arrest or detention, so as to require their suppression include:

(a) *Any physical object or substance seized without a warrant at or after the time of arrest, the validity of whose seizure depends on the arrest.* *Beck v. Ohio*, 379 U.S. 89 (1964); *Sibron v. New York*, 392 U.S. 40, 62-66 (1968); *Whiteley v. Warden*, 401 U.S. 560 (1971). Searches incident to arrest (§ 23.08 *supra*) and “frisks” incident to a *Terry* stop (§ 23.10 *supra*) are unconstitutional if the arrest or stop is unconstitutional. *E.g., United States v. Di Re*, 332 U.S. 581 (1948); *Henry v. United States*, 361 U.S. 98 (1959). Similarly, if an unconstitutionally arrested or detained person attempts to drop or throw away objects or exposes them to the police when attempting to discard them, their observation and seizure are tainted by the arrest or detention. *Reid v. Georgia*, 448 U.S. 438 (1980) (per curiam); *see* § 23.13 *supra*. A respondent needs not have independent standing to complain about the search or seizure of an object if its obtention by the government was the consequence of an earlier search or seizure that s/he does have standing to contest. *Jones v. United States*, 168 A.3d 703, 722 (D.C. 2017) (“[w]hile the fruit of the poisonous tree doctrine applies only when the defendant has standing regarding the Fourth Amendment violation which constitutes the poisonous tree, the law imposes no separate standing requirement regarding the evidence which constitutes the fruit of that poisonous tree”); *Commonwealth v. Fredericq*, 482 Mass. 70, 78, 121 N.E.3d 166, 176 (2019) (“Evidence may be suppressed as fruit of the poisonous tree even if it is found in a place where the defendant has no

reasonable expectation of privacy. This principle is as old as the fruit of the poisonous tree doctrine itself.”).

(b) *Any observations made in the course of effecting the arrest – before, during, or after the arrest – whose validity depends on the arrest.* *Johnson v. United States*, 333 U.S. 10 (1948). Thus, when police enter a building pursuant to the “arrest entry” doctrine (§ 23.19 *supra*), unconstitutionality of the arrest or intended arrest will invalidate their observations of objects in “plain view” (§ 23.22(b) *supra*) within the building and their subsequent searches or seizures of those objects. *See Johnson v. United States*, 333 U.S. at 12-13, 17; *Massachusetts v. Painten*, 368 F.2d 142 (1st Cir. 1966), *cert. dismissed*, 389 U.S. 560 (1968).

(c) *Confessions or statements made in custody after the arrest or otherwise induced by pressures flowing from the arrest* “unless intervening events break the causal connection between the illegal arrest and the confession so that the confession is “sufficiently an act of free will to purge the primary taint.”” *Taylor v. Alabama*, 457 U.S. at 690. *See Wong Sun v. United States*, 371 U.S. at 484-88; *Brown v. Illinois*, 422 U.S. at 597-603; *Dunaway v. New York*, 442 U.S. at 216-19; *Lanier v. South Carolina*, 474 U.S. 25 (1985) (per curiam); *Kaupp v. Texas*, 538 U.S. 626, 632-33 (2003) (per curiam); *United States v. Bocharnikov*, 966 F.3d 1000, 1003, 1004 (9th Cir. 2020) (“Bocharnikov argues that his statements in March 2018 should be suppressed because they were tainted by the illegality of his detention and the seizure of the laser in July 2017. . . . ¶ . . . [E]ight months is a considerable time for the memory of the violation to dissipate in Bocharnikov’s mind. But one of the first things that Agent Hoover said to Bocharnikov was that he was there to ‘ask some follow-up questions.’ That phrase was innocent enough, identifying in conversational fashion why Agent Hoover wished to speak with Bocharnikov, but it also served to refer Bocharnikov back to his prior detention and confession. In our view, referring back to the initial illegality by using the ‘follow-up’ phrasing made the second encounter a de facto extension of the first incident, the passage of time notwithstanding.”); *State v. Shaw*, 237 N.J. 588, 611, 614-15, 207 A.3d 229, 244 (2019) (“The length of time between the unlawful arrest and the confession is the least determinative due to its ambiguity; a long detention could suggest increasing pressure or dissipation of the initial shock of arrest, and a short detention could indicate the confession was a product of the initial shock or that the confession was unrelated to the arrest. . . . The conditions of the unlawful detention should be considered because they ‘can be as important as the temporal proximity.’ . . . ¶ The presence of intervening circumstances that break the causal connection between the arrest and confession can be the most important consideration. . . . ¶ And, finally, the purposefulness and flagrancy of the police misconduct is particularly relevant in determining whether a confession was the fruit of an unlawful arrest and has justified suppression where the illegal conduct was ‘calculated to cause surprise, fright, and confusion.’”); *Commonwealth v. Goncalves-Mendez*, 484 Mass. 80, 138 N.E.3d 1038 (2020) (requiring the suppression of a driver’s admission that a gun found in an unreasonable inventory search of his vehicle was his); *Jones v. United States*, 168 A.3d 703, 722 (D.C. 2017) (requiring the suppression of an incriminating statement made by a defendant when accosted and arrested by police who had located him through the use of a cell-site simulator held to constitute a Fourth Amendment search unconstitutional for lack of a search warrant). *Compare*

Rawlings v. Kentucky, 448 U.S. 98, 106-10 (1980); and *cf. United States v. Ceccolini*, 435 U.S. at 273-79 (dictum). *But cf. New York v. Harris*, 495 U.S. 14, 21 (1990) (“where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the State’s use of a statement made by the defendant outside of his home, even though the statement is taken after an arrest made in the home in violation of *Payton* [*v. New York*, 445 U.S. 573 (1980)]”). *Compare State v. Luuertsema*, 262 Conn. 179, 192-97, 811 A.2d 223, 231-34 (2002), *partially overruled on an unrelated point*, *State v. Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008) (rejecting the *New York v. Harris* rule as a matter of state constitutional law); *People v. Harris*, 77 N.Y.2d 434, 568 N.Y.S.2d 702, 570 N.E.2d 1051 (1991) (same).

(d) *Any physical object or substance or observation obtained by a search or seizure whose validity depends upon consent, when the consent is given in custody after the arrest or otherwise induced by pressures flowing from the arrest.* Consent to a police search or seizure (§ 23.18 *supra*) is ineffective if given during an unlawful confinement, *Florida v. Bostick*, 501 U.S. 429, 433-34 (1991) (if Bostick’s consent to search had been obtained during a period of unlawful detention, the results of that search “must be suppressed as tainted fruit”); *Florida v. Royer*, 460 U.S. 491, 507-08 (1983) (plurality opinion); *id.* at 509 (concurring opinion of Justice Powell); *id.* (concurring opinion of Justice Brennan); *United States v. Lopez*, 907 F.3d 472, 487 (7th Cir. 2018) (“Since Lopez was being detained in violation of the Fourth Amendment, his consent to search the house cannot be deemed voluntary. No time had elapsed, there were no intervening circumstances, and the detention was not even arguably justified after the search of the garage turned up nothing incriminating. . . . The evidence obtained pursuant to the search of the house may not be admitted as evidence against Lopez.”); *Harris v. Klare*, 902 F.3d 630, 637 (6th Cir. 2018) (a 17-year-old girl’s consent to an intrusive pat-down search was ineffective because it was given during a period of detention that violated the Fourth Amendment; any reasonable suspicion that she was involved in drug activity was dispelled when a drug-sniffing dog failed to alert to controlled substances in the minivan in which the girl was riding: “Because a reasonable jury could credit . . . [the girl’s] deposition testimony that she was not escorted to the restroom until after the drug dog had investigated the minivan, a reasonable jury could conclude that the officers did not reasonably suspect drug activity at the time of her search and that therefore she was unlawfully detained, rendering her consent to the search invalid.”); *United States v. Murphy*, 703 F.3d 182, 190 (2d Cir. 2012); *Watson v. United States*, 249 F.2d 106 (D.C. Cir. 1957); *United States v. Klapholz*, 230 F.2d 494 (2d Cir. 1956), just as a confession or incriminating statement would be. See § 24.15 *infra*. *And see United States v. Serrano-Acevedo*, 892 F.3d. 454, 461 (1st Cir. 2018) (“Agent Rivera sought and received consent immediately after the SWAT team told him that they saw money in the house during . . . [a] “protective” sweep [that the court holds was a search unjustifiable under the Fourth Amendment] and once Diaz was already in handcuffs. The record provides no indication that Diaz would have consented to the search if not for the unconstitutional sweep and what it uncovered. In response to this strong factual connection, the government ‘makes no argument as to why [Diaz’s] consent was not the tainted fruit of the unlawful sweep.’”). *United States v. Shrum*, 908 F.3d 1219, 1233 (10th Cir. 2018), summarized in § 23.16 *supra* (“Where an unlawful seizure of a home precedes a ‘consensual’ search of the home and the discovery of incriminating evidence then used to procure

a search warrant, the Government's burden to prove the primary taint of the illegality has been purged, *i.e.*, that the search warrant and its 'fruits' are valid, is two-fold. . . . The Government must prove the voluntariness of a defendant's consent But in addition, the Government must demonstrate a break in the causal chain somewhere between the illegality and discovery of the incriminating evidence used to support the defendant's prosecution."'). Consent given by persons not themselves arrested but who share possession of property with an unconstitutionally arrested or detained individual and who have been informed of that person's arrest is also tainted. *United States v. Maez*, 872 F.2d 1444 (10th Cir. 1989); *United States v. Oaxaca*, 233 F.3d 1154 (9th Cir. 2000); and see *United States v. Cordero-Rosario*, 786 F.3d 64 (1st Cir. 2015).

(e) *Fingerprint exemplars taken after the arrest, Davis v. Mississippi*, 394 U.S. 721 (1969); *Hayes v. Florida*, 470 U.S. 811 (1985); *Bynum v. United States*, 262 F.2d 465 (D.C. Cir. 1958); see *Taylor v. Alabama*, 457 U.S. at 692-93 (dictum), and, by the same logic, any other evidence obtained through physical custody of the respondent – lineup identifications, body-test results, and so forth (see § 23.14 *supra*). *E.g.*, *United States v. Crews*, 445 U.S. 463, 472 (1980) (the Court assumes the Government is correct in conceding that pretrial photo and lineup identifications following an arrest made without probable cause must be suppressed); *Young v. Conway*, 698 F.3d 69, 84-85 (2d Cir. 2012) (state court order suppressing the complainant's lineup identification as the fruit of an unconstitutional arrest without probable cause also should have precluded an in-court identification by the complainant because "the State failed to meet its burden to prove an independent basis [for an in-court identification] by clear and convincing evidence"); *People v. Teresinki*, 30 Cal. 3d 822, 832, 180 Cal. Rptr. 617, 622-23, 640 P.3d 753, 758-59 (1982) (a pretrial identification by an eyewitness to a robbery based upon booking photos resulting from a vehicle stop and investigative detention made without reasonable suspicion must be suppressed); *Ferguson v. State*, 301 Md. 542, 547-53, 483 A.2d 1255, 1257-60 (1984) (an identification by a robbery victim in a holding cell showup following an arrest without probable cause must be suppressed); *State v. Le*, 103 Wash. App. 354, 360-67, 12 P.3d 653, 656-60 (2000) (an identification by a police officer who had witnessed a fleeing burglar and was called to view the defendant in a showup at the scene of the defendant's warrantless arrest in his home – a dwelling entry that violated the rule of *Payton v. New York* – should have been suppressed, although the trial court's failure to suppress it was harmless error because of other overwhelming evidence of guilt); 6 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 11.4(g) (5th ed. & Supp.); but see *United States v. Olivares-Rangel*, 458 F.3d 1104, 1112-16 (10th Cir. 2006) (holding that the exclusion of physical evidence obtained by routine processing of an arrestee following an unconstitutional arrest – in this case, an arrest tainted by an investigative stop without reasonable suspicion – is required only if the arrest was made for the purpose of obtaining that evidence). Different kinds of police lawlessness may entail different evidentiary consequences. Compare *People v. Gethers*, 86 N.Y.2d 159, 654 N.E.2d 102, 630 N.Y.S.2d 281 (1995) (a police-arranged identification following an arrest without probable cause must be excluded), with *People v. Jones*, 2 N.Y.3d 235, 810 N.E.2d 415, 778 N.Y.S.2d 133 (2004) (a police-arranged identification following a warrantless home arrest in violation of *Payton v. New York* ordinarily needs not be excluded).

(f) *Evidence obtained through observations made by means of an earlier unconstitutional search or seizure. See, e.g., Johnson v. United States*, 333 U.S. 10, 16 (1948); *Arizona v. Hicks*, 480 U.S. 321 (1987); , summarized in § 23.22(b) *supra*; *Collins v. Virginia*, 138 S. Ct. 1663 (2018); *United States v. Alexander*, 888 F.3d 628 (2d Cir. 2018); *United States v. Ngumezi*, 980 F.3d 1285 (9th Cir. 2020); *State v. Christian*, 310 Kan. 229, 445 P.3d 183 (2019); *State v. Bennett*, 430 A.2d 424 (R.I. 1981); *Commonwealth v. Martin*, 2021 PA Super 128, 253 A.3d 1225 (Pa. Super. 2021), summarized in § 23.16 *supra*; *cf. United States v. Williams*, 615 F.3d 657 (6th Cir. 2010) (following a *Terry* stop which is held illegal for lack of reasonable suspicion, the defendant acknowledged that there was an outstanding warrant for his arrest and that he was carrying a gun; the Court of Appeals affirms the district court’s suppression of the statement and gun); *United States v. Camacho*, 661 F.3d 718 (1st Cir. 2011) (following a *Terry* stop which is held unconstitutional for lack of reasonable suspicion, an officer patted down the defendant, felt a gun, and seized it; the Court of Appeals orders the gun suppressed as the tainted fruit of the invalid stop).

(g) *Evidence obtained through warrants, subpoenas and other legal process issued on the basis of information uncovered in an earlier unconstitutional search or seizure, and evidence obtained through investigations triggered by such information. See § 23.17(d) supra.*

(h) *Evidence derived from any of the foregoing sources. See, e.g., United States v. Bagley*, 877 F.3d 1151 (10th Cir. 2017); *United States v. Nora*, 765 F.3d 1049 (9th Cir. 2014); *Perez Cruz v. Barr*, 926 F.3d 1128, 1135-37, 1145-46 (9th Cir. 2019) (suppressing a birth certificate obtained from Mexican authorities by the Immigration and Customs Enforcement agency, which was led to make the request because an individual detained by ICE agents in violation of the Fourth Amendment had admitted to them that he was a Mexican national); *Commonwealth v. Norman*, 484 Mass. 330, 142 N.E.3d 1 (2020) (the defendant was required to submit to GPS tracking as a condition of pretrial release; after holding that this requirement violated the state constitutional guarantee against unreasonable searches and seizures, the Supreme Judicial Court excludes evidence that the GPS data placed the defendant at the scene of a later home invasion; evidence obtained under a search warrant issued for a building address on the basis of GPS data indicating that the defendant had been at that address before and after the home invasion; and evidence that one of the home-invasion victims identified the defendant in a photo array).

However, evidence obtained by the police following an unconstitutional search or seizure is not suppressible if the prosecution shows that (i) the police officers’ knowledge of the evidence and access to it derived from an “independent source” unconnected with the search or seizure, *Segura v. United States*, 468 U.S. 796 (1984); *Murray v. United States*, 487 U.S. 533 (1988); *United States v. Miller*, 68 F.4th 1065, 1070 (7th Cir. 2023) (“An exception to the exclusionary rule, the independent-source doctrine permits the admission of the fruit of an unlawful search if the government obtained the evidence ‘via an independent legal source, like a warrant.’ . . . Here the officers recovered the gun in the execution of a valid warrant to search the car. Under the independent-source doctrine, we ask two questions: (1) did the evidence obtained from the officer’s use of the key fob [which the court assumes *arguendo* constituted an unlawful

search] affect the judge’s decision to issue a warrant; and (2) did that evidence affect the officers’ decision to apply for a warrant?”); *State v. Wilson*, 2023 WL 3065140 (N.J. Super. 2023); and see *United States v. Saelee*, 51 F.4th 327, 335 (9th Cir. 2022) (“To establish that ‘evidence initially acquired unlawfully’ has later been independently obtained through an untainted source, the Government must show ‘that no information gained’ from the Fourth Amendment violations ‘affected either [1] the law enforcement officers’ decision to seek a warrant or [2] the magistrate’s decision to grant it.’” (quoting *Murray*, 487 U.S. at 539-40)), or (ii) the evidence “ultimately or inevitably would have been discovered by lawful means” in the course of events even if the search or seizure had not produced it, *Nix v. Williams*, 467 U.S. 431, 444 (1984) (a Sixth Amendment decision placed on grounds equally applicable to the Fourth Amendment exclusionary rule); but compare *Commonwealth v. Davis*, 656 Pa. 213, 217, 239-40, 220 A.3d 534, 537, 551 (2019), summarized in § 23.08(b) *supra*; or (iii) “the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that ‘the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained’” (*Utah v. Strieff*, 579 U.S. 232, 238 (2016)). This third exception to the exclusionary rule goes by the name of “the attenuation doctrine” (*id.*). Applying it in the *Strieff* case, the Court held that the “doctrine applies when an officer makes an unconstitutional investigatory stop; learns during that stop that the suspect is subject to a valid arrest warrant; and proceeds to arrest the suspect and seize incriminating evidence during a search incident to that arrest” (*id.* at 235). “The three factors articulated in *Brown v. Illinois*, 422 U.S. 590 (1975), guide our analysis. First, we look to the ‘temporal proximity’ between the unconstitutional conduct and the discovery of evidence to determine how closely the discovery of evidence followed the unconstitutional search. . . . Second, we consider ‘the presence of intervening circumstances.’ . . . Third, and ‘particularly’ significant, we examine ‘the purpose and flagrancy of the official misconduct.’” *Utah v. Strieff*, 579 U.S. at 239. The latter two considerations were determinative, the Court wrote, because (a) “the second factor, the presence of intervening circumstances, strongly favors the State”; “the warrant was valid, it predated . . . [the] investigation [which generated the *Terry* stop of Strieff], and it was entirely unconnected with the stop. And once . . . [the investigating officer] discovered the warrant, he had an obligation to arrest Strieff.” (*Utah v. Strieff*, 579 U.S. at 240); and (b) the investigating officer “was at most negligent . . . [i]n stopping Strieff”: he made “errors in judgment” but “there is no indication that this unlawful stop was part of any systemic or recurrent police misconduct. To the contrary, all the evidence suggests that the stop was an isolated instance of negligence that occurred in connection with a bona fide investigation of a suspected drug house”: “[I]t is especially significant that there is no evidence that . . . [this] illegal stop reflected flagrantly unlawful police misconduct.” (*Id.* at 241-42.) See also *United States v. Forjan*, 66 F.4th 739 (8th Cir. 2023); but compare *United States v. Baker*, 58 F.4th 1109 (9th Cir. 2023) (the suppositious “intervening event” must precede the search that produced the evidence sought to be suppressed); *United States v. Waide*, 60 F.4th 327 (6th Cir. 2023) (“[T]he Supreme Court has made no distinction between actual and threatened violations of the Fourth Amendment with regard to the suppression of unlawfully obtained evidence. . . . [T]he fruit-of-the-poisonous-tree doctrine may be used to suppress evidence derived from the threatened use of an unlawful warrant [here, a warrant lacking probable cause because based on triple hearsay]. *Id.*

at 338. There were no “intervening circumstances between the threatened execution of the unlawful . . . warrant and the discovery of the challenged evidence. The affidavits that sought the narcotics warrants authorizing searches of the two . . . apartments satisfied the probable-cause requirement only because of information that had been obtained by that threat. . . . [T]he primary basis for the narcotics warrants was Waide’s confession about the presence of marijuana in his apartment. ¶ But Waide confessed only because of the officials’ threat to execute the unlawful . . . warrant. When . . . [a fire department investigator] informed Waide that the officials intended to execute the . . . warrant, [a narcotics officer accompanying the investigator] affirmatively ‘interjected at one point and asked him – advised him, you know, if he had any drugs in the apartment, if that’s what he was worried about and so forth.’ And a confession ‘made in response to a question posed by [an officer] [] is not the kind of ‘intervening spontaneous action’ that typically supports attenuation.” *Id.* at 340.); *People v. McWilliams*, 14 Cal. 5th 429, 434-35, 524 P.3d 768, 770-71, 304 Cal. Rptr. 3d 779, 782 (2023) (“As a general rule, evidence seized as a result of an unlawful search or seizure is inadmissible against the defendant in a subsequent prosecution. But the law permits use of the evidence when the causal connection ‘between the lawless conduct of the police and the discovery of the challenged evidence has “become so attenuated as to dissipate the taint.”’ . . . Here, the Court of Appeal held that the officer’s discovery of McWilliams’s parole search condition sufficiently attenuated the connection between the unlawful detention and the contraband found in McWilliams’s vehicle. The Court of Appeal relied on cases allowing the admission of evidence seized incident to arrest on a valid warrant, where the warrant was discovered during an unlawful investigatory stop. (*Utah v. Strieff*) ¶ We now reverse. Unlike an arrest on an outstanding warrant, a parole search is not a ministerial act dictated by judicial mandate. *Strieff, supra*, . . .), but a matter of discretion. We conclude the officer’s discretionary decision to conduct the parole search did not sufficiently attenuate the connection between the officer’s initial unlawful decision to detain McWilliams and the discovery of contraband. The evidence therefore was not admissible against him.”); *United States v. Garcia*, 974 F.3d 1071 (9th Cir. 2020); *United States v. Walker*, 965 F.3d 180, 188-90 (2d Cir. 2020); *United States v. Gaines*, 918 F.3d 793 (10th Cir. 2019); *United States v. Shrum*, 908 F.3d 1219 (10th Cir. 2018).

§ 23.38 PROSECUTORIAL BURDEN OF DISPROVING “TAINT” OF UNLAWFUL SEARCH AND SEIZURE

When unconstitutional activity by the police or other government agents has been shown that may have led to evidence proffered by the prosecution, “[t]he government has the burden to show that the evidence is not “the fruit of the poisonous tree”” (*United States v. Ngumezi*, 980 F.3d 1285, 1291 (9th Cir. 2020)). See *Harrison v. United States*, 392 U.S. 219, 224-26 (1968); *Brown v. Illinois*, 422 U.S. 590, 604 (1975); *Dunaway v. New York*, 442 U.S. 200, 218 (1979); *Rawlings v. Kentucky*, 448 U.S. 98, 107, 110 (1980); *Taylor v. Alabama*, 457 U.S. 687, 690 (1982); *Kaupp v. Texas*, 538 U.S. 626, 633 (2003) (per curiam); *United States v. Suggs*, 998 F.3d 1125, 1142 (10th Cir. 2021); *United States v. Paroutian*, 299 F.2d 486 (2d Cir. 1962), *aff’d after remand*, 319 F.2d 661 (2d Cir. 1963); *United States v. Serrano-Acevedo*, 892 F.3d. 454, 459-60 (1st Cir. 2018); *cf. Alderman v. United States*, 394 U.S. 165, 183 (1969) (dictum); and compare

Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 286-87 (1977). This requirement is the point of entry of the “inevitable discovery” doctrine. “[T]he inevitable discovery doctrine allows for the admission of evidence that would have been discovered even without the unconstitutional source.” *United States v. Cooper*, 24 F.4th 1086 (6th Cir. 2022). “Our cases recognize two scenarios in which inevitable discovery operates. First, the doctrine applies when there is ‘an independent, untainted investigation’ that was bound to uncover the same evidence. . . . Inevitable discovery also applies when ‘other compelling facts’ demonstrate that discovery was inevitable. . . . A few paradigmatic examples of ‘other compelling facts’ demonstrate what we mean. The doctrine applies when the evidence would have been discovered pursuant to a ‘routine procedure,’ such as an airline’s standard policy of opening lost luggage. . . . And it has repeatedly been employed when, after seizing evidence during an illegal search, police obtain and execute a search warrant based on probable cause developed before the illegal search.” *Id.* at 1091. “That test necessarily involves some hypothesizing. We must ask: ‘[V]iewing affairs as they existed at the instant before the unlawful search, what would have happened had the unlawful search never occurred[?]’” *Id.* at 1092. “Because inevitable discovery asks what would have happened had the illegality not occurred, courts may rely on post-illegality events only if they would have occurred in that counterfactual scenario.” *Id.* at 1095. The *Cooper* court accordingly holds that the district judge erred by applying the inevitable discovery rule to justify the admission into evidence of a gun found in an unlawful search of the home of an arrested suspect’s girlfriend based upon her consent to search the house *after* the gun was found and seized, although that consent itself was found by the district judge to have been unaffected by the illegality of the search under the “attenuation” principle discussed in § 23.37 *supra*. “On remand the court should focus on the following questions: If the . . . [unlawful search] had never happened, would officers have sought . . . [the girlfriend’s] consent to search? Would . . . [the girlfriend] have given her consent in such a hypothetical world? And would the ensuing consent search have led to the gun? The inevitable discovery exception applies only if the answer to all three questions is ‘yes.’” 24 F.4th at 1096). *See also, e.g., United States v. Stokes*, 733 F.3d 438, 446 (2d Cir. 2013) (the trial court erred in finding that the government had satisfied its burden of proving “by a preponderance of the evidence that the guns and ammunition would inevitably have been discovered”: the trial court “failed to account for all of the demonstrated historical facts in the record, and in doing so, failed adequately to consider . . . plausible contingencies that might not have resulted in the guns’ discovery”); *State v. Banks-Harvey*, 2018-Ohio-201, 152 Ohio St. 3d 368, 375-76, 96 N.E.3d 262, 271-72 (2018) (“The state argues that the local police officer’s observation of an empty capsule on the vehicle’s floorboard provided probable cause to believe the vehicle contained contraband and, thus, to conduct a warrantless search of the vehicle under the automobile exception to the warrant requirement . . . ¶ It was only *after* the trooper removed the appellant’s purse from the vehicle [in violation of the Fourth Amendment], began to search it, and stated that he had found narcotics in it that the local officer approached the trooper and told him that he was ‘pretty sure’ he had observed a capsule on the vehicle’s floorboard. . . . ¶ Even assuming that the local officer’s observation of the capsule afforded him probable cause to search the vehicle, the inevitable-discovery exception would not apply if the local officer based his decision to search the vehicle on knowledge of the contraband found in the unlawful search of the appellant’s purse. . . . ¶ [Thus,] the . . . [record] fail[s] to demonstrate by a

preponderance of the evidence a reasonable probability that the local officer would inevitably have discovered the contraband in the appellant’s purse apart from the trooper’s removal and search of the purse in violation of the appellant’s Fourth Amendment rights.”); *Rodriguez v. State*, 187 So.3d 841, 849 (Fla. 2015) (“The question before this Court is whether the inevitable discovery rule requires the prosecution to demonstrate that the police were in the process of obtaining a warrant prior to the misconduct or whether the prosecution need only establish that a warrant could have been obtained with the information available prior to the misconduct.”); “Because the exclusionary rule works to deter police misconduct by ensuring that the prosecution is not in a better position as a result of the misconduct, the rule cannot be expanded to allow application where there is only probable cause and no pursuit of a warrant. If the prosecution were allowed to benefit in this way, police misconduct would be encouraged instead of deterred, and the rationale behind the exclusionary rule would be eviscerated.”); *Brown v. McClennen*, 239 Ariz. 521, 524-525, 373 P.3d 538, 542-543 (2016) (“The [inevitable discovery] exception does not turn on whether the evidence would have been discovered had the deputy acted lawfully in the first place. . . . Rather, the exception applies if the evidence would have been lawfully discovered despite the unlawful behavior and independent of it.”); *Gore v. United States*, 145 A.3d 540, 548-49 (D.C. 2016) (“The inevitable discovery doctrine shields illegally obtained evidence from the exclusionary rule if the government can show, by a preponderance of the evidence, that the evidence ‘ultimately or inevitably *would* have been discovered by lawful means.’ . . . ‘Would’ – not ‘could’ or ‘might’ – is the word the Supreme Court used in *Nix v. Williams*[, *infra*] and is, therefore, the ‘constitutional standard.’ . . . ¶ The requirements of the inevitable discovery doctrine were not met in this case. At the time the police officers illegally entered appellant’s room, and even when they seized Mr. Ward’s property from her bathroom, the ‘lawful process’ that supposedly would have ended in the inevitable discovery of that property there – the putative application for a search warrant for the room – had not begun. Indeed, it was never begun; we have only Officer Tobe’s statement that he ‘could’ have applied for a warrant in the event a hypothetical search of nearby dumpsters (which itself had not been commenced and was hardly certain to have been performed) was unproductive. Of course, whenever police officers disregard the warrant requirement, they ‘could’ have applied for a warrant instead. But in this case, there is no solid evidence that the officers *would* have done so.”); *United States v. Lauria*, 70 F.4th 106, 123 (2d Cir. 2023) (“[T]he inevitable discovery doctrine requires that the means by which the evidence would inevitably be discovered is independent from the means by which the evidence was actually – and unlawfully – discovered. Consistent with this principle, the investigation supporting a claim of inevitable discovery cannot itself have occurred only because the misconduct resulting in actual discovery was exposed. . . . ¶ This comports with the requirement for ‘a high level of confidence that each of the contingencies required’ for lawful inevitable discovery of the disputed evidence ‘would in fact have occurred.’ . . . (‘We have previously characterized the Government’s obligation as one of “certitude” that the evidence would have been discovered.’). In other words, the inevitable discovery doctrine does not apply simply because ‘a reasonable police officer *could have*’ lawfully discovered the evidence at issue; rather, it applies where the record establishes ‘with a sufficiently high degree of certainty that a reasonable police officer *would have*’ lawfully discovered the evidence regardless of the disclosure of any legal defect in the actual discovery of the evidence.”); *Jones v.*

United States, 168 A.3d 703, 722 (D.C. 2017) (“[T]he government is asking us to find inevitable discovery where the police had mutually exclusive options and, for whatever reason, chose the option that turned out to be unlawful. The inevitable-discovery doctrine does not apply in this type of situation. . . . ‘([T]he argument that ‘if we hadn’t done it wrong, we would have done it right’ is far from compelling.’”). Compare *United States v. Alexander*, 54 F.4th 162, 164-65 (3d Cir. 2022) (“The police entered the homes of both Alexander and his girlfriend, without search warrants. In law enforcement parlance, the officers at each location conducted a ‘hit-and-hold;’ that is, they entered and secured the premises before getting a warrant, a tactic sometimes used to respond to emergency circumstances. Once inside, and having secured the premises, the officers at Alexander’s home waited to conduct a search until a warrant for that house was issued. Those who entered Alexander’s girlfriend’s home likewise secured the premises and were in the process of applying for a warrant, which was all but certain to issue, when they received what they understood as consent to a search. Because the government has shown that the evidence from both locations would have been discovered in any event, we need not consider the lawfulness of the hit-and-holds or subsequent searches . . .”).

In *Nix v. Williams*, 467 U.S. 431, 444 n.5 (1984), the Supreme Court implied that “the usual burden of proof” on this issue is “a preponderance of evidence.” It may, however, be greater in situations in which the illegality is peculiarly likely to have tainted the sort of evidence that the prosecution is offering or when there is peculiar “difficulty in determining” questions of cause and effect because these involve “speculative elements.” *Id.* Both considerations were mentioned in *Nix* as distinguishing *United States v. Wade*, 388 U.S. 218, 240 (1967), which held that the prosecutor’s burden of proof in showing that in-court identification testimony is not tainted by the witness’s exposure to the accused in an earlier, unconstitutional identification confrontation is “clear and convincing evidence.” See also *Moore v. Illinois*, 434 U.S. 220, 225-26 (1977) (dictum). And see *Kastigar v. United States*, 406 U.S. 441, 461-62 (1972), holding that when an individual has given compelled testimony under an immunity grant, the prosecution bears “the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources.” See also *Braswell v. United States*, 487 U.S. 99, 117 (1988); *United States v. Hubbell*, 530 U.S. 27, 40 & n.22 (2000). Both *Nix* and *Wade* were Sixth Amendment right-to-counsel cases; *Kastigar* and *Braswell* and *Hubbell* were Fifth Amendment self-incrimination cases; the Supreme Court has not squarely addressed the prosecutor’s burden of proving its evidence untainted following a Fourth Amendment search-and-seizure violation. But there appears to be no reason to distinguish among kinds of constitutional violations when it comes to the standards for determining whether derivative evidence is “‘purged of the primary taint.’” *Johnson v. Louisiana*, 406 U.S. 356, 365 (1972). The *Nix* opinion derived its statement of the “usual burden of proof at suppression hearings” from Fourth and Fifth Amendment caselaw (see also *Colorado v. Connelly*, 479 U.S. 157, 167-69 (1986)); *Wade*’s companion case, *Gilbert v. California*, 388 U.S. 263, 272-73 (1967), expressly adopted principles of taint that were first announced in the Fourth Amendment context (see also *Moore v. Illinois*, 434 U.S. at 226, 231); the Court in *Harris v. New York*, 401 U.S. 222, 224-25 (1971), relied upon a Fourth Amendment case, *Walder v. United States*, 347 U.S. 62 (1954), when deciding the exclusionary consequences of a *Miranda* violation; and it later treated *Harris* as authoritative in another Fourth Amendment

case, *United States v. Havens*, 446 U.S. 620, 624-27 (1980). The exclusionary rules that enforce the Fourth, Fifth, and Sixth Amendments are said to have the same essential purpose: “to deter – to compel respect for the constitutional guaranty in the only effectively available way – by removing the incentive to disregard it,” *Elkins v. United States*, 364 U.S. 206, 217 (1960). See *Colorado v. Connelly*, 479 U.S. at 166; *Linkletter v. Walker*, 381 U.S. 618, 633, 636-37 (1965) (Fourth Amendment); *Stone v. Powell*, 428 U.S. 465, 484-88 (1976) (same); *Illinois v. Krull*, 480 U.S. 340, 347 (1987) (same); *Johnson v. New Jersey*, 384 U.S. 719, 729-31 (1966) (Fifth Amendment); *Stovall v. Denno*, 388 U.S. 293, 297 (1967) (Sixth Amendment); cf. *United States v. Payner*, 447 U.S. 727, 735-36 n.8 (1980); *United States v. Johnson*, 457 U.S. 537, 561 (1982). Rules for litigating issues of taint under all three Amendments are therefore presumptively similar. *But see Oregon v. Elstad*, 470 U.S. 298, 304-09 (1985).

State constitutional decisions may heighten the prosecution’s burden of dissipating taint. See, e.g., *State v. Rodrigues*, 128 Hawai’i 200, 211-15, 286 P.3d 809, 820-24 (2012) (discussing and applying a state constitutional rule that follows Justice Brennan’s dissent in *Nix v. Williams* by requiring that the prosecution ““satisfy a heightened burden of proof”” of “clear and convincing evidence” in order to rely on the inevitable discovery exception); and see generally § 7.09 *supra*.

§ 23.39 RELEVANCE OF THE “FLAGRANCY” OF THE POLICE CONDUCT IN ASCERTAINING “TAINT”

A passage in *Brown v. Illinois*, 422 U.S. 590, 604 (1975), indicates that “the purpose and flagrancy of . . . official misconduct are . . . relevant” in determining the scope of taint that flows from Fourth Amendment violations. See also *Dunaway v. New York*, 442 U.S. 200, 218 (1979); *Rawlings v. Kentucky*, 448 U.S. 98, 109-10 (1980); *Taylor v. Alabama*, 457 U.S. 687, 693 (1982); *Kaupp v. Texas*, 538 U.S. 626, 633 (2003) (per curiam).

The *Brown* case itself involved the question of the admissibility of a confession following an illegal arrest (as did *Dunaway*, *Rawlings*, *Taylor*, and *Kaupp*). The *Brown* majority opinion leaves unclear whether the “flagrancy” principle is limited to that issue or is applicable to determinations of taint in other contexts. Arguably, “flagrancy” is particularly relevant in connection with the inquiry whether confessions – “(verbal acts, as contrasted with physical evidence),” 422 U.S. at 600 – are tainted by unconstitutional police treatment of a suspect because the *degree* of official disregard of a suspect’s rights is particularly likely to affect the suspect’s choice to confess. See *Oregon v. Elstad*, 470 U.S. 298, 312 (1985). The *Brown* majority notes specifically that “[t]he manner in which Brown’s arrest was effected gives the appearance of having been calculated to cause surprise, fright, and confusion.” 422 U.S. at 605. If this is the rationale for considering “flagrancy” as a factor in the exclusionary calculus in confession cases, then “flagrancy” should also be considered in cases involving motions to suppress the tangible fruits of searches and seizures based on consent given after an unconstitutional arrest or stop, or in unconstitutional detention, or as a result of other unconstitutional police conduct that is potentially intimidating. And the courts do consistently consider the “flagrancy of . . . official

misconduct” in consent-search cases. *E.g.*, *United States v. Martinez*, 486 F.3d 855, 865 (5th Cir. 2007) (applying the flagrancy principle in determining to exclude firearms seized in a dwelling search based upon consent given following a stop made without reasonable suspicion); *United States v. Robeles-Ortega*, 348 F.3d 679, 684-85 (7th Cir. 2003) (applying the flagrancy principle in determining to exclude drugs seized in a dwelling search based upon consent given following a forcible, warrantless entry by five DEA agents with drawn guns); *United States v. Jones*, 234 F.3d 234, 243 (5th Cir. 2000) (applying the flagrancy principle in determining to exclude drugs seized in a vehicle search based on consent given after a vehicle stop was unconstitutionally prolonged); *State v. Munroe*, 2001 WI App 104, 244 Wis. 2d 1, 13-14, 630 N.W.2d 223, 228-29 (Wis. App. 2001) (applying the flagrancy principle in determining to exclude drugs seized in a motel-room search based on consent given after an entry to request identification was unconstitutionally prolonged).

But the “flagrancy” principle appears to apply more broadly than in cases involving intimidating police conduct that may influence a suspect’s will to confess or consent. The *Brown* majority supports its “flagrancy” statement with a footnote citing lower court decisions that involved both confessional and nonconfessional evidence (*Brown v. Illinois*, 422 U.S. at 604 n.9); and it purports, at the outset of its opinion, to be explicating the principles announced in *Wong Sun v. United States*, 371 U.S. 471 (1963), “to be applied where the issue is whether statements *and other evidence* obtained after an illegal arrest or search should be excluded” (422 U.S. at 597 (emphasis added)). A concurring opinion by Justice Powell explains the relevance of “flagrancy” by reference to a notion which has appeared in a few other Supreme Court decisions (*see, e.g., United States v. Peltier*, 422 U.S. 531, 542 (1975); *United States v. Janis*, 428 U.S. 433, 454 n.28, 458-59 n.35 (1976)), that the exclusionary rule “is most likely to be effective” in cases of willful or gross police violations of the Constitution (422 U.S. at 611); *see also United States v. Rush*, 808 F.3d 1007, 1010 (4th Cir. 2015), quoting *Davis v. United States*, 564 U.S. 229, 238 (2011). If *this* is the rationale for the “flagrancy” principle – or any part of its rationale – then the principle should apply to all exclusionary-rule issues. “In view of the deterrent purposes of the exclusionary rule[,] consideration of official motives may play some part in determining whether application of the exclusionary rule is appropriate. . . .” *Scott v. United States*, 436 U.S. 128, 135-36 (1978) (dictum). *See also id.* at 139 n.13; *United States v. Leon*, 468 U.S. 897, 911 (1984). Strong support for the proposition that “flagrancy” is relevant in this broader manner to the adjudication of issues bearing on the excludability of derivative evidence is provided by the Supreme Court’s opinion in *Utah v. Strieff*, 579 U.S. 232 (2016), summarized in § 23.37 subdivision (g) *supra*. As noted there, *Strieff* repeatedly refers to the “flagrancy of the official misconduct” as “‘particularly’ significant” (*id.* at 239) and “‘especially significant” (*id.* at 242) and explains that its consideration “reflects . . . [the exclusionary rule’s core deterrent] rationale by favoring exclusion only when the police misconduct is most in need of deterrence – that is, when it is purposeful or flagrant” (*id.* at 241). For additional cases that take account of the flagrancy of unconstitutional police conduct in applying the exclusionary rule to evidence other than confessions and the products of consent searches, *see, e.g., United States v. Torres*, 2022 WL 13983627 (6th Cir. 2022) (in a case involving the seizure of firearms, the court discusses the “blanket suppression” principle – *i.e.*, the suppression of evidence obtained through the portion

of a search which is constitutionally permissible when other aspects of the same search are flagrantly unconstitutional); *United States v. Garcia*, 974 F.3d 1071 (9th Cir. 2020) (requiring the exclusion of methamphetamine and other physical evidence obtained during the second police entry into a residence following their first illegal entry); *United States v. Fletcher*, 978 F.3d 1009 (6th Cir. 2020) (requiring the exclusion of pornographic photographs found in the search of a cell phone under a warrant issued on the basis of information obtained through an anterior unconstitutional warrantless search); *United States v. Walker*, 965 F.3d 180, 188-90 (2d Cir. 2020) (requiring the suppression of narcotics seized from the person of a defendant following a *Terry* stop held flagrantly unconstitutional for lack of reasonable suspicion); *People v. Sampson*, 86 Ill. App. 3d 687, 694, 408 N.E.2d 3, 9, 41 Ill. Dec. 657, 663 (1980) (requiring a hearing on a motion to suppress a lineup identification following an arrest without probable cause); *Ferguson v. State*, 301 Md. 542, 549-53, 483 A.2d 1255, 1258-60 (1984) (excluding a show-up identification following an arrest without probable cause); *Hill v. State*, 692 S.W.2d 716, 723 (Tex. Crim. App. 1985) (excluding a lineup identification following an arrest without probable cause or any legal authorization, made for the purpose of exhibiting the defendant in the lineup); *State v. Le*, 103 Wash. App. 354, 360-62, 12 P.3d 653, 657-58 (2000) (holding that a pretrial identification by a police officer who had witnessed a fleeing burglar and was called to view the defendant in a show-up at the scene of the defendant’s warrantless home arrest in violation of the rule of *Payton v. New York*, 445 U.S. 573 (1980), should have been suppressed, although its admission was harmless because of other overwhelming evidence of guilt); *Yoc-Us v. Attorney General*, 932 F.3d 98 (3d Cir. 2019) (applying the principle in alien removal proceedings in which the government relies on evidence obtained through an unconstitutional seizure made by a state officer); and *cf. United States v. Olivares-Rangel*, 458 F.3d 1104, 1112-16 (10th Cir. 2006) (holding that the exclusion of physical evidence obtained by routine processing of an arrestee following an unconstitutional arrest is required only if the arrest was made for the purpose of obtaining that evidence). *Compare Brendlin v. California*, 551 U.S. 249, 259-61, 263 (2007) (rejecting a lower court approach that would have permitted a police claim of lawful intent to *uphold* a seizure – by treating an officer’s assertion that s/he had no intent to seize an individual as a basis for finding that no such seizure took place – and instead announcing a rule that is designed to avert the “powerful incentive” that police have to engage in certain “kind[s] of” conduct the Court has previously found to be unlawful). *But cf. Whren v. United States*, 517 U.S. 806 (1996) (rejecting the argument that an objectively valid traffic stop is unconstitutional when it is used as a pretext for an impermissible investigative search, and stating more generally that, in making the initial determination whether police action is constitutional, the Supreme Court has “never held . . . that an officer’s motive invalidates objectively justifiable behavior under the Fourth Amendment” (*id.* at 812); thus, that “[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis” (*id.* at 813)); *Arkansas v. Sullivan*, 532 U.S. 769 (2001) (per curiam) (same); *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004) (“Our cases make clear that an arresting officer’s state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause.”); *United States v. Brooks*, 987 F.3d 593, 599 (6th Cir. 2021) (“Brooks says that the officers’ seatbelt ‘excuse’ did not permit the stop because it was ‘pretextual’ and the officers were really engaged in a fishing expedition to uncover crime in a high-crime area. He misunderstands black-letter law. Under the Fourth Amendment, officers may

stop a car as long as they objectively have probable cause that an occupant of the car has committed a traffic offense, even if they subjectively do so for a different reason. *Whren*, 517 U.S. at 811–16. ‘*Whren* puts an end to inquiries’ like Brooks’s ‘about an officer’s state of mind in conducting a traffic stop.’ . . . And while the Equal Protection Clause does bar officers from pretextually stopping a car based on such unlawful motivations as the occupants’ race, Brooks asserts no equal-protection claim here.”).

See § 22.05(a), third paragraph *supra* for a tactical *caveat* regarding defense recourse to “flagrancy” analysis.

§ 23.40 UNAVAILABILITY OF “TAINTED” EVIDENCE AS JUSTIFICATION FOR ANY SUBSEQUENT POLICE ACTION

Illegally obtained evidence or information that may not be used in court also may not be used to justify any subsequent police action. The fruits of an illegal search, for example, may not be used to supply the probable cause required for a later arrest, *Johnson v. United States*, 333 U.S. 10 (1948), or search, *see United States v. Paroutian*, 299 F.2d 486 (2d Cir. 1962), *aff’d after remand*, 319 F.2d 661 (2d Cir. 1963); *State v. Harris*, 369 Or. 628, 650, 509 P.3d 83, 96-97 (2022); *cf. New Jersey v. T.L.O.*, 469 U.S. 325, 344 (1985) (dictum), or for the issuance of a warrant, *United States v. Giordano*, 416 U.S. 505, 529-34 (1974); *Florida v. Jardines*, 569 U.S. 1 (2013); *Steagald v. United States*, 451 U.S. 204 (1981) (by implication); *Hair v. United States*, 289 F.2d 894 (D.C. Cir. 1961); *United States v. Lopez-Zuniga*, 909 F.3d 906, 910 (8th Cir. 2018); *United States v. Drakeford*, 992 F.3d 255 (4th Cir. 2021); *United States v. Shelton*, 997 F.3d 749 (7th Cir. 2021); *People v. Bonilla*, 2018 IL 122484, 120 N.E.3d 930 (2018); see also § 23.17(d) *supra*. When they are so used, the products of the second police action are tainted by the illegality of the first, *see Alderman v. United States*, 394 U.S. 165, 177 (1969) (dictum); *United States v. Karo*, 468 U.S. 705, 719 (1984) (dictum), unless the prosecution shows “sufficient untainted evidence” (that is, information not derived in any way from the first action) to justify the later one (*id.*). This evidence must be “genuinely independent of [the] . . . earlier, tainted [police action],” a condition that cannot be met if either (1) the police “decision to seek [a] . . . warrant [or conduct the second search] was prompted by what they had seen during the initial entry,” or (2) “information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant [or is necessary to justify the second search without a warrant, if it was so made].” *Murray v. United States*, 487 U.S. 533, 542 (1988). *Cf. United States v. Hubbell*, 530 U.S. 27 (2000).