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**DEVELOPMENTS IN FEDERAL  
SEARCH AND SEIZURE LAW**

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**September 2016 Update**

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## DEVELOPMENTS IN FEDERAL SEARCH AND SEIZURE LAW

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September 2016

### A. Introduction

The federal courts are the scene of an ongoing struggle between the government's need to secure evidence to convict law-breakers and the individual's expectations of privacy. For attorneys representing criminal defendants, court decisions often seem to overwhelmingly favor the interests of law enforcement. This outline sets out basic principles and counterpoints from which criminal defense lawyers can fashion arguments for a more expansive view of the Fourth Amendment's protections.

In federal court, in most cases, federal law provides the relevant authority in assessing the legality of the search. In federal prosecutions, even searches solely by state officers are judged only against federal standards. *United States v. Chavez-Vernaza*, 844 F.2d 1368, 1372-74 (9th Cir. 1987). There are exceptions regarding the standard for arrest and detention where, in the absence of an applicable federal statute, the law of the state where the warrantless arrest takes place determines its validity. *United States v. Shephard*, 21 F.3d 933, 936 (9th Cir. 1994); *United States v. Mota*, 982 F.2d 1384, 1387 (9th Cir. 1993). Favorable state court precedents construing the Fourth Amendment provide persuasive authority equal to federal interpretations. *See Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976).

### B. What Constitutes A Search?

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

**COUNTERPOINT** – Where a private party acts as an “instrument or agent” of the state in effecting a search, Fourth Amendment interests are implicated. *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971). In determining whether the actions of a private person are attributable to the government, the Ninth Circuit set out a two-part test: (1) whether the government knew of and acquiesced in the conduct; and (2) whether the party performing the search intended to assist law enforcement. *United States v. Walther*, 652 F.2d 788, 791-93 (9th Cir. 1981) (holding that an airport employee's actions were attributable to the government, even though the government had no knowledge of the particular search, because government officials previously paid the employee to search bags); *see also United*

*States v. Reed*, 15 F.3d 928, 930-33 (9th Cir. 1994) (holding the hotel manager acted as government agent where the manager reported a guest's suspicious activity to police and police were present while the manager searched the guest's room).

The Fourth Amendment is also triggered when government actors exceed the scope of the initial private search. *United States v. Jacobsen*, 466 U.S. 109, 104 (1984). Police exceed the scope of private searches when they examine a closed container not previously opened by the private party unless they are “substantially certain” of what is inside. *United States v. Runyan*, 275 F.3d 449, 463-64 (5th Cir. 2001) (analogizing digital media storage devices to containers and ruling police exceeded the scope of the private search by examining computer disks the private actor provided but had not opened); *see also United States v. D’Andrea*, 648 F.3d 1, 6-10 (1st Cir. 2011) (observing the government may exceed the scope of a private search of cell phone images stored online if agents are uncertain that contraband will be found). The Sixth Circuit indicated the Supreme Court’s holding regarding warrantless searches of cell phones may have made it more difficult for police to establish “substantial certainty” in subsequent searches of electronic devices given the extent of information housed on a computer. *United States v. Lichtenberger*, 786 F.3d 478, 488 (6th Cir. 2015) (noting “searches of physical spaces and the items they contain differ in significant ways from searches of complex electronic devices” and holding the police exceeded scope of the private search because they lacked “virtual certainty” that the files viewed were the same ones originally viewed by the private actor).

There appears to be a circuit split as to how far reconstructed searches of hard drives and computers may go, specifically whether a search unit is defined as a single file or as the entire electronic device. *Compare Ramn v. Atchison*, 689 F.3d 832, 836-38 (7th Cir. 2012) (defining the search unit as the entire electronic device thereby permitting police to view individual files stored on digital media devices where the private individual previously viewed other images on the same devices) *with Lichtenberger*, 786 F.3d at 488-89 (defining the search unit in terms of individual files and thereby prohibiting police from viewing files not previously viewed by the private actor); *see also United States v. Wolff*, No. 14-cr-638-JD, 2015 WL 5960117 (N.D. Cal. Oct. 14, 2015) (describing the split).

The Warren Court freed the scope of Fourth Amendment searches from the constraints of property rights by focusing on whether government action infringed upon a reasonable expectation of privacy in *Katz v. United States*, 389 U.S. 347, 351 (1967). A reasonable expectation of privacy turns on (1) whether the person had “an actual (subjective) expectation of privacy,” and (2) whether the individual’s subjective expectation of privacy is “one that society is prepared to recognize as ‘reasonable.’” *Id.* at 361 (Harlan, J., concurring).

**COUNTERPOINT** –The Supreme Court reaffirmed the pre-*Katz* rule that a physical trespass can constitute a search even when no privacy right is implicated. *Florida v. Jardines*, 133 S. Ct. 1409, 1417 (2013) (trespassing on curtilage to allow

police dog to investigate was a search regardless of whether defendant had a separate expectation of privacy); *United States v. Jones*, 132 S. Ct. 945, 949 (2012) (attaching GPS device to defendant's car, with the purpose of gathering information, constitutes a search); *accord United States v. Perea-Ray*, 680 F.3d 1179, 1184-86 (9th Cir. 2012) (trespass on defendant's carport, which the court held was curtilage, constituted a search); *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1029 (9th Cir. 2012) (upholding injunction prohibiting police from seizing possessions of homeless people that were left unattended in public because the Fourth Amendment protects "possessory and liberty interests even when privacy rights are not implicated"); *see also United States v. Thomas*, 726 F.3d 1086, 1093 (9th Cir. 2013) ("[I]t is conceivable that, by directing the drug dog to touch the truck and toolbox in order to gather sensory information about what was inside, the border patrol agent committed an unconstitutional trespass or physical intrusion.").

The government also conducts a search when it attaches a device to a person's body, without the person's consent, for the purposes of tracking the individual's movements. *Grady v. North Carolina*, 135 S. Ct. 1368, 1370 (2015) (remanding to state court to determine in the first instance whether North Carolina's program requiring certain sex offenders to wear global positioning systems devices is an "unreasonable" search). The Seventh Circuit, interpreting *Grady* as permitting satellite-based monitoring if it is reasonable, held that requiring certain sex offenders wear an anklet monitor for the rest their lives does not violate the Fourth Amendment. *Belleau v. Walls*, 811 F.3d 929, 937 (7th Cir. 2016).

What a person knowingly exposes to the public is not subject to Fourth Amendment protections. *See, e.g., California v. Greenwood*, 486 U.S. 35, 40-41 (1988) (individuals do not have a reasonable expectation of privacy in their garbage, which they placed in opaque bags outside their home for collection). In *United States v. Marr*, the court denied a defendant's motion to suppress warrantless audio recordings of conversations captured by microphones installed outside courthouse entrances, finding no reasonable expectation of privacy in communications "at or near a courthouse entrance." No. 14-cr-00580-PJH, 2016 WL 3951657, slip. op. at \*7 (N.D. Cal. 2016); *see also Kee v. City of Rowlett*, 247 F.3d 206, 213-15 (5th Cir. 2001) (identifying six factors courts consider in determining whether an individual may claim a reasonable expectation of privacy in their conversations).

**COUNTERPOINT** – Individuals retain a reasonable expectation of privacy in a wide variety of circumstances. For example, a person may have a reasonable expectation of privacy in a tent, whether in a public campground, *United States v. Gooch*, 6 F.3d 673, 676-79 (9th Cir. 1993), or on land where camping is not authorized, *United States v. Sandoval*, 200 F.3d 659, 660-61 (9th Cir. 2000). A government employee can have a reasonable expectation of privacy in his private office where the search went beyond reasonable work-related justifications. *Ortega v. O'Connor*, 146 F.3d 1149, 1157-59 (9th Cir. 1998); *see United States v. Taketa*, 923 F.2d 665, 672-73 (9th Cir. 1991). An attached garage receives the full degree of Fourth Amendment protection afforded to the rest of the home, even if the garage

door is left open. *United States v. Oaxaca*, 233 F.3d 1154, 1157 (9th Cir. 2000). An individual who is detained by the police has a reasonable expectation of privacy in conversations with his or her attorney in an interview room at the police station. *Gennusa v. Canova*, 748 F.3d 1103, 1117 (11th Cir. 2014). Individuals have a reasonable expectation of privacy in their living and sleeping quarters aboard cruise ships. *United States v. Whitted*, 541 F.3d 480, 489 (3rd Cir. 2008). A hotel guest had a reasonable expectation of privacy in his hotel room, and the luggage he left there, even after hotel staff discovered a firearm in his room and temporarily locked him out. *United States v. Young*, 573 F.3d 711, 720 (9th Cir. 2009); *but see Wells v. United States*, 739 F.3d 511 (10th Cir. 2014) (defendant police officer had no reasonable expectation of privacy that motel room he was searching was not subject to electronic surveillance). Exploratory surgery can violate privacy rights. *Sanchez v. Pereira-Castillo*, 590 F.3d 31, 44 (1st Cir. 2009) (citing *Winston v. Lee*, 470 U.S. 753 (1985)).

A person does not forfeit his or her expectation of privacy in a closed container merely because he or she stores it in a place not controlled exclusively by the container's owner. *See, e.g., United States v. Monghur*, 588 F.3d 975, 978 (9th Cir. 2009) (defendant did not waive his expectation of privacy in a closed container that was stored at another's apartment when he mentioned the container in telephone calls made from jail); *United States v. Davis*, 332 F.3d 1163, 1167-68 (9th Cir. 2003) (an occasional overnight houseguest had an expectation of privacy in a gym bag he left under his girlfriend's bed); *United States v. Fultz*, 146 F.3d 1102, 1105 (9th Cir. 1998) (finding defendant had a reasonable expectation of privacy in cardboard boxes permissively stored in another's garage).

With respect to cellular telephones, the Supreme Court unanimously held that warrantless searches of the contents of cell phones seized incident to arrest violate the Fourth Amendment. *Riley v. California*, 134 S. Ct. 2473, 2495 (2014) ("Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse."). Even probationers have a "substantial" privacy interest in the contents of their cell phones, which is not waived even where the probationer accepts as a condition of probation a provision authorizing the government to search his "property" at any time. *United States v. Lara*, 815 F.3d 605, 611-12 (9th Cir. 2016).

The Ninth Circuit noted that "electronic storage devices such as laptops 'contain the most intimate details of our lives: financial records, confidential business documents, medical records and private emails,' and held that '[t]hese records are expected to be kept private and this expectation is one that society is prepared to recognize as reasonable.'" *United States v. Cotterman*, 709 F.3d 952, 964 (9th Cir. 2013); *accord United States v. Galpin*, 720 F.3d 436, 446 (2d Cir. 2013) ("[A]dvances in technology and the centrality of computers in the lives of average people have rendered the computer hard drive akin to a residence in terms of the scope and quantity of private information it may contain."). Relying on *Riley* and

*Cotterman*, the Ninth Circuit recognized “a strong claim to a legitimate expectation of privacy in [one’s] personal email, given the private information it likely contains.” *In re Grand Jury Subpoena*, No. 15-35434, 2016 WL 3745541, at \*5 (9th Cir. July 13, 2016); accord *United States v. Warshak*, 631 F.3d 266, 288 (6th Cir. 2010) (recognizing a reasonable expectation of privacy in emails stored with commercial internet service providers).

The Court has traditionally held that individuals have no reasonable expectation of privacy over information they voluntarily shared with third parties. *Smith v. Maryland*, 442 U.S. 735, 745 (1979) (holding individuals have no reasonable expectation of privacy in the phone numbers they dial). The Third, Fourth, Fifth, Sixth and Eleventh Circuits have applied the rule in *Smith* to historical cell site location information (CSLI) and held individuals do not have a reasonable expectation of privacy in such records. *United States v. Graham*, No. 12-4659, 2016 WL 3068018, at \*3 (4th Cir. May 31, 2016) (en banc); *United States v. Carpenter*, 819 F.3d 880, 887-89 (6th Cir. 2016), rehearing en banc denied (June 29, 2016); *United States v. Davis*, 785 F.3d 498, 511-13 (11th Cir.) (en banc), cert. denied, *Davis v. United States* 136 S. Ct. 479 (2015); *In re Application of U.S. for Historical Cell Site Data*, 724 F.3d 600, 615 (5th Cir. 2013); *In re Application of the U.S. for an Order Directing a Provider of Electronic Communication Service to Disclose Records to the Government*, 620 F.3d 304, 312-13, (3rd Cir. 2010) (although holding CSLI does not implicate Fourth Amendment concerns doing so on narrower grounds than the other circuits, specifically noting the CSLI at issue was too imprecise and in too small of a quantity to intrude upon an expectation of privacy); see also *United States v. Lambis*, No. 15-cr-734, 2016 WL 3870940, at \*6 & n.2 (S.D.N.Y. July 12, 2016) (observing the Second Circuit has not yet decided the issue but in *United States v. Pascual*, 502 F.App’x 75, 80 (2d Cir. 2012) (unpub.), the court suggested that if it was presented with the question it would find no privacy interest).<sup>1</sup>

**COUNTERPOINT** – In her concurring opinion in *Jones*, Justice Sotomayor suggested it may be time to reconsider the applicability of the third-party doctrine to digital information. 132 S. Ct. at 957; see also *Riley*, 134 S. Ct. 2490 (favorably citing Justice Sotomayor’s *Jones* concurrence). Although the Ninth

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<sup>1</sup> CSLI are records of a phone’s location based on the cell tower that was used to route an individual’s calls or messages, although many newer phones automatically generate this data when they are turned on, even if they are not in use. CSLI is often referred to either as “historical,” which can be used to determine where a phone was at a given point in time, or “prospective” or “real time,” which reveals a phone’s present location. Under the Stored Communications Act, 18 U.S.C. § 2703, the government may obtain CSLI records from a phone company through a § 2703(d) order upon a showing of reasonable suspicion. 18 U.S.C. § 2703(c), (d) (2012) (defining the requisite standard of cause); *In re U.S. for an Order Pursuant to 18 U.S.C. Section 2703(d)*, 707 F.3d 283, 287 (4th Cir. 2013) (describing it as “essentially a reasonable suspicion standard”). CSLI is different from a phone’s GPS location, which is generated by triangulating a cell phone’s position by reference to multiple network satellites. Unlike CSLI, this information is generated at the specific command of the cell phone operator, an action known as “pinging,” and can provide a more precise location than CSLI.



Circuit has not addressed the issue, courts in the Northern District of California have ruled the third-party doctrine does not apply to historical CSLI, finding it more akin to GPS tracking than third-party business records. *See, e.g., In re Application for Telephone Information Needed for a Criminal Investigation*, 119 F. Supp. 3d 1011, 1031 (N.D. Cal. July 29, 2015) (distinguish historical CSLI generated through user activity from continuously operating apps and automatic pinging common in modern cell phones); *United States v. Alvarez*, No. 14-CR-00120-EMC, 2016 WL 3610581, at \*4 (N.D. Cal. June 10, 2016); *United States v. Williams*, No. 13-CR-00764-WHO-1, 2016 WL 492934, at \*1 (N.D. Cal. Feb. 9, 2016); *but see United States v. Dorsey*, No. 14-cr-328-CAS, 2015 WL 847395, at \*8 (C.D. Cal. Feb. 23, 2015) (no reasonable expectation of privacy in historical CSLI based on the third-party doctrine).

With respect to “real-time” or “prospective” location data, the majority of federal courts to have considered the issue conclude that, unlike historical CSLI, such information may only be obtained pursuant to a warrant supported by probable cause because it effectively converts the cell phone into a tracking device. *See, e.g., United States v. Cooper*, Misc. No. 06-0186, 187, 188, 2015 WL 881578, at \*8 (N.D. Cal. Mar. 2, 2015 (reasonable expectation of privacy in prospective cell phone location information); *United States v. Espudo*, 954 F. Supp. 2d 1029, 1035 (S.D. Cal. 2013) (same, concluding real-time cell phone data not business records under the Stored Communication Act); *In re App. of U.S. for an Order Authorizing Disclosure of Location Information*, 849 F.Supp.2d 526, 539–42 (D. Md. 2011) (reasonable expectation of privacy in location and movements revealed by cell phone data); *In re App. of the U.S. for an Order Authorizing the Disclosure of Prospective Cell Site Info.*, No. 06-MISC-004, 2006 WL 2871743, at \*5 (E.D. Wis. Oct. 6, 2006) (same); *In re App. of the U.S. for an Order Authorizing the Monitoring of Geolocation and Cell Site Data for a Sprint Spectrum Cell Phone No. ESN*, 2006 WL 6217584, at \*4 (D.D.C. Aug. 25, 2006) (same: probable cause required for cell-phone tracking data warrant); *In re App. of the U.S. for an Order (1) Authorizing the Use of a Pen Register and a Trap and Trace Device*, 396 F.Supp.2d 294 (E.D.N.Y.2005) (same); *see also In re Application of the U.S. for Historical Cell Site Data*, 724 F.3d 600, 615 (5th Cir. 2013) (expressly limiting its holding to historical data). *But see United States v. Skinner*, 690 F.3d 772, 777 (6th Cir. 2012) (finding no meaningful distinction between historical and prospective CSLI and thus holding no reasonable expectation of privacy in either); *In re Application of the U.S. for an Order for Authorization to Obtain Location Data Concerning an AT&T Cellular Telephone*, 102 F. Supp. 3d 884, 889 (N.D. Miss. 2015) (same); *In re Smartphone Geolocation Data Application*, 977 F. Supp. 2d 129, 147 (E.D.N.Y. May 1, 2013) (same). Some district courts have found no expectation of privacy in prospective CSLI under the instantaneous storage theory, according to which prospective data instantly becomes historical data upon its transmission to a cellular provider’s servers. *See e.g., United States v. Booker*, 2013 WL 2903562, \*7 (N.D. Ga. June 13, 2013).

Although later reversed on standing grounds, the D.C. Circuit court relied on *Jones* to enjoin the NSA's bulk collection of all telephone numbers dialed finding the third-party doctrine did not apply. *Klayman v. Obama*, CV 13-0881 (RJL), 2013 WL 6598728 (D.D.C. Dec. 16, 2013) ("bulk telephony metadata collection and analysis almost certainly does violate a reasonable expectation of privacy"), *vacated and remanded*, *Obama v. Klayman*, 800 F.3d 559 (D.C. Cir. 2015). In *ACLU v. Clapper*, 785 F.3d 787, 821 (2d Cir. 2015) (*Clapper I*), the court concluded that a provision of the USA PATRIOT Act did not authorize the National Security Agency's since-curtailed bulk telephone metadata collection program and, in dicta, discussed the Fourth Amendment concerns such a program implicates. *See also ACLU v. Clapper*, 804 F.3d 617, 625 (2d Cir.2015) (*Clapper II*) (describing the constitutional issue raised by the bulk collection program as "one of the most difficult issues of modern jurisprudence," and one "on which the Supreme Court's jurisprudence is in some turmoil.").

The government also relies on *Smith* as establishing lack of privacy expectations in shared internet networks because users may realize that their files and internet activity are available to others when they connect to a shared network. The Third Circuit held an individual gave up the expectation of privacy when he used a neighbor's unsecured wireless router without permission, but the court cautioned against applying its holding broadly to any case where information is "routed through third-party equipment". *United States v. Stanley*, 753 F.3d 114, 124 (3d Cir. 2014).

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

The Fourth Amendment protects the curtilage around a dwelling but not the open fields surrounding it. *Oliver v. United States*, 466 U.S. 170, 176-77 (1984) (officers not limited by Fourth Amendment from invading open fields surrounding dwelling despite fences and no trespassing signs); *see also United States v. Barajas-Avalos*, 377 F.3d 1040,1055-56 (9th Cir. 2004) (officer's visual observation made from an open field into an unoccupied travel trailer did not constitute a search). In *United States v. Dunn*, 480 U.S. 294, 304-05 (1987), the Court identified four factors to be used in determining whether an area is curtilage: proximity to the home, existence of enclosures, manner in which the area is used, and steps an individual has taken to shield the area from public view. *See generally United States v. Johnson*, 256 F.3d 895 (9th Cir. 2001) (en banc) (noting curtilage determinations are fact-intensive inquiries and the disagreement among the circuits whether curtilage determinations should be reviewed de novo or under the clearly erroneous standard).

**COUNTERPOINT** – Courts have found areas in near proximity to homes to be within the curtilage. *See, e.g., United States v. Perea-Ray*, 680 F.3d 1179 (9th Cir. 2012) (carport part of curtilage); *United States v. Struckman*, 603 F.3d 731, 739 (9th Cir. 2010) (suspect’s backyard was curtilage); *United States v. Depew*, 8 F.3d 1424, 1426-28 (9th Cir. 1993) (driveway 50-60 feet from the house was curtilage because of the defendant’s efforts to maintain privacy); *Wattenburg v. United States*, 388 F.2d 853, 857 (9th Cir. 1968) (a woodpile 20-35 feet from a house was within the curtilage). The end of a driveway, which was by a utility pole and 82 feet from the dwelling, was deemed curtilage because the area showed evidence of personal use and was naturally enclosed. *United States v. Diehl*, 276 F.3d 32, 38-40 (1st Cir. 2002). The area inside a six-foot high chain-link fence, set 100 yards away from and completely surrounding defendant’s mobile home, was within the curtilage. *Ysasi v. Brown*, 3 F. Supp. 1088, 1152 (D.N.M. 2014).

The Court has defined “search” in the context of technologically-assisted intrusions to include the use of infra-red thermal imaging devices on homes to assist in detecting marijuana grow operations. *United States v. Kyllo*, 533 U.S. 27, 34-35 (2001). In *Ontario v. Quon*, 560 U.S. 746, 764-65 (2010), the Court appeared willing to consider review of text messages as a search but noted that public employees may have a diminished expectation of privacy in mobile communication devices issued by their employers. The Court approved surveillance by electronic beepers as implicating no Fourth Amendment interests except when used in private residences. *United States v. Karo*, 468 U.S. 705, 718 (1984) (beeper in private residence); *United States v. Knotts*, 460 U.S. 276 (1983) (beeper use limited to public space).

**COUNTERPOINT** – “*Knotts* noted the ‘limited use which the government made of the signals from this particular beeper,’ 460 U.S., at 284, and “reserved the question whether ‘different constitutional principles may be applicable’ to ‘dragnet-type law enforcement practices.’” *Jones*, 132 S. Ct. at 952 n.6 (2012). In *Jones*, the Supreme Court held that *Karo* and *Knotts* do not authorize the government to install a GPS tracker on a defendant’s car without a warrant. 132 S. Ct. at 951-52 (distinguishing both cases on grounds that the search in *Jones* was an illegal physical trespass whereas in *Karo* and *Knotts* the beepers were attached with the owner’s consent). The *Jones* Court did not address whether “*Knotts* would be relevant” to “the argument that what would otherwise be an unconstitutional search is not such where it produces only public information[.]” but it noted that it knew “of no case that would support it.” *Id.* at 952.

In their concurring opinions, Justice Alito and Justice Sotomayor distinguished the “relatively short-term monitoring” in *Knotts*, which did not implicate privacy concerns, with the “longer term GPS monitoring” in *Jones*, which the concurrences agreed “impinges on expectations of privacy.” *Id.* at 955, 964. Justice Sotomayor further noted that even in cases “involving short-term monitoring, some unique attributes of GPS surveillance relevant to the *Katz* analysis will require particular attention.” *Id.* at 955.

The Southern District of New York is the first federal court to suppress evidence obtained through the warrantless use of a cell-site simulator because the use of such a device constitutes a Fourth Amendment search. *United States v. Lambis*, No. 15-cr-734, 2016 WL 3870940, at \*5 (S.D.N.Y. July 12, 2016) (observing a warrant to obtain CSLI does not extend to use of the more precise cell-site simulator).<sup>2</sup> Several district courts have suggested the use of cell-site simulators may be sufficiently intrusive to constitute a “search” for Fourth Amendment purposes. *See e.g., In re Application of the U.S. for an Order Authorizing the Installation and Use of a Pen Register and Trap and Trace Device*, 890 F. Supp. 2d 747 (S.D. Texas June 2, 2012) (denying government’s application to authorize use of a Stingray device under the Pen/Trap Statute and suggesting a warrant would be necessary instead); *United States v. Rigmaiden*, 844 F. Supp. 2d 982 (D. Ariz. 2012) (noting the government conceded that the proper analysis should be pursuant to Fourth Amendment search and seizure jurisprudence). One court expressed concern over the cell-site simulator’s collection of innocent third parties’ information. *In the Matter of the Application of the U.S. for an Order Relating to Telephones*, No. 15 M 0021, 2015 WL 6871289, at \*3-4 (N.D. Ill Nov. 9, 2015) (observing “there is no dispute that a warrant meeting the probable cause standard is necessary to use a cell-site simulator” and imposing three requirements for the use of cell-site simulators). On September 3, 2015, the U.S. Department of Justice issued new guidelines requiring the FBI, the Marshals Service, and the DEA agents, but not Homeland Security or state and local law enforcement, to obtain a search warrant before using IMSI devices such as Stingrays. *See* Press Release, U.S. Dep’t of Justice, Justice Department Announces Enhanced Policy for Use of Cell-Site Simulators (Sept. 3, 2015).<sup>3</sup> On October 19, 2015, the Department of Homeland Security promulgated similar guidelines. *See* Policy Directive 047-02, Department Policy Regarding the Use of Cell-Site Simulator Technology, Oct. 19, 2015.<sup>4</sup>

In *California v. Ciraolo*, the Court ruled the defendant lacked a reasonable expectation of privacy from aerial surveillance 1,000 feet above his fenced-in backyard. 476 U.S. 207, 213 (1986); *see also Florida v. Riley*, 488 U.S. 445, 450 (1989) (surveillance of backyard by helicopter hovering at 400 feet was not a search). In *Dow Chemical Co. v. United States*, 476 U.S. 227, 238-

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<sup>2</sup> A cell-site simulator, sometimes referred to as an international mobile subscriber identity (IMSI) catcher, or by the brand names Stingrays, Hailstorm, Triggerfish or Kingfish, is a briefcase-sized electronic device used to pinpoint a cellphone’s location. It works by mimicking a cell tower, forcing mobile phones in the vicinity to transmit “pings” to the simulator, the strength of which is used to determine a phone’s precise location. The cell-site simulator also captures a phone’s identifying information, such as its electronic serial number, mobile subscriber identification, and telephone number. Law enforcement, therefore, can use a cell-site simulator to locate a suspect whose telephone number, for example, is known, or use the device to reveal a suspect’s number, where only the suspect’s location is known.

<sup>3</sup> Available at <http://www.justice.gov/opa/pr/justice-department-announces-enhanced-policy-use-cell-site-simulators>.

<sup>4</sup> Available at <https://www.dhs.gov/sites/default/files/publications/Department%20Policy%20Regarding%20the%20Use%20of%20Cell-Site%20Simulator%20Technology.pdf>.

39 (1986), the Court approved aerial surveillance of commercial property with cameras that magnified sufficiently to see objects one-half inch in diameter. The Court found the 2,000-acre industrial complex more comparable to an open field than curtilage and, as such, held that “it is open to the view and observation of persons in aircraft lawfully in the public airspace above or sufficiently near the area for the reach of cameras.” *Id.* at 239. Relying on *Ciraolo*, the Sixth Circuit held the government does not violate an individual’s reasonable expectation of privacy when, without a warrant, it attached a video camera to a utility pole, directed the camera at an individual’s home, and let it run for ten weeks, because the camera captured the same views enjoyed by passersby. *United States v. Houston*, 813 F.3d 282, 287-88 (6th Cir. 2016); accord *United States v. Vankesteren*, 553 F.3d 286, 291 (4th Cir. 2009) (pole camera installed to record defendant’s open field does not implicate Fourth Amendment).

**COUNTERPOINT** – Visual observations into the interior of a home may constitute a search. *LaDuke v. Nelson*, 762 F.2d 1318, 1332 n.19 (9th Cir.), amended by 796 F.2d 309 (1986) (shining a flashlight into the windows of units temporarily housing farm workers constituted a search); see also *United States v. Duran-Orozco*, 192 F.3d 1277, 1280-81 (9th Cir. 1999) (peering into the back window of a home using a flashlight constituted a search). Where informants rented a hotel room for a drug transaction, then continued video surveillance in the room after the informants left, the police violated the Fourth Amendment given that “[h]idden video surveillance is one of the most intrusive investigative mechanisms available to law enforcement.” *United States v. Nerber*, 222 F.3d 597, 603 (9th Cir. 2000). Requiring an apartment resident to open his door so that officers could see him constituted a search where the officers gained visual access to the dwelling, even though they had not physically entered it. *United States v. Mowatt*, 513 F.3d 395, 400 (4th Cir. 2008), abrogated on other grounds by *Kentucky v. King*, 563 U.S. 452 (2011).

Dog sniffs present a sui generis search problem. In *Illinois v. Caballes*, 543 U.S. 405, 409 (2005), the Supreme Court held that use of a narcotics-detection dog around a lawfully stopped car does not implicate the Fourth Amendment because a dog only reveals the presence of contraband. See also *United States v. Place*, 462 U.S. 696, 707 (1983) (upholding the use of dogs to sniff luggage for narcotics but holding that the search was unreasonable because it took 90-minutes to complete); *United States v. Pierce*, 622 F.3d 209, 213-14 (3d Cir. 2010) (joining the Eighth and Tenth Circuits in holding a narcotics dog may enter and sniff the interior of a car if the dog acts instinctively and without law enforcement facilitation); *United States v. Lingenfelter*, 997 F.2d 632, 638 (9th Cir. 1993) (permitting a dog sniff of a package located in a sealed commercial warehouse because there is no legitimate expectation of privacy in contraband). A dog sniff of a suspect’s car is proper when the car is parked in the suspect’s driveway because the driveway is not part of the curtilage. *United States v. Beene*, 818 F. 3d 157, 164-66 (5th Cir. 2016) (noting that if the driveway was part of the curtilage, then the analysis would be controlled by *Jardines*).

**COUNTERPOINT** – Police cannot extend an otherwise-completed traffic stop to conduct a dog sniff absent reasonable suspicion. *Rodriguez v. United States*, 135 S. Ct. 1609, 1616-17 (2015); accord *United States v. Evans*, 786 F.3d 779, 788

9th Cir. 2015) (applying *Rodriguez* to find police use of drug dogs impermissibly extended a traffic stop). The Fourth Amendment is implicated when police use a dog sniff at the front door of a house as that area is protected curtilage. *Florida v. Jardines*, 133 S. Ct. 1409, 1417-18 (2013) (focusing on the physical intrusion and noting that the search method is irrelevant when the police's purpose is investigatory). The Seventh Circuit extended the rule announced in *Jardines* to apartment hallways, holding police officers engaged in a warrantless search in violation of the Fourth Amendment when they walked drug-sniffing dogs to the door of the suspect's apartment to search for illegal drugs. *United States v. Whitaker*, 820 F.3d 849, 852-54 (7th Cir. 2016); see also *United States v. Thomas*, 757 F.2d 1359, 1367 (2d Cir. 1985) (holding use of a marijuana-sniffing dog outside an apartment constitutes a search). The Eighth Circuit found that under *Jardines*, an unlawful search occurs where a drug dog enters the curtilage of a suspect's home off the leash, while the handling officer remains in a lawful location. *United States v. Burston*, 806 F.3d 1123, 1127-28 (8th Cir. 2015). A dog sniff that results in "casting" rather than an "alert" is insufficient to justify a search. *United States v. Rivas*, 157 F.3d 364, 367-68 (5th Cir. 1998).

In *United States v. Jacobsen*, 466 U.S. 109, 122-24 (1984), the Court ruled that no search occurred where federal officers conducted a field test of white powder for the purpose of determining whether it was cocaine.

**COUNTERPOINT** – In *United States v. Mulder* the court held a search occurred where, several days after a private individual seized defendant's pills and turned them over to the government, federal officials conducted a series of chemical tests to determine the tablets' molecular structure. 808 F.2d 1346, 1348 (9th Cir. 1987) (distinguishing *Jacobsen* on ground that "the greater sophistication of these tests... could have revealed an arguably private fact."). The *Jacobsen* rationale does not apply to closed containers such as backpacks and suitcases. *United States v. Young*, 573 F.3d 711, 720-21 (9th Cir. 2009).

The Supreme Court delivered a singularly favorable decision on the definition of a search in *Arizona v. Hicks*, 480 U.S. 321 (1987). In *Hicks*, the police were lawfully present in the defendant's apartment and saw electronic equipment, which an officer suspected was stolen. 480 U.S. at 323. The officer moved a turntable to read and record serial numbers that established the equipment was stolen. The Court held that even the minimal movement of the equipment constituted a search beyond plain view and, in the absence of probable cause, the evidence must be suppressed. *Hicks*, 480 U.S. at 326-28.

**COUNTERPOINT** – The Ninth Circuit relied on *Hicks* in rejecting the government's contention that a limited intrusion at the threshold of a dwelling could be justified by less than probable cause in *United States v. Winsor*, 846 F.2d 1569, 1574 (9th Cir. 1988). See *United States v. Conner*, 127 F.3d 663, 666 (8th Cir. 1997). In *Bond v. United States*, 529 U.S. 334, 337-38 (2000), the Court held an officer's physical manipulation of the outside of luggage stowed on a bus was a

search that violated the Fourth Amendment. The removal of a car cover to reveal the Vehicle Identification Number constituted a search in *United States v. \$277,000.00*, 941 F.2d 898, 902 (9th Cir. 1991). A police officer's partial unzipping of a suspect's jacket, which exposed a sweatshirt underneath, was a search that intruded on the suspect's reasonable expectation of privacy. *United States v. Askew*, 529 F.3d 1119, 1129 (D.C. Cir. 2008).

### C. What Constitutes A Seizure?

An increasingly restrictive definition of what constitutes a seizure has expanded the range of intrusions free from Fourth Amendment limitations. A "seizure" of property occurs when "there is some meaningful interference with an individual's possessory interests in that property." *United States v. Karo*, 468 U.S. 705, 712 (1989). "An interference is not "meaningful" when it is short in duration and non-invasive." *United States v. Roberts*, 603 F. App'x 426, 436 (6th Cir. 2015) (citations omitted) (holding no seizure of hotel key cards occurred when investigator reached into defendant's back pocket to remove his wallet and the cards came out with it); *accord United States v. Mastronardo*, 987 F. Supp. 2d 569, 576 (E.D. Pa. 2013) (photographing documents is not a seizure because it does not meaningfully interfere with the owner's possessory interest). Law enforcement detention of property entrusted to a third-party common carrier constitutes a seizure only when the detention results in significant delay or deprives the carrier of its custody. *United States v. Alvarez-Manzo*, 570 F.3d 1070, 1075 (8th Cir. 2009).

**COUNTERPOINT** – "[A] seizure lawful at its inception can nevertheless violate the Fourth Amendment because its manner of execution unreasonably infringes possessory interests," for example by retaining property for an unreasonably long time. *United States v. Jacobsen*, 466 U.S. 109, 124 & n.25 (1984) (citation omitted). An en banc Second Circuit reversed a panel decision holding that the government cannot indefinitely retain, and subsequently search, copies of non-responsive electronic files. *United States v. Ganais*, No. 12-240-cr, 2016 WL 3031285, at \*9 (2d. Cir. May 27, 2016) (en banc) (the full court held it did not need to reach the Fourth Amendment issue because the case could be decided on other grounds). A 30-day delay in returning a vehicle to its owner turned what was originally a lawful seizure into an unlawful one. *Sandoval v. City of Sonoma*, 72 F. Supp. 3d 997, 1010 (N.D. Cal. 2014). The forceful removal of individuals' mobile home from a mobile-home park constitutes a seizure, even if the owner's privacy interest is not invaded. *Sodal v. Cook County*, 506 U.S. 56, 72 (1992); *see also United States v. Miller*, 799 F.3d 1097, 1102 (D.C. Cir. 2015) ("It is well established that the reasonableness of a seizure turns on the nature and extent of interference with possessory, rather than privacy, interests."). A police officer's removal of a bag from a bus cargo hold to its passenger seating area constituted a seizure in *United States v. Alvarez-Manzo*, 570 F.3d 1070, 1076-77 (8th Cir. 2009).

A person is seized within the meaning of the Fourth Amendment "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 545 (1980) (no seizure of airline

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

**COUNTERPOINT** – Absent probable cause or judicial authorization, the involuntary removal of a suspect from his home to a police station for investigative purposes constitutes an unreasonable seizure. *Kaupp v. Texas*, 538 U.S. 626, 629-31 (2003). The defendant was seized when a sheriff pulled into and blocked his driveway. *United States v. Kerr*, 817 F.2d 1384, 1386-87 (9th Cir. 1987). A seizure occurs when, with his hand on his gun, a police officer retains a motorist's license and initiates further inquiry. *United States v. Chan-Jimenez*, 125 F.3d 1324, 1326 (9th Cir. 1997). In *United States v. Jordan*, 951 F.2d 1278, 1283 (D.C. Cir. 1991), the court indicated that if the district court found, on remand, that the police retained defendant's driver license during questioning, a seizure occurred. An unlawful seizure occurred when employees of a suspected corporation were held incommunicado without probable cause unless they submitted to interrogations. *Ganwich v. Knapp*, 319 F.3d 1115, 1120 (9th Cir. 2003). Police knocking loudly on a door for two-and-a-half minutes at night for a "knock and talk" constituted a seizure in *United States v. Velazco-Durazo*, 372 F. Supp. 2d 520, 525-26 (D. Ariz. 2005). An individual was seized when a police officer entered her car, directed her to drive to a nearby parking lot, and never advised her that she was free to leave. *United States v. Fox*, 600 F.3d 1253, 1258 (10th Cir. 2010). "When a person 'has no desire to leave' for reasons unrelated to the police presence, the 'coercive effect of the encounter' can be measured better by asking whether 'a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter.'" *Brendlin v. California*, 551 U.S. 249, 255 (2007); *see also Salmon v. Blesser*, 802 F.3d 249, 253 (2d Cir. 2015) (holding that police officer seized an individual by grabbing his collar, twisting his arm, and shoving him toward the door in an effort to remove him from the courthouse).

In *Florida v. Bostick*, 501 U.S. 429, 439-40 (1991), the Court invalidated the Florida Supreme Court's blanket rule that the sheriff's practice of questioning bus passengers and requesting their consent to search violated the Fourth Amendment (affirming rule that in order to determine whether a seizure occurred courts must consider totality of the circumstances). In *United States v. Drayton*, 536 U.S. 194, 203-04 (2002), the Court concluded that officers did not seize bus passengers when the officers boarded the bus because they did not brandish weapons, make intimidating movements or block the aisle.



**COUNTERPOINT** – A traffic stop constitutes a seizure of the vehicle’s occupants. *See, e.g., Rodriguez v. United States*, 135 S. Ct. 1609, 1614 (2015) (characterizing routine traffic stops as investigative ones); *Heien v. North Carolina*, 135 S. Ct. 530, 536 (2014); *Navarette v. California*, 134 S. Ct. 1683, 1687 (2014); *Brendlin v. California*, 551 U.S. 249, 257-58 (2007). In *United States v. Cuevas-Ceja*, 58 F. Supp. 2d 1175, 1189 (D. Or. 1999), the court held that police seized bus passengers when the officers boarded at a scheduled stop and requested consent to search the passengers. Repeated questioning of ex-pro baseball player Joe Morgan, while he was using a public telephone in an airport, was held to be a seizure in *Morgan v. Woessner*, 997 F.2d 1244, 1252-54 (9th Cir. 1993). The focus is on the suspect’s mental state: even if the officer knows the person stopped has a right to walk away, the totality of the circumstances can establish an arrest as a matter of law. *Allen v. City of Portland*, 73 F.3d 232, 235-36 (9th Cir. 1995). In *United States v. Izguerra-Robles*, 660 F. Supp. 2d 1202, 1207 (D. Or. 2009), the court held that defendant was constructively arrested when he was ordered out of a motor home.

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

**COUNTERPOINT** – A seizure occurred when an officer ordered a suspect to place his hands on a nearby car, the suspect did so, then fled “a few seconds later.” *United States v. Brodie*, F.3d 1058, 1060 (D.C. Cir. 2014); *see also Flythe v. District of Columbia*, 4 F. Supp. 3d 216, 220 (D.D.C. 2014) (reading *Brodie* as holding that momentary submission is sufficient to establish a seizure for purposes of the Fourth Amendment). Similarly, in *United States v. Coggins*, 986 F.2d 651, 653-54 (3d Cir. 1993), a suspect who briefly submitted to an order to stay put before fleeing was seized under *Hodari*. A suspect, who uniformed officers singled out from a group and accused of a crime, was seized because a reasonable person would not feel free to leave under the circumstances. *United States v. Williams*, 615 F.3d 657, 664 (6th Cir. 2010). An individual would not have felt free to leave due to a combination of a “collective show of authority” by a number of officers, the seizure of property and the search of companions. *United States v. Black*, 707 F.3d 531, 538 (4th Cir. 2013) (“Black’s subsequent decision to leave does not negate the finding that a reasonable person in Black’s circumstances would not feel free to leave.”); *see also United States v. Jones*, 678 F.3d 293, 304 (4th Cir. 2012) (individual would not have felt free to leave where “officers suspected him of some

sort of illegal activity in a ‘high crime area,’ which, in turn, would convey that he was a target of a criminal investigation”). A sheriff seized an attorney when he briefly grabbed her arm at a courthouse security checkpoint. *West v. Davis*, 767 F.3d 1063, 1070 (11th Cir. 2014).

The line between consensual conversations and temporary seizures cut against the individual in *INS v. Delgado*, 466 U.S. 210 (1984). In *Delgado*, immigration agents entered a factory and questioned workers about their immigration status while other agents stood in the building’s exits. 466 U.S. at 212. The Court held that such factory sweeps did not constitute a seizure of all the workers inside because there was insufficient evidence that the workers did not feel free to leave. 466 U.S. at 220-21; *see also United States v. Drayton*, 536 U.S. 194 (2002) (officers boarding a bus, even if armed, were not so intimidating that passengers did not feel free to leave). In *United States v. Gross*, the court held that no seizure occurred when a car of four police officers wearing tactical vests pulled up next to a pedestrian, shined a flashlight on him, asked if he had a gun, and then requested that he pull up his shirt to reveal his waistband. 784 F.3d 784, 787-88 (D.C. Cir. 2015); *but see id.* at 790 (Brown, J., concurring) (“While viewing such an encounter as consensual is roughly equivalent to finding the latest Sasquatch sighting credible, I submit to the prevailing orthodoxy, but I continue to reject its counterintuitive premise.”).

**COUNTERPOINT** – In *LaDuke v. Nelson*, 762 F.2d 1318, 1321 (9th Cir. 1985), *modified*, 796 F.2d 309 (9th Cir. 1986), the court distinguished *Delgado* and held that immigration officers seized residents of labor camps when they “cordoned off migrant housing during early morning or late evening hours, surrounded the residences in emergency vehicles with flashing lights, approached the homes with flashlights, and stationed officers at all doors and windows.” *See also Orhorhaghe v. INS*, 38 F.3d 488, 494-99 (9th Cir. 1994) (holding a home visit by immigration officers was a seizure without a sufficient articulable basis). In *Martinez v. Nygaard*, 831 F.2d 822, 827 (9th Cir. 1987), the court held that INS agents “exceeded any detention approved in *Delgado*” when they temporarily prevented an employee from exiting the building during a factory sweep. A late-night knock and talk at a motel room was deemed to be a seizure in *United States v. Jerez*, 108 F.3d 684, 690-93 (7th Cir. 1997). *See also United States v. Washington*, 387 F.3d 1060, 1068-69 (9th Cir. 2004) (detention during “knock and talk” violated Fourth Amendment); *United States v. Johnson*, 170 F.3d 708 (7th Cir. 1999) (same); *United States v. Freeman*, 635 F. Supp. 2d 1205 (D. Or. 2009) (same). In *United States v. Washington*, 490 F.3d 765, 770-74 (9th Cir. 2007), the court held that, under the totality of the circumstances, the police improperly seized the defendant, even though he had already consented to the search of his person. In making its determination, the court considered the tension between Portland police and the African-American community, the authoritative manner of the search, and the fact that the search occurred at night. *Id.* at 773-74; *see also United States v. Izguerra-Robles*, 660 F. Supp. 2d 1202, 1207 (D. Or. 2009) (seizure exceeded lawful scope when suspect held for 45 minutes after arrest for failure to produce a driver’s license). In contrast to the D.C. Circuit, the Seventh Circuit held that the line between consensual encounter and seizure was crossed when police asked a lone

citizen in an alley if he has a weapon. *United States v. Smith*, 794 F.3d 681, 686 (7th Cir. 2015).

#### **D. Standing**

Proof that a defendant had “standing” was once a threshold issue in Fourth Amendment challenges. In determining whether a defendant could exclude evidence from trial, courts engaged in a two-step analysis: (1) has the government intruded upon the defendant’s – as opposed to a third party’s – Fourth Amendment rights?, and if so, (2) whether defendant prevailed on the merits because an actual violation occurred? In *Rakas v. Illinois*, the Supreme Court collapsed the inquiry into a single question. 439 U.S. 98 (1978) (explaining that this type of standing is not rooted in Article III but “is more properly subsumed under substantive Fourth Amendment doctrine.”). Now the relevant analysis is whether the defendant personally has an expectation of privacy in the place searched, and whether that expectation is reasonable. *Minnesota v. Carter*, 525 U.S. 83, 87-88 (1998) (defendants, who were in another person’s apartment packaging cocaine, had no legitimate expectation of privacy); *United States v. Salvucci*, 448 U.S. 83, 87 (1980) (individuals charged with possession of stolen mail could not challenge search of their mother’s apartment where the incriminating checks were found); *Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980) (petitioner could not challenge legality of search of friend’s purse in which he placed drugs); *see also United States v. Padilla*, 508 U.S. 77 (1993) (co-conspirators have no special standing to challenge a search of their co-conspirator’s car); *United States v. Anderson*, 772 F.3d 969 (2d Cir. 2014) (husband lacked standing to suppress evidence seized from his wife’s body cavity, even where the seizure was “flagrantly illegal” and coercive).

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

**COUNTERPOINT** – The judiciary has been somewhat hostile to the government challenging standing then claiming at trial that the items belong to the defendant. *United States v. Bagley*, 772 F.2d 482, 489 (9th Cir. 1985); *United States v. Issacs*, 708 F.2d 1365, 1367-68 (9th Cir. 1983); *but see United States v. Singleton*, 987 F.2d 1444, 1447-50 (9th Cir. 1993) (government not estopped from claiming defendant had no privacy interest at trial where it was the government, not the defendant, that demonstrated defendant had an expectation of privacy during the suppression hearing).

Searches of vehicles involve complicated standing questions. *See United States v. Pulliam*, 405 F.3d 782, 786-87 (9th Cir. 2005) (distinguishing rights of drivers and passengers).

**COUNTERPOINT** – Passengers in a car have standing to challenge an unlawful car stop, even if they have no possessory or ownership interest in the car. *Brendlin v. California*, 551 U.S. 249, 258-59 (2007); *United States v. Colin*, 314 F.3d 439, 442-443 (9th Cir. 2002); *but see United States v. Symonevich*, 688 F.3d 12, 20–21 (1st Cir. 2012) (passenger lacked standing to challenge only the automobile search and not its seizure). Unauthorized drivers of rental cars can establish standing if the authorized renter gave the driver has permission to use the car. *United States v. Thomas*, 447 F.3d 1191, 1199 (9th Cir. 2006); *United States v. Best*, 135 F.3d 1223, 1225 (8th Cir. 1995) (same); *but see United States v. Kennedy*, 638 F.3d 159, 167-68 (3d Cir. 2011) (disagreeing with Ninth and Eighth Circuits and holding that an unauthorized driver lacked standing although he had the renter’s permission). The First Circuit, in contrast, held even unauthorized rental-car drivers have standing. *United States v. Starks*, 769 F.3d 83 (1st Cir. 2014).

## E. Probable Cause

1. **Probable Cause To Search** – In *Illinois v. Gates*, 462 U.S. 213 (1983), the Court rejected reliance on the two-prongs of the *Aguilar-Spinelli* test (*Spinelli v. United States*, 393 U.S. 410 (1969); *Aguilar v. Texas*, 378 U.S. 108 (1964)), and adopted the flexible standard of whether, given the totality of the circumstances, there is a fair probability that contraband, evidence, or an individual will be found in a particular place. The Court reiterated the “totality of the circumstances” test in *Massachusetts v. Upton*, 466 U.S. 727 (1984). In *Upton*, the Court emphasized deference to the judge’s determination of probable cause, the availability of corroboration by innocent facts to save an otherwise invalid warrant, the preference accorded to warrants, and the need for common-sense review of warrant affidavits. The Ninth Circuit reversed a three-judge panel on the standard for searching a computer for evidence of child pornography in *United States v. Gourde*, 440 F.3d 1065, 1066 (9th Cir. 2006) (en banc), and held that the Fourth Amendment requires only that, “based on the totality of the circumstances, the magistrate judge who issued the warrant made a ‘practical, common-sense decision’ that there was a ‘fair probability’ that child pornography would be found.”

**COUNTERPOINT** – Even under the looser *Gates* standard, the government has often failed to establish probable cause. *See, e.g., United States v. Raymonda*, 780 F.3d 105, 117 (2d Cir. 2015) (evidence that defendant briefly viewed thumbnail of child pornography failed to support probable cause that defendant hoarded such images); *United States v. Weber*, 923 F.2d 1338 (9th Cir. 1991) (absent proof that defendant collected child pornography, controlled delivery of a single order of child pornography did not establish probable cause to search for other illegal images in his home); *United States v. Brown*, 951 F.2d 999, 1003 (9th Cir. 1991) (belonging to an allegedly corrupt narcotics unit and being present when a member of that team took a large amount of money insufficient); *United States v. Hove*, 848 F.2d 137, 139 (9th Cir. 1988) (missing page of affidavit eliminated nexus to location); *United States v. Ricardo D.*, 912 F.2d 337, 342 (9th Cir. 1990) (youth fitting the vague description of suspect and crouching behind a tree did not amount to probable cause). Corroboration of an anonymous tip by “static, innocent details”

is insufficient to establish probable cause. *United States v. Mendonsa*, 989 F.2d 366, 368-69 (9th Cir. 1993). A civil contract dispute does not give rise to probable cause. *Allen v. City of Portland*, 73 F.3d 232, 236-38 (9th Cir. 1995) (“By definition, probable cause can only exist in relation to criminal conduct.”). A dog sniff of supposed drug money was insufficient to establish probable cause where expert evidence showed that 75% of money in circulation in the area was tainted. *United States v. \$30,060.00*, 39 F.3d 1039, 1041-44 (9th Cir. 1994). Similarly, a dog sniff leading from the scene of a crime to a suspect’s apartment complex but not the suspect’s apartment, even when combined with tentative witness identifications and general victim’s descriptions of the suspect, did not constitute probable cause. *Grant v. City of Long Beach*, 315 F.3d 1081 (9th Cir. 2002); *United States v. Prescott*, 581 F.2d 1343, 1351 (9th Cir. 1978) (“passive refusal to consent to a warrantless search is privileged conduct which cannot be considered as evidence of criminal wrongdoing.”). The presence of stolen tags on a car did not create probable cause to search for contraband in the trunk in *United States v. Jackson*, 415 F.3d 88, 91-95 (D.C. Cir. 2005). Staleness of the information can undermine probable cause that items will be found in a named location. *United States v. Grant*, 682 F.3d 827, 832-35 (9th Cir. 2012). The Sixth Circuit found a warrant affidavit insufficient because it was based only on (1) an anonymous tip, (2) police observations of short visits by various individuals, and (3) 2.2 grams of marijuana recovered from a visitor leaving the residence. *United States v. Buffer*, 529 F. App’x 482, 486 (6th Cir. 2013). The court noted that the observed visits “provide little information about what sort of evidence police might find inside” and that the recovered marijuana “was discovered off the premises and in a quantity not indicative of a recent sale.” *Id.* In *United States v. Cervantes*, the Ninth Circuit held the officer lacked probable cause to search defendant’s vehicle based on the officer’s general statement of expertise, his conclusory statement that a box in defendant’s possession came from a “ ‘suspected stash house,’ “ and his observation that defendant “ ‘did not take a direct route to his location.’ “ 703 F.3d 1135, 1139 (9th Cir. 2012).

To find probable cause based solely on a dog sniff, the prosecution must show that the dog is reliable. *See United States v. Cruz-Roman*, 312 F. Supp. 2d 1355, 1364-65 (W.D. Wash. 2004) (drug dog’s alert in front of defendant’s apartment did not provide probable cause for arrest because the dog-handler was not certified and the team had no track record of reliability); *but see United States v. Grupee*, 682 F.3d 143, 147 (1st Cir. 2012) (finding drug dog reliable based on statement in affidavit that police department is dog’s “employer”); *United States v. Ludwig*, 641 F.3d 1243, 1251 (10th Cir. 2011) (holding so long as a drug dog is certified by a legitimate organization, courts should not inquire into the capabilities of the individual dog to determine reliability). In *Florida v. Harris*, the Supreme Court held that a drug dog’s reliability can be established by a showing of satisfactory performance in a certification or training program. 133 S. Ct. 1050, 1057 (2015). The Court rejected the Florida Supreme Court’s strict evidentiary checklist as inconsistent with the flexible standard of probable cause and reaffirmed that the proper inquiry is “whether all the facts surrounding a dog’s alert, viewed through the lens of common sense,

would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime. *Id.* at 1058-59.

2. **Probable Cause To Arrest** – In *Maryland v. Pringle*, 540 U.S. 366, 372 (2003), the Supreme Court held that the presence of drugs in a car established probable cause to arrest all three occupants. The Court reasoned that, even though the officers did not have evidence that any one of the three occupants was responsible for the drugs, probable cause existed as to all of them because co-occupants of a vehicle are often engaged in a common enterprise and all three denied knowing anything about the drugs. *Id.* at 373-74. In *Devenpeck v. Alford*, the Supreme Court expanded the grounds for arrest holding an arrest to be lawful where there is no probable cause for the offense cited by the arresting officer, but there was probable cause to arrest for another offense, even if the two offenses were not closely related. 543 U.S. 146, 152-53 (2004) (upholding arrest where the officer told the defendant he was under arrest for violating Washington’s Privacy Act, although the criminal offense for which there was probable cause was impersonation of a police officer); accord *United States v. Magallon-Lopez*, No. 14-30249, 2016 WL 1254033, at \*3 (9th Cir. March 31, 2016) (citing *Devenpeck* and observing that “if the facts support probable cause to arrest for one offense, the arrest is lawful even if the officer invoked, as the basis for the arrest, a different offense as to which probable cause was lacking”).

**COUNTERPOINT** – After *Pringle*, it is even more important to challenge cases where guilt is established through association. *Callahan v. Unified Gov’t of Wyandotte Cty.*, 806 F.3d 1022, 1029 (10th Cir. 2015) (observing that *Pringle* raises questions as to how the particularity requirement is satisfied in multi-suspect situations). The inference that everyone on the scene of a crime is a party to it evaporates when there is evidence singling out the guilty person. *United States v. Di Re*, 332 U.S. 581, 594 (1948); see also *United States v. Collins*, 427 F.3d 688, 691 (9th Cir. 2005) (arriving in a parking lot where an illicit transaction was occurring did not establish guilt because, other than “proximity and timing,” there was no individualized suspicion); *United States v. Robertson*, 833 F.2d 777, 782-83 (9th Cir. 1987) (presence in a house while officers search it pursuant to a valid search warrant is insufficient to justify an arrest). Mere presence in a car in which the driver possessed marijuana and reeked of chemicals did not establish probable cause to search the passenger. *United States v. Soyland*, 3 F.3d 1312, 1314 (9th Cir. 1993); see also *United States v. Huguez-Ibarra*, 954 F.2d 546, 551-52 (9th Cir. 1992) (association with persons involved with drugs and unusual vehicle traffic insufficient to establish probable cause to support a warrantless entry of a residence). Because probable cause has “both a burden-of-proof component (facts sufficient to make a reasonable person believe . . . ) and a substantive component ( . . . that the suspect is involved in crime),” detention of a person without probable cause for purposes of criminal investigation “is repugnant to the Fourth Amendment.” *Al-Kidd v. Ashcroft*, 580 F.3d 949, 970 (9th Cir. 2009) (arrest of material witness is not justified unless both components established).

## F. Searches And Seizures Pursuant To A Warrant

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

Generally, the application of the exclusionary rule to an invalid search warrant depends on the balance of the costs and benefits of exclusion. *Herring*, 555 U.S. at 141. The benefit of deterring the government’s Fourth Amendment violations is weighed against the cost of limiting the court’s “truth-seeking” function and damaging “law enforcement objectives.” *Id.* at 141-42; accord *United States v. Fofana*, 666 F.3d 685, 988 (6th Cir. 2012). The Supreme Court extended the good faith exception to officers’ “reasonable reliance on binding judicial precedent” in *Davis v. United States*, 131 S. Ct. 2419, 2423-24 (2011). The majority of circuits have concluded that warrantless evidence collected from a GPS tracker attached to a suspect’s car before the Supreme Court’s ruling in *Jones* is admissible under the good-faith exception. See, e.g., *United States v. Mitchell*, No. 15-3006, 2016 WL 3579951, at \*2 (10th Cir. June 30, 2016) (unpub.); *United States v. Holt*, 777 F.3d 1234, 1258–59 (11th Cir. 2015); *United States v. Taylor*, 776 F.3d 513, 517–19 (7th Cir. 2015) (per curiam); *United States v. Stephens*, 764 F.3d 327, 336–39 (4th Cir. 2014); *United States v. Fisher*, 745 F.3d 200, 204 (6th Cir. 2014); *United States v. Katzin*, 769 F.3d 163, 181-82 (3d Cir. 2014); *United States v. Pineda-Moreno*, 688 F.3d 1087, 1091 (9th Cir. 2012)). In *Heien v. North Carolina*, the Supreme Court held a stop based on an officer’s reasonable mistake of law is constitutional if the error is reasonable. 135 S. Ct. 530, 540 (2014).

**COUNTERPOINT** – In *United States v. Song Ja Cha*, 597 F.3d 995, 1003-04 (9th Cir. 2010), the court determined that the exclusionary rule applied where officers’ unlawful warrant executions were found to be “deliberate, culpable, and systemic[.]” In remanding the case to district court to conduct a cost-benefit analysis, the Sixth Circuit stated that the good faith exception may apply where police rely upon a warrant issued by a judge without the authority do so but warned that attempts to circumvent “jurisdictional limits imposed by state law is conduct that can, and should be, considered and deterred[.]” *United States v. Master*, 614 F.3d 236, 241-43 (6th Cir. 2010). The Ninth Circuit has upheld suppression partly

on the ground that a police affiant “did not have a supervisor or anyone else review, let alone approve, his affidavit.” *United States v. Underwood*, 725 F.3d 1076, 1087-88 (9th Cir. 2013). The good-faith exception did not apply to officers’ unlawful entry into a residence to search for the subject of their arrest warrant because the officers’ conduct was, at a minimum, grossly negligent. *United States v. Vasquez-Algarin*, 821 F.3d 467, 482-83 (3d Cir. 2016).

**1. Controverted Warrant Affidavit** – *Leon* expressly excepts from the scope of its holding warrants that are challenged under *Franks v. Delaware*, 438 U.S. 154 (1978). 468 U.S. at 923. In *Franks*, the Court held that warrant affidavits containing reckless or intentional false statements by the affiant are subject to challenge by a motion to controvert. 438 U.S. at 171-72. If the affidavit, cleansed of the challenged statements, does not establish probable cause, the defendant is entitled to suppression of the derivative evidence. *Id.* Material omissions as well as false statements are subject to challenge. *United States v. Jacobs*, 986 F.2d 1231, 1234-35 (8th Cir. 1993); *United States v. Stanert*, 762 F.2d 775, 781 (9th Cir. 1985), *amended by* 769 F.2d 1410 (9th Cir. 1985). The fact that probable cause existed and could have been established in a truthful affidavit, but was not cited in the warrant, will not cure a *Franks* error. *Baldwin v. Placer County*, 418 F.3d 966, 971 (9th Cir. 2005). Misstatements or omissions of government officials in an affidavit for a search warrant are grounds for a *Franks* hearing even if the official at fault is not the affiant. *United States v. DeLeon*, 979 F.2d 761, 763-64 (9th Cir. 1992). The defendant need not present clear proof that misrepresentations were deliberate or reckless in order to obtain a *Franks* hearing; all that is needed is a substantial showing. *United States v. Gonzalez, Inc.*, 412 F.3d 1102, 1111 (9th Cir. 2005); *see also United States v. McMurtrey*, 704 F.3d 502, 510 (7th Cir. 2013) (holding that in determining whether to grant a *Franks* hearing the court should not consider the government’s explanation of contradictions and discrepancies). The deliberately false or reckless inclusion of perceptions of sight, smell, and sound – given the court’s reliance on officers’ experience – is “unforgivable.” *Hervey v. Estes*, 65 F.3d 784, 789-91 (9th Cir. 1995) (applying *Franks* to false statements regarding officers’ experience and the smell of a meth lab). The due process principles of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny concerning the production of exculpatory or potentially exculpatory evidence, are applicable to suppression hearings involving a challenge to the truthfulness of allegations in the affidavit for a search warrant. *United States v. Barton*, 995 F.2d 931, 934-36 (9th Cir. 1993). When a warrant describes a vehicle and house in detail but, due to a cut-and-paste error, only allows a search of the vehicle, any evidence obtained from the house must be suppressed. *United States v. Robinson*, 358 F. Supp. 2d 975, 980 (D. Mont. 2005). The good faith exception did not apply where the search warrant affidavit for a known drug dealer’s residence failed to connect the residence to drug-dealing activity, because such reliance would be objectively unreasonable. *United States v. Brown*, No. 13-1761, 2016 WL 3584723, at \*6 (6th Cir. June 27, 2016).

**2. Overbreadth** – Where the warrant is facially overbroad, the officer cannot reasonably rely on its validity. *Millender v. County of Los Angeles*, 620 F.3d 1016, 1024-28 (9th Cir. 2010), *rev’d on other grounds*, 132 S. Ct. 1235 (2012); *United States v. Kow*, 58 F.3d 423, 426-30 (9th Cir. 1995); *Center Art Galleries-Hawaii, Inc. v. United States*, 875 F.2d 747, 751-54 (9th Cir. 1989); *United States v. Stubbs*, 873 F.2d 210, 212 (9th Cir. 1989); *United States v. Dozier*, 844 F.2d 701, 707-08 (9th Cir. 1988); *United States v. Spilotro*, 800 F.2d 959, 964, 968 (9th Cir.



1986); *United States v. Washington*, 797 F.2d 1461, 1463 (9th Cir. 1986); *United States v. Cardwell*, 680 F.2d 75, 77 (9th Cir. 1982). The Ninth Circuit set out the following factors to determine if a warrant is sufficiently specific: “(1) whether probable cause exists to seize all items of a particular type described in the warrant; (2) whether the warrant sets out objective standards by which executing officers can differentiate items subject to seizure from those which are not; and (3) whether the government was able to describe the items more particularly in light of the information available to it at the time the warrant was issued.” *Spilotro*, 800 F.2d at 963. In reversing the Ninth Circuit’s holding in *Millender*, 620 F.3d at 1025, that a warrant to seize “guns” from a residence was overbroad because the police only knew about a sawed-off shotgun, the Supreme Court held it was reasonable for police to assume there was probable cause to search for other guns in the defendant’s residence in light of his criminal history. *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1246 (2012).

**COUNTERPOINT** – A warrant is overbroad if it allows the officer to seize virtually all of a business’s assets. *United States v. Bridges*, 344 F.3d 1010, 1016-18 (9th Cir. 2003). To cure the warrant, the application must specifically allege that the business is “permeated with fraud.” *Id.* at 1018. The “pervasive fraud” doctrine focuses not on the percentage of a business that is fraudulent but rather the extent to which fraud has permeated the business. *United States v. Bradley*, 644 F.3d 1213, 1259-60 (11th Cir. 2011). The doctrine applies not just where a company is engaged solely in fraud, but where “evidence of fraud is likely to be found in records related to a wide range of company business.” *Id.* at 1259; *see also In re United States’ Application For A Search Warrant To Seize & Search Elec. Devices From Edward Cunniss*, 770 F. Supp. 2d 1138, 1143 (W.D. Wash. 2011) (finding overbroad the government’s request to seize all of defendant’s digital devices without limitation).

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

**3. Particularity** – The warrant also requires particularity. *Leon*, 468 U.S. at 923; *United States v. Collins*, 830 F.2d 145, 146 (9th Cir. 1987). Warrants to search individuals present at the place to be searched must be particularized and supported by probable cause. *Marks v. Clarke*, 102 F.3d 1012, 1027-29 (9th Cir. 1996). A novice officer’s failure to show a homeowner a list of specific items to be seized, however, will not trigger the exclusionary rule if the failure can be fairly attributed to the agent’s lack of experience and reasonable misunderstanding. *United States v. Franz*, 772 F.3d 134, 149 (3d Cir. 2014). In *Faulkner*, the court held that installing a GPS tracking device on a defendant’s car outside the county specified in the warrant was a “technical

deficiency” that did not invalidate the warrant. *United States v. Faulkner*, No. 15–2252, 2016 WL 3513995, at \*4 (8th Cir. June 27, 2016) (distinguishing *Jones* because *Jones* “simply stands” for the proposition that a warrant is required in such circumstances).

**COUNTERPOINT** – A search warrant for a multi-family dwelling unit lacks particularity where there is not probable cause that evidence will be found in each unit. *United States v. Clark*, 638 F.3d 89, 95-99 (2d Cir. 2011) (finding the informant’s assertion that the defendant “controlled” the entire building insufficient grounds to search all units). Lack of particularity in a warrant cannot be cured by a detailed affidavit unless it is specifically incorporated by reference. *Groh v. Ramirez*, 540 U.S. 551 (2004); see *United States v. Rosa*, 626 F.3d 56, 65-66 (2d Cir. 2010) (refusing to apply *Groh* where the “price” of suppression outweighed the need to deter unlawful police conduct). The Tenth Circuit approves blanket suppression where the search has an improper ulterior motive. *United States v. Foster*, 100 F.3d 846, 849-53 (10th Cir. 1996).

Anticipatory search warrants are sufficiently particular so long as “there is a fair probability that contraband or evidence of a crime will be found in a particular place.” *United States v. Grubbs*, 547 U.S. 90, 95 (2006) (quoting *Gates*, 462 U.S. at 238).

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

Warrants for computer searches must affirmatively limit a search to evidence of specific federal crimes or specific types of material. *United States v. Otero*, 563 F.3d 1127, 1132 (10th Cir. 2009). Concern regarding overbreadth of computer warrants led to controversial guidance on the proper administration of warrants for computer-stored information in *United States v. Comprehensive Drug Testing*, 621 F.3d 1162 (9th Cir. 2010) (en banc). See also *United States v. Warshak*, 631 F.3d 266, 288 (6th Cir. 2010). In *Comprehensive Drug Testing*, the court pointed to an array of protective measures for computer privacy during searches, stating, “[d]istrict and magistrate judges must exercise their independent judgment in every case, but heeding this guidance will significantly increase the likelihood that the searches and seizures of electronic storage that they authorize will be deemed reasonable and lawful.” 621 F.3d at 1178. However, the *Comprehensive Drug Testing* guidance is advisory, and the real test remains reasonableness assessed on a case-by-case basis. See *United States v. Schesso*, 730 F.3d 1040, 1047 (9th Cir. 2013). Other circuits have refused to afford special Fourth Amendment protections or guidance pertaining to computers, opting instead to evaluate reasonableness on a case-by-case basis. See *United States v. Burgess*, 576 F.3d 1078, 1090-92 (10th Cir. 2009); *United States v. Richards*, 659 F.3d 527, 539-540 (6th Cir. 2011). One court rejected defendant’s argument that, in light of *Riley*, to satisfy the particularity requirement a search warrant for a computer must identify the forensic search methods to be used. *United States v. Mulcahey*, No. 15-10112-RGS, 2015 WL 9239755, at \*2 (D. Mass. Dec. 17, 2015)

Courts disagree as to whether network investigative technique (NIT) warrants satisfy the particularity requirement because the targets of such warrant are typically unknown. *Compare United States v. Levin*, No. 15-10271-WGY, at \*37 (D. Mass, April 20, 2016) (expressing concern as to whether warrants permitting law enforcement officers to search computers at unknown locations satisfied the particularity requirement); *In re Warrant to Search a Target computer at Premises Unknown*, 958 F. Supp. 2d 753, 755-58 (S.D. Tex. 2013) (holding a warrant to surreptitiously install software designed to extract certain stored electronic records from an unknown computer at an unknown location did not satisfy the particularity requirement); *with United States v. Epich*, No. 15-cr-163-PP, 2016 WL 953269, at \*1-2 (E.D. Wisc. March 14, 2016) (holding that because of the “complicated machinations” required to access a specific website containing images of child pornography, a warrant to covertly search users’ computers was sufficiently particular as it was unlikely an individual would unwittingly stumble upon it); *United States v. Michaud*, No. No. 3:15-cr-05351-RJB, 2016 WL 337263, at \*5 (W.D. Wash. Jan. 28, 2016) (same).<sup>5</sup>

**4. Obvious Lack Of Probable Cause** – The level of probable cause may be insufficient for a reasonable officer to rely on the warrant affidavit. *Leon*, 468 U.S. at 923; *Millender*, 620 F.3d at 9-15; *United States v. Weaver*, 99 F.3d 1372, 1377-81 (6th Cir. 1996); *Greenstreet v. County of San Bernadino*, 41 F.3d 1306, 1309-10 (9th Cir. 1994); *United States v. Hove*, 848 F.2d 137, 139 (9th Cir. 1988). Officers could not in good faith rely on a search warrant to investigate a homicide, which occurred nine months earlier, where the affidavit provided insufficient evidence to link the defendant to the murder. *United States v. Grant*, 682 F.3d 827, 832-38 (9th Cir. 2012). The probable cause determination is based only on what is included in the affidavit, not on what the officer orally conveyed to the magistrate, *United States v. Luong*, 470 F.3d 898, 904 (9th Cir. 2006), nor what the officer may have known but failed to include, *United States v. Laughton*, 409 F.3d 744, 752 (6th Cir. 2005).

The circuits are split on the use of facts outside the affidavit in order to apply the good faith exception. *Compare Laughton*, 409 F.3d at 751-52 (“conclud[ing] that a determination of good-faith reliance, like a determination of probable cause, must be bound by the four corners of the affidavit”); *and Hove*, 848 F.2d at 140 (finding that the good faith exception is limited by the facts presented to the judge); *with United States v. McKenzie-Gude*, 671 F.3d 452, 460 (4th Cir. 2011) (permitting the consideration of facts outside the affidavit to apply the good faith exception), *and United States v. Marion*, 238 F.3d 965, 969 (8th Cir. 2001) (same), *and United States v. Dickerson*,

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<sup>5</sup> NITs, which are sometimes referred to as data extraction software, port reader, harvesting program, remote search, or Computer and Internet Protocol Address Verifier (CIPAV), are trojan devices used to ascertain the identity of Internet users who have masked their online identities and to surveil computer activity. The Onion Router (Tor network), for example, is a browser used to access the Darknet and designed to preserve users’ anonymity by concealing their Internet Protocol (IP) addresses. In sting operations, where government agents have seized control of an illicit website, when an anonymous user accesses that website, agents may covertly transmit a trojan device, which is essentially a string of computer code, to the user’s computer, and the device then transmits identifying information, such as the user’s IP address, back to government servers.

975 F.2d 1245, 1250 (7th Cir. 1992) (same), and *United States v. Taxacher*, 902 F.2d 867, 871-73 (11th Cir. 1990) (same). “[A] warrant cannot be based on the claim of an untrained or inexperienced person to have smelled growing plants which have no commonly recognized odor.” *United States v. DeLeon*, 979 F.2d 761, 765 (9th Cir. 1992).

Boilerplate recitations regarding sex crimes “so lacked the requisite indicia for probable cause” that the products of the search were suppressed in *United States v. Zimmerman*, 277 F.3d 426, 436 (3rd Cir. 2002). See also *United States v. Greathouse*, 297 F. Supp. 2d 1264, 1272-73 (D. Or. 2003) (evidence suppressed because thirteen-month old child pornography evidence was too stale). Despite a 41-page affidavit, the court found no reasonable officer would believe the affidavit established probable cause where close analysis disclosed, through the mass of boilerplate and irrelevancies, no links to establish that contraband would be in the house to be searched. *United States v. Sartin*, 262 F. Supp. 2d 1154 (D. Or. 2003).

An unverified, anonymous tip is insufficient to create a reasonable belief that probable cause existed. *Luong*, 470 F.3d at 903. A three-year-old allegation of attempted child molestation and current allegations of inappropriate touching and looking at students does not establish sufficient probable cause to support a search for possession of child pornography. See *Dougherty v. City of Covina*, 654 F.3d 892, 898 (9th Cir. 2011); *Virgin Islands v. John*, 654 F.3d 412, 418-19 (3d Cir. 2011) (affidavit that defendant committed sex crimes against students on school property and kept two pieces of evidence of crimes did not amount to probable cause that defendant possessed child pornography); *United States v. Hodson*, 543 F.3d 286, 292-93 (6th Cir. 2008) (same: probable cause for child molestation did not equal probable cause for possession of child pornography); *United States v. Falso*, 544 F.3d 110, 122-23, 128-29 (2d Cir. 2008) (Sotomayor, J.) (holding the warrant lacked probable cause but the officers acted in good faith). A warrant to search a defendant’s residence lacked probable cause where it was based on his status as a known drug dealer and a drug dog’s alert to the odor of narcotics on defendant’s car while it was parked at a co-defendant’s home because such facts do not create a sufficient nexus between the residence to be searched and the suspected drug-dealing activity. *United States v. Brown*, No. 13-1761, 2016 WL 3584723, at \*6 (6th Cir. June 27, 2016) (also holding the good-faith exception did not apply because reliance on the warrant was objectively unreasonable).

**5. Product Of Prior Illegality** – The government cannot insulate an illegal warrantless search by including the product of that search in a warrant affidavit. *United States v. Grandstaff*, 813 F.2d 1353, 1355 (9th Cir. 1987); see *United States v. Wanless*, 882 F.2d 1459, 1466-67 (9th Cir. 1989); *United States v. Vasey*, 834 F.2d 782, 789-90 (9th Cir. 1987); see also *Allen v. City of Portland*, 73 F.3d 232, 236 (9th Cir. 1996) (facts learned or evidence obtained as a result of an illegal stop or arrest cannot be used to justify probable cause for that arrest).

**6. Manner Of Execution** – The manner in which a warrant is executed could render the search unreasonable and implicate the exclusionary rule. See, e.g., *United States v. Winsor*, 846 F.2d 1569, 1579 (9th Cir. 1988) (en banc) (excluding evidence obtained where police, acting without a warrant, demanded defendant open the door and then saw contraband through the open door); *United States v. Warner*, 843 F.2d 401, 405 (9th Cir. 1988) (refusing to extend the good faith exception to a warrantless search of a garage leased to defendant). The Fourth Amendment

does not require the exclusion of evidence obtained from a constitutionally permissible arrest even if the officers violate applicable state laws of arrest. *Virginia v. Moore*, 553 U.S. 164, 178 (2008).

Violation of the knock-and-announce statute, 18 U.S.C. § 3109, required suppression. *United States v. Zermeno*, 66 F.3d 1058, 1062-63 (9th Cir. 1995). The Supreme Court has recognized knock and announce as a component of the Fourth Amendment. *Wilson v. Arkansas*, 514 U.S. 927 (1995); see *Richards v. Wisconsin*, 520 U.S. 385 (1997). The Supreme Court allowed no-knock entry upon “reasonable suspicion” of officer danger, with some unspecified level of balancing for unnecessary destruction of property in making the entry. *United States v. Ramirez*, 523 U.S. 65, 71-73 (1998); see also *United States v. Peterson*, 353 F.3d 1045 (9th Cir. 2003) (exigent circumstances existed to authorize no-knock entry when officers had reasonable suspicion that drug evidence could be destroyed and explosives were in the house). *United States v. Bynum*, 362 F.3d 574 (9th Cir. 2004) (defendant’s strange behavior – appearing at the door naked and carrying a loaded semiautomatic pistol – authorized no-knock entry).

However, in *Hudson v. Michigan*, 547 U.S. 586, 594 (2006), the Court held that the exclusionary rule does not apply to violations of the constitutional knock-and-announce rule. Several courts have extended *Hudson* to no-knock entries accompanied by massive force even where police could have obtained a no-knock warrant. See, e.g., *United States v. Garcia-Hernandez*, 659 F.3d 108, 112-14 (1st Cir. 2011) (applying *Hudson* to a knock-and-announce violation with aggressive, military-style tactics); *United States v. Ankeny*, 502 F.3d 829, 835-38 (9th Cir. 2007) (refusing to suppress evidence seized in aggressive search that caused physical injury and property damage). In *Ankeny*, Judge Reinhardt dissented and argued against extending *Hudson* “beyond the specific context of the knock-and-announce requirement” to cases where police use excessive force in executing a search. 502 F.3d at 841-48. In footnote 3, the majority refused to reach the issue of whether *Hudson* applies to statutory knock-and-announce under 18 U.S.C. § 3109. *Id.* at 835.

Searches of computer drives are governed by objective reasonableness rather than formulaic search protocols, and courts have found it reasonable to remove computers from defendants’ homes to conduct the search at another location. *United States v. Stabile*, 633 F.3d 219, 239 (3d Cir. 2011); *United States v. Upham*, 168 F.3d 532, 535 (1st Cir. 1999) (the “narrowest definable search and seizure reasonably likely to obtain” the evidence described in a warrant is, in most instances, “the seizure and subsequent off-premises search of the computer and all available disks”); *United States v. Hay*, 231 F.3d 630, 637 (9th Cir. 2000) (seizure of entire computer reasonable because affidavit “justified taking the entire system off site because of the time, expertise, and controlled environment required for a proper analysis”); *United States v. Grimmer*, 439 F.3d 1263, 1269 (10th Cir. 2006) (“we have adopted a somewhat forgiving stance when faced with a ‘particularity’ challenge to a warrant authorizing the seizure of computers”). In a child pornography case, the Third Circuit held execution of a warrant to search defendant’s home computer and related storage devices using forensic software’s “gallery view”, instead of its “hashtag” function, was reasonable, as was removing the computer from defendant’s home for three weeks to search it at another location. *United States v. Townsend*, No. 14-4667, 2016 WL 2851164, at \*1-2 (3rd Cir. May 16, 2016) (unpub.).

**COUNTERPOINT** – In *United States v. Metter*, 860 F. Supp. 2d 205, 215–16 (E.D.N.Y. 2012), the government failed to review seized electronic data to determine whether it fell within the scope of the warrant. The court found that “retention of *all* imaged electronic documents, including personal emails, without *any* review whatsoever” was “unreasonable and disturbing” *Id.* at 215 (emphasis in original). Because the government engaged in a general search and acted in bad faith, the court suppressed all the data. *Id.* at 216. In *Trent v. Wade*, 776 F.3d 368 (5th Cir. 2015), the court ruled the hot-pursuit exception does not necessarily justify a failure to knock and announce.

7. **Role Of Judicial Officer** – The good faith exception does not apply where the issuing judge was not operating as a neutral magistrate. *Leon*, 468 U.S. at 923; *United States v. Decker*, 956 F.2d 773, 778 (8th Cir. 1992); *see also Connally v. Georgia*, 429 U.S. 245 (1977) (justice not neutral where paid through fees collected when a warrant is issued and not paid when warrant is denied). An officer also cannot rely on an unsigned search warrant because such reliance is not “objectively reasonable.” *United States v. Evans*, 469 F. Supp. 2d 893, 900 (D. Mont. 2007); *but see United States v. Cruz*, 774 F.3d 1278, 1285-89 (10th Cir. 2014) (declining to follow *Evans* instead adopting First Circuit’s approach in *United States v. Lyons*, 740 F.3d 702 (1st Cir. 2014). In child pornography cases, at least two district courts have held the good faith exception does not apply where a warrant was never valid because the issuing court lacked jurisdiction to authorize it in the first instance. *United States v. Matish*, No. 4:16-cr-16, 2016 WL 3545776 (E.D. Va. June 23, 2016) (suppressing evidence derived from a child pornography investigation where the defendant’s computer was not located in the magistrate’s district and finding the failure to comply with Rule 41 is not mere procedural error); *United States v. Levin*, No. 15-10271-WGY, at \*24 (D. Mass. April 20, 2016) (same).<sup>6</sup>

8. **Arrest Warrants** – The Fourth Amendment prohibits warrantless entry into a home for the purposes of making an arrest. *Kirk v. Louisiana*, 536 U.S. 635, 637-39 (2002); *Payton v. New York*, 445 U.S. 573, 586-87 (1980). To justify a warrantless entry into a residence, the government must show the existence of probable cause and exigent circumstances or consent. *Kirk*, 536 U.S. at 638. Where police officers have an arrest warrant, but lack a search warrant, they may enter a residence if they have a “reasonable belief” that (1) the arrestee resides at the dwelling, and (2) the arrestee is present at the time of entry. *United States v. Vasquez-Algarin*, 821 F.3d 467, 472 (3d Cir. 2016). There is a circuit split as to whether *Payton*’s “reason to believe” language amounts to a probable cause standard. *Compare Vasquez-Algarin*, 821 F.3d at 477 (holding “reason to believe” requires probable cause), *and United States v. Gorman*, 314 F.3d 1105, 1114–15 (9th Cir.2002) (same), *and United States v. Jackson*, 576 F.3d 465, 469 (7th Cir. 2009) (noting in

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<sup>6</sup> Proposed changes to Federal Rule of Criminal Procedure 41, which Chief Justice John Roberts submitted to Congress on April 28, 2016, would, if approved, permit magistrate judges to issue search warrants for computers outside of their district, where the location of the computer has been concealed through technological means, such as The Onion Router, or Tor, network). *Proposed Amendments to the Fed. R. Crim. P. 41*, (April 28, 2016), [https://www.supremecourt.gov/orders/courtorders/frcr16\\_mj80.pdf](https://www.supremecourt.gov/orders/courtorders/frcr16_mj80.pdf).

dictum that it is “inclined” toward interpreting “reason to believe” as “probable cause”), and *United States v. Hardin*, 539 F.3d 404, 415–16 & n. 6 (6th Cir. 2008); with *United States v. Bohannon*, No. 14-4679-CR, 2016 WL 3067993, at \*9 (2d Cir. May 31, 2016) (holding “reason to believe” requires less than probable cause), and *United States v. Werra*, 638 F.3d 326, 337 (1st Cir. 2011) (same), and *United States v. Thomas*, 429 F.3d 282, 286 (D.C. Cir. 2005) (same), and *Valdez v. McPheters*, 172 F.3d 1220, 1224–25 (10th Cir.1999) (same).

The circuits are also split over whether law enforcement officers violate *Payton* without physically entering the home, such as in a warrantless “across the threshold” arrest whereby police summon a suspect to the front door and arrest him there. Compare *United States v. Nora*, 765 F.3d 1049, 1054 (9th Cir. 2014) (under doctrine of constructive entry, officers do not have to physically enter the home for *Payton* to apply because it is the location of the arrested person, not the arresting agents, that determines if an arrest occurs inside the home), and *United States v. Reeves*, 524 F.3d 1161, 1165 (10th Cir. 2008), and *United States v. Saari*, 272 F.3d 804, 807–08 (6th Cir.2001) (same), with *Knight v. Jacobson*, 300 F.3d 1272, 1277 (11th Cir.2002) (no *Payton* violation unless police physically cross the threshold and enter the home), and *United States v. Berkowitz*, 927 F.2d 1376, 1386–88 (7th Cir.1991) (same), and *United States v. Carrion*, 809 F.2d 1120, 1128 (5th Cir.1987) (same). The Second Circuit rejected the doctrine of constructive entry and held that, where police summon the defendant to the door of his home, they may not effect a warrantless “across the threshold” arrest in the absence of exigent circumstances. *United States v. Allen*, 813 F.3d 76, 88-89 (2d Cir. 2016). The existence of an arrest warrant does not justify entry into a third-party’s residence unless the officers first obtain a search warrant “based on their belief that [the arrestee] might be a guest there,” the search is consensual, or otherwise justified by exigent circumstances. *Steagald v. United States*, 451 U.S. 204, 213-16 (1981).

**COUNTERPOINT** – Warrantless entry of a third party’s home to execute an arrest warrant requires substantial evidence of the target’s presence – an unverified anonymous tip is not enough. *Watts v. County of Sacramento*, 256 F.3d 886, 889-90 (9th Cir. 2001). A misdemeanor arrest warrant executed on a person standing in his doorway did not authorize a non-consensual entry into the dwelling. *United States v. Albrektsen*, 151 F.3d 951, 953-54 (9th Cir. 1998). Defendant did not expose himself to a warrantless arrest in his entryway merely by reaching his arm through a hole out to the front porch. *United States v. Flowers*, 336 F.3d 1222, 1226-29 (10th Cir. 2003); see also *United States v. Quaempts*, 411 F.3d 1046, 1048-49 (9th Cir. 2005) (when a “trailer home was so small that he could open the front door while lying on his bed,” the defendant did not waive *Payton* protections because he was in the private area of his home). If police serving an arrest warrant cannot locate the residence listed on the warrant but see two residences identically labelled with an adjacent address, one of which is presumably mislabeled, the police cannot simply select one and enter it. *United States v. Shaw*, 707 F.3d 666, 670 (6th Cir. 2013). Even when police do not actually enter a home, *Payton* prohibits them from forcing people outside at gunpoint. *Nora*, 765 F.3d at 1054 (holding an individual was seized in violation of *Payton* because his arrest was “accomplished . . . by surrounding his house and ordering him to come out at gunpoint”).

## G. Warrantless Searches And Seizures

The traditional rule is that warrantless searches and seizures are per se unreasonable and that the burden is on the government to establish that a search or seizure falls within a well-established exception to the warrant requirement. *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971); *Stoner v. California*, 376 U.S. 483, 486 (1964). The exceptions to the warrant requirement have generally been given increasingly broad readings. In his dissent to *Groh v. Ramirez*, Justice Thomas noted that the current status of the case law surrounding the warrant requirement stands “for the illuminating proposition that warrantless searches are per se unreasonable, except, of course, when they are not.” 540 U.S. 551, 572-73 (2004) (Thomas, J., dissenting). Determinations of probable cause and reasonable suspicion are given de novo review by the appellate courts. *Ornelas v. United States*, 517 U.S. 690, 699 (1996).

1. **Consent** – “To the Fourth Amendment rule ordinarily prohibiting the warrantless entry of a person’s house as unreasonable per se, one ‘jealously and carefully drawn’ exception recognizes the validity of searches with the voluntary consent of an individual possessing authority.” *Georgia v. Randolph*, 547 U.S. 103, 109 (2006). A search without a warrant or any level of suspicion can be conducted if, under the totality of the circumstances, the officers have obtained voluntary consent, regardless of whether the officers advised that consent could be refused. *United States v. Drayton*, 536 U.S. 194, 206-07 (2002); *Schneekloth v. Bustamonte*, 412 U.S. 218, 248 (1973). The Ninth Circuit considers five factors in determining whether consent was voluntarily given: (1) whether the defendant was in custody; (2) whether the arresting officers had their guns drawn; (3) whether *Miranda* warnings were given; (4) whether the defendant was notified that he or she had a right to refuse consent; and (5) whether the defendant had been told a search warrant could be obtained. *United States v. Soriano*, 346 F.3d 963, 968-69 (9th Cir. 2003), *amended by* 361 F.3d 494, 503 (9th Cir. 2004) (mother’s consent to search hotel room was voluntary despite threat that children may be removed and that warrant could be obtained); *but see United States v. Perez-Lopez*, 348 F.3d 839, 846-48 (9th Cir. 2003) (questioning the relevance of *Miranda* warnings to voluntariness of consent). A police officer’s request to search a Spanish-speaker’s car, which was mistranslated to “May I look for your car?” did not invalidate the defendant’s consent to the search because “it was clear the that the officer did not need to look for or locate the car,” the defendant readily consented to the search and “did not seem boggled by the question as nonsensical.” *United States v. Leiva*, 821 F.3d 808, 818-19 (7th Cir. 2016).

**COUNTERPOINT** – The government bears the burden of establishing voluntary consent, and this “burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority.” *Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968). In *Kaupp v. Texas*, 538 U.S. 626, 627-28 (2003), the police, without probable cause, woke the 17-year-old defendant in his home at 3 a.m., telling him that they needed to talk to him about a murder investigation. Kaupp said “okay,” whereupon the officers handcuffed him and led him, shoeless and dressed only in his boxer shorts and T-shirt, to the patrol car. *Id.* at 628. The Court held that under the circumstances, “Kaupp’s ‘okay’ . . . is no showing of consent . . . . There is no reason to think Kaupp’s answer was anything more than a ‘mere submission to a claim of lawful authority.’” *Id.* at 631. In *United States v. Washington*, the court



noted that the fact a defendant was in custody when he consented “raise[d] grave questions” as to its voluntariness. 490 F.3d 765, 775 (9th Cir. 2007). The fact that an individual consented to government searches as a condition of pretrial release did not relieve the government of its burden of proving the search was “reasonable.” *United States v. Scott*, 450 F.3d 863, 868 (9th Cir. 2005). Consent may be presumed involuntary where multiple police officers and squad cars surround an individual and officers engage in “immediately accusatory” questioning. *United States v. Robertson*, 736 F.3d 677, 680 (4th Cir. 2013).

The absence of clear words of consent undercuts a government claim of permissive entry. *United States v. Shaibu*, 920 F.2d 1423, 1426-28 (9th Cir. 1990) (“[W]e interpret failure to object to the police officer’s thrusting himself into Shaibu’s apartment as more likely suggesting submission to authority than implied or voluntary consent”). Where immigration agents made misleading statements implying they did not need a warrant to enter an apartment and talk, the court found no voluntary consent. *Orhorhaghe v. INS*, 38 F.3d 488, 500-01 (9th Cir. 1994); see also *United States v. Escobar*, 389 F.3d 781, 785 (8th Cir. 2004) (consent to search luggage was not voluntary when officers falsely claimed that a drug dog had alerted to the luggage).

When ATF agents garnered consent from the defendant to search a home through trickery, implying that the home might be in danger, the consent was involuntary. *United States v. Harrison*, 639 F.3d 1273, 1279-80 (10th Cir. 2011). When an officer wrongly pronounced that a search would occur regardless of the individual’s consent, consent could be presumed involuntary. *United States v. Vazquez*, 724 F.3d 15, 24 (1st Cir. 2013). Expert testimony regarding a defendant’s rudimentary grasp of English can establish lack of voluntary consent. *United States v. Higareda-Santa Cruz*, 826 F. Supp. 355, 359 (D. Or. 1993); see also *United States v. Garcia-Rosales*, No. 05-402-MO, 2006 WL 468320, at \*12 (D. Or. 2006) (even where the officer has a rudimentary knowledge of Spanish, language barriers can still result in an involuntary consent).

The officer’s hand on his gun, on a deserted stretch of highway, with no advice on the right to refuse consent, rendered the purported consent involuntary in *United States v. Chan-Jimenez*, 125 F.3d 1324, 1326-28 (9th Cir. 1997). See also *United States v. Perez*, 506 F. App’x 672, 674 (9th Cir. 2013) (finding consent involuntary because defendant “was ordered out of [his] vehicle, frisked, seated, and forbidden to rise” by uniformed police officers with their guns drawn; “not advised of his right to refuse to consent or given a *Miranda* warning”; and “denied his right to call his lawyer, despite his repeatedly asking to do so”). Consent was involuntary after police ordered the suspect against a wall in a spread-eagle position, frisked him, handcuffed him and told him he was going to jail. *United States v. Reid*, 226 F.3d 1020, 1026-27 (9th Cir. 2000). The fact that defendant twice refused to open the door prior to the officer identifying himself proved that, when he eventually opened

the door, he was merely submitting to police authority and not consenting to entry. *United States v. Cruz-Roman*, 312 F. Supp. 2d 1355, 1361-62 (W.D. Wash. 2004).

A defendant can withdraw consent through unequivocal acts, such as repeatedly lowering his hands to block officers from searching his pockets, even without explicitly saying he no longer consented. *United States v. Sanders*, 424 F.3d 768, 775 (8th Cir. 2005). A defendant who allowed police officers to enter his residence did not impliedly consent to officer's entry into his bedroom when he "kind of flipped his hand" in that direction after the officer asked him for identification. *United States v. Castellanos*, 518 F.3d 965, 970 (8th Cir. 2008). In two Oregon cases, courts rejected claims of voluntary consent based on the agents' inadequate reports and conflicting testimony. *United States v. Eggleston*, No. 08-169-HA, 2010 WL 2854682, at \*3 (D. Or. July 19, 2010); *United States v. Freeman*, No. 08-289-1-JO, 2009 WL 2046039, at \*4 (D. Or. July 8, 2009).

The scope of consent is determined objectively by the expressed object of the search. *Florida v. Jimeno*, 500 U.S. 248, 251 (1991) (consent to search car for narcotics included search of paper bag in car); *United States v. Reeves*, 6 F.3d 660, 662 (9th Cir. 1993) (consent to "complete search" of car included search of briefcase in trunk of car); see *United States v. Flores*, 368 F. App'x. 424, 434-35 (4th Cir. 2010) (if consent does not limit search, officers may lawfully drill into a vehicle's axle to search for contraband); *United States v. Lucas*, 640 F.3d 168, 178 (6th Cir. 2011) (holding police did not exceed the scope of defendant's consent to search his residence for drugs and "other material or records pertaining to narcotics" by searching the defendant's personal computer because the computer was not password protected and the defendant did not object).

**COUNTERPOINT** – Intrusions that exceed the reasonable scope of consent violate the Fourth Amendment. *United States v. Lopez-Cruz*, 730 F.3d 803, 808 (9th Cir. 2013) (police exceeded scope of consent search a phone when they answered incoming calls); *United States v. Cotton*, 722 F.3d 271, 276 (5th Cir. 2013) (search of entire car was unlawful where defendant only consented to a search of his luggage); *Winfield v. Trottier*, 710 F.3d 49, 57 (2d Cir. 2013) (officer exceeded scope of consent to search car for contraband when he opened an envelope in the car and read its contents); *United States v. Lemmons*, 282 F.3d 920, 924 (7th Cir. 2002) (written consent to search trailer did not include consent to search a computer located within); *United States v. Blake*, 888 F.2d 795, 798 (11th Cir. 1989) (consent to search "person" in airport did not include "frontal touching" of genitals to locate drugs); *United States v. Washington*, 739 F. Supp. 546, 550-51 (D. Or. 1990) (permission to open a locked trunk did not include consent to pull the seats out of the car in order to look in trunk). After an initial consent to search a home for a burglar, the officers exceeded the scope of the consent in conducting subsequent searches for drugs. *Shamaeizadeh v. Cunigan*, 338 F.3d 535, 547-48 (6th Cir. 2003); see also *United States v. McMullin*, 576 F.3d 810, 816 (8th Cir. 2009) (new consent required for a marshal's second warrantless entry into a defendant's house because the second entry exceeded the scope of consent to the first entry). An initially consensual encounter can be transformed into a seizure

within the meaning of the Fourth Amendment by increasingly intrusive police procedures. *Kaupp*, 538 U.S. at 631-32. Defendant's consent to the search of his trunk did not include the entire car, even though he handed the officer the keys to his car, left the door open, and failed to object to a search of its interior. *United States v. Neely*, 564 F.3d 346, 351 (4th Cir. 2009). Following the lawful stop of his car, the defendant's consent for DEA agents to search his car did not extend to a search of his cell phones, which were removed from his person and placed on the roof of his vehicle. *United States v. Zavala*, 541 F.3d 562, 576 (5th Cir. 2008).

Consent to search may be given by a third party who has common authority over the place to be searched. *United States v. Matlock*, 415 U.S. 164, 170-71 (1974). Such third parties do not include hotel managers, landlords and similar non-resident persons with a property interest. *Stoner v. California*, 376 U.S. 483, 488-89 (1964) (hotel clerk); *Chapman v. United States*, 365 U.S. 610, 616-17 (1961) (landlord); *but see United States v. Lumpkins*, 687 F.3d 1011, 1013-14 (8th Cir. 2012) (holding a vehicle rental manager may consent to a search of rented car over defendant-driver's objection). A wife had the authority to consent to a forensic search of her husband's computer, which contained child pornography, where the defendant-husband failed to adequately safeguard his internet history through separate logins or encryption. *United States v. Thomas*, 818 F.3d 1230, 1241-42 (11th Cir. 2016) (noting that the facts that the defendant was the primary user, typically deleted his internet history, and used popup and spam filters were insufficient to vitiate the wife's common authority to provide consent).

**COUNTERPOINT** – When two individuals with equal authority in the home are both present and disagree on consent, officers may not enter. *Georgia v. Randolph*, 547 U.S. 103, 106 (2006); *see United States v. Moore*, 770 F.3d 809, 813-14 (9th Cir. 2014) (holding *Randolph* requires an express objection, so defendant's refusal to open the door to police, prompting them to use a battering ram with his roommate's permission, did not render the entry nonconsensual). If one occupant of a home consents but another occupant does not, police can enter after removing the objecting occupant only if the removal was "objectively reasonable." *Fernandez v. California*, 134 S. Ct. 1126, 1134 (2014); *see also United States v. Witzlib*, 796 F.3d 799, 801-02 (7th Cir. 2015) (man lured outside to speak with police lost authority to overrule his grandmother's consent to a warrantless search of their shared residence). *Fernandez* also suggests that one occupant can continue to override another occupant's consent as long as the non-consenting occupant remains anywhere on the premises. 134 S. Ct. at 1136. The Sixth Circuit refused to draw a distinction between consent from individuals with varying possessory interests in the property. *United States v. Johnson*, 656 F.3d 375, 378-79 (6th Cir. 2011) (police acted unreasonably in searching defendant's bedroom after he objected to the search over his wife's consent).

In a major expansion of the consent exception, the apparent authority of a third party to give consent is sufficient to make the search lawful as long as the mistake is reasonable. *Illinois v. Rodriguez*, 497 U.S. 177, 187 (1990) (approving search based on roommate's consent even though, unknown to the police, she had moved out a month before and retained a key without permission);

*see also United States v. Amratiel*, 622 F.3d 914, 916-17 (8th Cir. 2010) (defendant’s wife had apparent authority to consent to a search of the defendant’s locked gun safe, even though the police retrieved the safe’s keys from the defendant, not the wife); *United States v. Ruiz*, 428 F.3d 877, 882 (9th Cir. 2005) (holding it reasonable to believe that a co-resident in a trailer had authority to grant consent to search a gun case, where the case was located in plain view in a common area and when asked about the contents of the case, the co-resident did not disclaim ownership but merely stated he did not know whether a gun was inside).

**COUNTERPOINT** – The police have a duty of inquiry when relying on a third party’s apparent authority. *United States v. Reid*, 226 F.3d 1020, 1025-26 (9th Cir. 2000). Police could not assume, without further questioning, that a “sleepy-looking” person who answered the door and agreed the officers could “look around” had authority to allow a search. *United States v. Arreguin*, 735 F.3d 1168, 1178 (9th Cir. 2013). Police officers had no authority to search a gym bag under a bed, which the lessee identified as belonging to a houseguest. *United States v. Davis*, 332 F.3d 1163, 1170 (9th Cir. 2003); *see also United States v. Peyton*, 745 F.3d 546, 553 (D.C. Cir. 2014) (police could not search a defendant’s belongings where the defendant’s great grandmother, who lived with defendant, told officers the property in question belonged to the defendant); *United States v. Fultz*, 146 F.3d 1102, 1105-06 (9th Cir. 1998) (a homeowner had neither actual nor apparent authority to consent to the search of cardboard boxes stored in her garage by a homeless person). In *United States v. Welch*, 4 F.3d 761, 765 (9th Cir. 1993), the court held invalid the consent given by the defendant’s boyfriend to search defendant’s purse, which was located in a car they had joint control over, because the information known at the time did not support a reasonable belief in the boyfriend’s authority to consent. In *United States v. Dearing*, 9 F.3d 1428, 1430 (9th Cir. 1993), the court held an ATF agent’s reliance on a caretaker’s consent to search the defendant’s bedroom was unreasonable where the agent knew the caretakers’ prior entries into defendant’s bedroom were unauthorized and the caretaker’s relationship with the defendant was nearing an end. In *United States v. Salinas-Cano*, 959 F.2d 861, 865 (10th Cir. 1992), the court held the consent given by the defendant’s girlfriend to open the defendant’s closed suitcase, which was located in the girlfriend’s house, to be invalid. Third party consent that stems from prior government illegality, such as an illegal arrest, is not valid. *United States v. Oaxaca*, 233 F.3d 1154, 1158 (9th Cir. 2000); *but see United States v. Brandwein*, 796 F.3d 980, 985 (8th Cir. 2015) (an hour police spent in a residence before seeking consent to search for evidence of drug manufacturing purged the taint of the illegal entry). Agents’ discovery of men’s clothing in a duffel bag, which a female suspect claimed was hers, created sufficient ambiguity to negate her apparent authority over other bags in the hotel room. *United States v. Purcell*, 526 F.3d 953, 964 (6th Cir. 2008); *see also United States v. Taylor*, 600 F.3d 678, 681-82 (6th Cir. 2010) (female tenant lacked apparent authority to consent to a search of a shoe box belonging to a male suspect that was in a closet full of men’s clothing, and which the female tenant did not appear to be using).

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

**COUNTERPOINT** – Where a meth lab was in plain view during a protective sweep of a storage locker, the subsequent search required a warrant in the absence of exigent circumstances. *United States v. Murphy*, 516 F.3d 1117, 1121 (9th Cir. 2008). Where the warrant failed to particularly describe the items to be seized, material that is not contraband in plain view should be suppressed. *United States v. Van Damme*, 48 F.3d 461, 465-67 (9th Cir. 1995). The “single purpose container” exception allows officers to search a container only if, solely by the container’s exterior, officers can be certain of what is inside. *United States v. Gust*, 405 F.3d 797, 800-05 (9th Cir. 2005) (black plastic case was not readily identifiable as a gun case, nor could its contents be readily inferred from outward appearances). The subscriber number of a defendant’s cell phone was not admissible under a plain view theory when the agent had to open the cell phone and manipulate it in order to retrieve the number. *United States v. Zavala*, 541 F.3d 562, 577 n.5 (5th Cir. 2008). The plain view doctrine does not allow searches of wallets that are in an officer’s plain view. *United States v. Rivera-Padilla*, 365 Fed. App’x. 343, 346 (3d Cir. 2010).

Application of the plain view doctrine to computer searches raises troubling issues. In *United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162, 1178 (9th Cir. 2010) (en banc) (Kozinski, J., concurring), the concurring judges stated that, when the government obtains a warrant to examine a computer hard drive or electronic storage medium to search for certain incriminating files, magistrate judges should insist that the government waive reliance upon the plain view doctrine. *But see United States v. Stabile*, 633 F.3d 219, 240-41, 241 n.16 (3d Cir. 2011) (declining to follow the Ninth Circuit’s approach, and holding that the plain view doctrine applies to computer file searches). The search of a computer exceeded the scope of a warrant for drug records, resulting in the suppression of child pornography in *United States v. Payton*, 573 F.3d 859, 861-62 (9th Cir. 2009).

3. **Investigative Stops Less Intrusive Than Arrest** – In *Terry v. Ohio*, 392 U.S. 1 (1968), the Court recognized that a limited stop and frisk of an individual could be conducted without a warrant based on less than probable cause. A *Terry* stop must be predicated on a reasonable, individualized suspicion based on articulable facts, and the frisk is limited to a pat-down for weapons. For example, a person’s unprovoked flight in a high crime area when an officer approaches provides reasonable suspicion for a stop. *Illinois v. Wardlow*, 528 U.S. 119, 124-25

(2000). The Court has also upheld an airport stop based in part on a drug courier profile. *United States v. Sokolow*, 490 U.S. 1, 9-10 (1989).

**COUNTERPOINT** – A *Terry* stop must be based on recent observations. *United States v. Valerio*, 718 F.3d 1321, 1324 (11th Cir. 2013) (holding that a stop “nearly a week after [police] had last observed” the defendant was “well outside” the scope of *Terry* because it was “not responsive to the development of suspicion within a dynamic or urgent law enforcement environment”). Refusal to cooperate with police does not furnish the objective justification required for a stop. *Florida v. Bostick*, 501 U.S. 429, 437 (1991). Nor does an observation of “nervous” behavior. *United States v. I.E.V.*, 705 F.3d 430, 438 (9th Cir. 2012) (holding that police cannot “justify a *Terry* search based on mere nervous or fidgety conduct and touching of clothing”); *United States v. Wilson*, 506 F.3d 488, 495 (6th Cir. 2007) (“Nervous behavior, standing alone, is not enough to justify a *Terry* search.”); *United States v. McKoy*, 428 F.3d 38, 40 (1st Cir. 2005) (“Nervousness is a common and entirely natural reaction to police presence.”); *United States v. Ford*, 333 F.3d 839, 842, 845 (7th Cir. 2003) (finding “no reasonable suspicion that would justify a protective pat-down” of an individual who “appeared nervous, looked around, stepped backward and reached for his pocket after he activated [a] metal detector”). The Ninth Circuit found a stop unjustified because it was “essentially based on nothing more than the suspicion that drugs could be found”; because the defendant “acted in a compliant and nonthreatening manner”; and because there was “no evidence that [he] was dangerous.” *I.E.V.*, 705 F.3d at 435. Police cannot conduct an investigatory detention on the basis of reasonable suspicion that a person committed a misdemeanor that poses no threat to public safety. *United States v. Grigg*, 498 F.3d 1070, 1075-83 (9th Cir. 2007) (reported violation of a noise ordinance insufficient to justify stop).

“[S]imply driving with out-of-state license plates on a particular stretch of highway where [police say] much drug trafficking occurs” does not amount to reasonable suspicion. *Huff v. Reichert*, 744 F.3d 999, 1004-05 (7th Cir. 2014). In the following cases, the Ninth Circuit rejected a claim that reasonable suspicion justified a stop: *United States v. Colin*, 314 F.3d 439, 443-46 (9th Cir. 2003); *United States v. Sigmond-Ballesteros*, 285 F.3d 1117, 1126 (9th Cir. 2002); *United States v. Salinas*, 940 F.2d 392, 394-95 (9th Cir. 1991); *United States v. Hernandez-Alvarado*, 891 F.2d 1414, 1418-19 (9th Cir. 1989); *United States v. Robert L.*, 874 F.2d 701, 703-05 (9th Cir. 1989); and *United States v. Thomas*, 863 F.2d 622, 628-29 (9th Cir. 1988). The “reasonable suspicion” standard cannot justify extended seizure for questioning in the hall outside a suspect’s hotel room. *United States v. Washington*, 387 F.3d 1060, 1067-68 (9th Cir. 2004). Mere proximity to the U.S.-Mexico border and areas known for drug or illegal alien smuggling alone cannot sustain reasonable suspicion to stop. *United States v. Rangel-Portillo*, 586 F.3d 376 (5th Cir. 2009). Response to a report of domestic violence, alone, does not create reasonable suspicion to justify frisking the suspect for weapons. *Thomas v. Dillard*, 818 F.3d 864, 882 (9th Cir. 2016).

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

**COUNTERPOINT** – The Fourth Circuit limited the collective knowledge doctrine to “vertical knowledge,” where an instructing officer communicates probable cause or reasonable suspicion to an acting officer, and refused to extend the doctrine to “horizontal knowledge,” where uncommunicated information aggregates to form reasonable suspicion or probable cause. *Massenburg*, 654 F.3d at 493-94; see also *United States v. Rodriguez-Rodriguez*, 550 F.3d 1223, 1228 n.5 (10th Cir. 2008). The need to rigorously apply *Terry* to outlaw race-based stops is strongly supported in *Washington v. Lambert*, 98 F.3d 1181, 1185-92 (9th Cir. 1996). The concurrence in *Illinois v. Wardlow*, 528 U.S. 119, 124-25 (2000), also highlights racial issues in stops. In *United States v. Montero-Camargo*, 208 F.3d 1122, 1134-35 (9th Cir. 2000) (en banc), the court rejected reliance on the racial or ethnic appearance of the driver as the basis for a stop. In *United States v. Patterson*, 340 F.3d 368 (6th Cir. 2003), officers received an anonymous complaint on a drug hotline alleging that a group of young men located on a particular street corner were selling drugs. This complaint did not create reasonable suspicion to stop the defendant, who was among a group of eight to ten black males found on the same street corner, despite the fact that the group retreated when they observed the police officers and one of the members of the group appeared to dispose of something in the bushes. *Patterson*, 340 F.3d at 371-72. Though officers may rely partially on general “factors composing a broad profile,” ultimately they must show something that establishes particularized suspicion. *United States v. Manzo-Jurado*, 457 F.3d 928, 939-40 (9th Cir. 2006) (“a group of Hispanic-looking men, who appeared to be in a work crew, calmly conversing in Spanish to each other” was not enough to create reasonable suspicion that the men were illegal immigrants, although each of these facts bore some relevance to establishing reasonable suspicion).

Police officers may not seize non-threatening contraband detected through groping and manipulating the object after a protective pat-down revealed no weapons. *Minnesota v. Dickerson*, 508 U.S. 366, 378-79 (1993). The intrusiveness of a pat-down under *Terry* is limited by its purpose. *United States v. Miles*, 247 F.3d 1009, 1013-15 (9th Cir. 2001) (shaking matchbox exceeded permissible scope of *Terry* frisk). By shoving his hand into defendant’s pocket, instead of frisking him, an officer had converted a permissible pat-down into an unlawful search. *United States v. Casado*, 303 F.3d 440, 449 (2d Cir. 2002). The mere hunch that a suspect’s furtive actions meant he was carrying a gun, without articulable reasons to believe

criminal activity is afoot, does not support a *Terry* stop. *United States v. Jones*, 606 F.3d 964, 966-67 (8th Cir. 2010).

An anonymous tip can furnish the basis for an investigative stop if, under the totality of the circumstances, the tip demonstrates “sufficient indicia of reliability to provide reasonable suspicion.” *Navarette v. California*, 134 S. Ct. 1683, 1688 (2014) (quoting *Alabama v. White*, 496 U.S. 325, 327 (1972)). Police may rely on an anonymous tip only to the extent that they corroborate details of the tip or have other reason to trust its reliability. *Navarette* relied on a totality-of-the-circumstances analysis that considered several factors supporting the reliability of an anonymous tip that a driver had tried to run the tipster off the road. *See* 134 S. Ct. at 1689-91. As evidence of the tip’s reliability, the Court noted that (1) the tipster described the truck and gave a license number; (2) the tipster claimed eyewitness knowledge of the alleged dangerous activity; (3) the tip was made contemporaneous to the alleged conduct; (4) the tip was made in a 911 call and police can identify 911 callers; and (5) the call described the sort of erratic behavior that police could conclude, based on experience and training, was the product of drunk driving. *Id.*; *see also United States v. Edwards*, 761 F.3d 977, 984-85 (9th Cir. 2014) (explaining that an anonymous tip is more reliable when it reports an ongoing emergency, such as an individual presently shooting at cars). Similarly, in *Alabama v. White*, police had conducted a search pursuant to an anonymous tip that a woman would drive from a particular apartment building to a particular motel in a brown Plymouth station wagon with a broken right tail light and that she would be transporting cocaine. 496 U.S. 325, 327 (1990). The Court held that the search was valid because the police had confirmed “innocent details” of the tip and this “corroboration of certain details made the anonymous tip sufficiently reliable to create reasonable suspicion of criminal activity.” *Id.*

**COUNTERPOINT** – An anonymous tip that a person is carrying a gun is not, by itself, sufficient to justify an investigative stop. *Florida v. J.L.*, 529 U.S. 266 (2000). The Court in *J.L.* held that police had no basis for believing that a tipster had “knowledge of concealed criminal activity” because he did not explain how he knew about the gun, did not suggest that he had any special familiarity with the defendant’s affairs, and did not predict any future behavior. 529 U.S. at 271-72.

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



**COUNTERPOINT** – In analyzing whether a detention exceeds the justification for the stop, the crucial question is whether the detention is unnecessarily prolonged. *See Rodriguez v. United States*, 135 S. Ct. 1609 (2015) (extension of traffic stop to conduct dog sniff without reasonable suspicion to conduct dog sniff constitutes unreasonable seizure); *Illinois v. Caballes*, 543 U.S. 405, 407 (2005) (citing *United States v. Jacobsen*, 466 U.S. 109, 124 (1984)) (“It is nevertheless clear that a seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution.”); accord *United States v. Mendez*, 476 F.3d 1077, 1079-80 (9th Cir. 2007); *see also Muehler v. Mena*, 544 U.S. 93 (2005) (holding that, although the police may question a suspect about issues unrelated to the purpose of the stop, the officers may not unnecessarily prolong the detention). “[A]n officer’s inquiries into matters unrelated to the justification for the traffic stop do not convert the encounter into something other than a lawful seizure, so long as the inquiries do not measurably extend the stop’s duration.” *Arizona v. Johnson*, 555 U.S. 323, 333 (2009). Police cannot detain a driver and ask for his license after it becomes clear that the initial justification for the stop has evaporated. *People v. Cummings*, 6 N.E.3d. 725, 734 (Ill. 2014). A defendant was unlawfully detained when a police officer questioned her in her car for a prolonged period incident to a traffic stop. *United States v. Garcia-Rosales*, No. 05-402-MO, 2006 WL 468320, at \*10 (D. Or. 2006). When officers at an immigration checkpoint detained travelers after checking their immigration status, their continued detention and questioning about drugs was unreasonable. *United States v. Portillo-Aguirre*, 311 F.3d 647, 653-56 (5th Cir. 2002); *see also United States v. Higareda Santa-Cruz*, 826 F. Supp. 355, 358-59 (D. Or. 1993). The officer violated the Fourth Amendment’s limit on the duration and the scope of traffic stops, where a police officer delayed the traffic violation processing to ask questions about drug trafficking and to request consent for a search. *United States v. Digiovanni*, 650 F.3d 498, 500-13 (4th Cir. 2011).

The level of intrusion during a stop may also trigger the probable cause requirement. *United States v. Lopez-Arias*, 344 F.3d 623, 627-28 (6th Cir. 2003) (transporting vehicle occupants away from the scene of the stop requires probable cause); *United States v. Rodriguez*, 869 F.2d 479, 483 (9th Cir. 1989); *United States v. Strickler*, 490 F.2d 378, 380-81 (9th Cir. 1974); *see also United States v. Bailey*, 743 F.3d 322, 340 (2d Cir. 2014) (holding that a lawful detention-incident-to-search became unlawful at the moment that police handcuffed the individual, because the police had already searched the individual for weapons and the government never argued that he was a flight risk); *Longshore v. State*, 924 A.2d 1129, 1145 (Md. Ct. App. 2007) (holding that handcuffing a suspect turns an investigative stop into an arrest and thus requires probable cause absent “special circumstances,” such as a reason to believe the suspect will flee or endanger the officer).

The same requirement of reasonable suspicion for a stop applies to stops of individual vehicles. *United States v. Arvizu*, 534 U.S. 266 (2002); *United States v. Cortez*, 449 U.S. 411

(1981); *Delaware v. Prouse*, 440 U.S. 648 (1979). The suspicion to justify a stop may relate to crimes already committed, *United States v. Hensley*, 469 U.S. 221 (1985) (permissible to stop vehicle for further investigation based on “wanted flyer”), and the stop may be based on traffic violations observed by another officer, *United States v. Miranda-Guerena*, 445 F.3d 1233, 1237-38 (9th Cir. 2006).

Probable cause to believe a parking offense is ongoing justifies at least a brief stop. *United States v. Shields*, 789 F.3d 733, 744-46 (7th Cir. 2015); *see also United States v. Choudhry*, 461 F.3d 1097, 1103-04 (9th Cir. 2006) (allowing investigatory stop of vehicle in no-stopping/tow-away zone); *United States v. Copeland*, 321 F.3d 582, 594 (6th Cir. 2003) (allowing stop based on parking violation). Investigation of a potential parking violation, in which police officers believed a car was parked too close to a crosswalk, justified the seizure of the car’s passengers. *United States v. Johnson*, 823 F.3d 408, 410 (7th Cir. 2016).

**COUNTERPOINT** – The Supreme Court held that a police officer’s reasonable mistake of law may provide the individualized reasonable suspicion necessary to justify a traffic stop under the Fourth Amendment. *Heien v. North Carolina*, 135 S. Ct. 530 (2014). In *Heien*, the Court a North Carolina officer stopped a vehicle for having only one working brake light, which turned out not to be a violation of North Carolina’s traffic laws. 135 S. Ct. at 534. Because the “ultimate touchstone of the Fourth Amendment is reasonableness,” Justice Roberts explained that there is no significant difference between searches and seizures based on mistake of fact and searches and seizures based on mistake of law—both can be “reasonable.” *Id.* at 536. In *Heien*, the Court concluded that an objectively reasonable mistake of law (in addition to a reasonable mistake of fact) can provide the reasonable suspicion needed to justify a traffic stop leading to a search and seizure of drugs. *Id.* at 537, 540. *Heien* may affect significant circuit law regarding errors of law. *See, e.g., United States v. Nicholson*, 721 F.3d 1236, 1241 (10th Cir. 2013) (holding that an officer’s mistake of law was “unreasonable whether or not the ordinance was ‘plain and unambiguous’”); *United States v. Herrera*, 444 F.3d 1238, 1246-49 (10th Cir. 2006) (officer’s mistaken belief that a truck qualified as a commercial vehicle did not justify a suspicionless stop, even though officer claimed stopping the truck to check the VIN number was the only way to determine whether or not it qualified as commercial); *United States v. Mariscal*, 285 F.3d 1127, 1130-33 (9th Cir. 2002) (no reasonable suspicion where failure to signal right turn did not affect traffic as required for a violation under state law); *United States v. King*, 244 F.3d 736, 739-41 (9th Cir. 2001) (mistaken belief that ordinance prohibited driving with disabled placard hanging from mirror); *United States v. Lopez-Soto*, 205 F.3d 1101, 1105-06 (9th Cir. 2000) (erroneous belief that a registration sticker was required); *United States v. Pena-Montes*, 589 F.3d 1048, 1054-55 (10th Cir. 2010) (officer’s mistaken belief that dealer plates are only installed on vehicles not yet sold did not justify a stop based on a suspicion that a vehicle was stolen from the dealership). In *United States v. Izguerra-Robles*, 660 F. Supp. 2d 1202, 1206 (D. Or. 2009), police officers exceeded their authority to conduct a traffic stop for failure to carry an operator’s license.

The court rejected a car stop in *United States v. Thomas*, 211 F.3d 1186, 1191 (9th Cir. 2000), that was based in part on the purported “distinctive sound” of marijuana bales being loaded into the back of an El Camino. The Seventh Circuit has held that “a discrepancy between the observed color of a car and the color listed on its registration” is not alone “sufficient to give rise to reasonable suspicion.” *United States v. Uribe*, 709 F.3d 646, 651 (7th Cir. 2013). The Second Circuit has held in a § 1983 case that police cannot stop a vehicle solely on the basis of a passenger “giving the finger.” *Swartz v. Insogna*, 704 F.3d 105, 112 (2d Cir. 2013). In *United States v. Sowards*, the Fourth Circuit concluded that an officer’s traffic stop for exceeding the speed limit by five miles lacked probable cause when officer visually determined the vehicle’s speed. 690 F.3d 583, 597 (4th Cir. 2012); *but see United States v. Mubdi*, 691 F.3d 334, 340–41 (4th Cir. 2012), *vacated and remanded on other grounds*, 133 S. Ct. 2851 (2013) (distinguishing *Sowards* from a traffic stop with “two independent and virtually identical estimates as to Mubdi’s speed by officers who were required, as part of a radar certification class, to visually estimate the speed of vehicles within a narrow margin of error”). In overturning a drug conviction due to lack of reasonable suspicion, the Fourth Circuit expressed “concern about the inclination of the Government toward using whatever facts are present, no matter how innocent, as indicia of suspicious activity.” *United States v. Foster*, 634 F.3d 243, 248 (4th Cir. 2011) (“[T]he Government cannot rely upon post hoc rationalizations to validate those seizures that happen to turn up contraband.”).

Like the more stringent standard for individual stops based on race, in *United States v. Garcia-Camacho*, 53 F.3d 244, 246-49 (9th Cir. 1995), the court noted the problems with profile-based traffic stops and deconstructed the “heads I win, tails you lose” justifications for a stop. In *United States v. Golab*, 325 F.3d 63, 66-67 (1st Cir. 2003), the court held that an immigration agent lacked reasonable suspicion based on an occupied car in a remote parking lot, with out-of-state plates, near a Social Security office. In *United States v. Townsend*, 305 F.3d 537, 542-45 (6th Cir. 2002), the court rejected a profile-based detention that included the presence of a Bible (purportedly to deflect suspicion), travel from and to source and destination cities, and food wrappers in the car.

During a stop for traffic violations, the officers need not independently have reasonable suspicion that criminal activity is afoot to justify frisking passengers, but they must have reason to believe the passengers are armed and dangerous. *Arizona v. Johnson*, 555 U.S. 323, 326-27 (2009). The scope of the “frisk” for weapons during a vehicle stop may include areas of the vehicle in which a weapon may be placed or hidden. *Michigan v. Long*, 463 U.S. 1032 (1983).

**COUNTERPOINT** – Reasonable suspicion for a frisk must be “something more than an inchoate and unparticularized suspicion or hunch.” *United States v. Sokolow*, 490 U.S. 1, 7 (1989). Police cannot frisk an individual without “reasonable suspicion that the subject is ‘armed and dangerous’ as opposed to being generally suspicious.” *United States v. Williams*, 731 F.3d 678, 686 (7th Cir. 2013).

Radio communication warning of the defendant's prior criminal activity and an alleged false statement by the defendant did not create reasonable suspicion that the defendant was armed and dangerous to justify a traffic stop frisk. *United States v. Powell*, 666 F.3d 180, 187-89 (4th Cir. 2011). Officer observation that the driver and passenger switched places during traffic stop and that passenger fidgeted with front dash board did not provide reasonable suspicion to conduct a vehicle frisk. *Jackson v. United States*, 56 A.3d 1206, 1212 (D.C. 2012). Even if police officers have legitimately stopped a vehicle, the officers may search the vehicle only if they have probable cause to do so. *United States v. Parr*, 843 F.2d 1228, 1231-32 (9th Cir. 1988).

In *Hiibel v. Sixth Judicial District Court*, 542 U.S. 177 (2004), the Supreme Court held that a Nevada statute requiring a person to disclose his name to an officer during a *Terry* stop did not violate any provisions of the Constitution and upheld the defendant's arrest.

**COUNTERPOINT** –In *Martiszus v. Washington County*, 325 F. Supp. 2d 1160, 1168-70 (D. Or. 2004), the court held that refusing to provide identification, standing alone, is insufficient justification for a *Terry* stop. In *United States v. Henderson*, 463 F.3d 27, 46-47 (1st Cir. 2006), the court found that an officer could not demand a driver's identifying information "for reasons of officer safety" when the officer did not perceive any danger, there was no reasonable suspicion that the defendant was engaged in any illegal activity, the stop was not in a dangerous location, and the traffic violations for which the defendant was pulled over for did not "raise the specter of illegal activity."

The police may order passengers and the driver out of or into the vehicle pending completion of the stop. *Maryland v. Wilson*, 519 U.S. 408 (1997); *Pennsylvania v. Mimms*, 434 U.S. 106 (1977); *United States v. Williams*, 419 F.3d 1029, 1034 (9th Cir. 2005) (officers have the general authority to control all movement in a traffic encounter). A traffic stop subjects a passenger, as well as the driver, to a Fourth Amendment seizure. *Brendlin v. California*, 551 U.S. 249, 257 (2007).

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

**COUNTERPOINT** – When executing a search warrant, officers cannot detain recent occupants who have left the immediate vicinity of the premises to be

searched. *Bailey v. United States*, 133 S. Ct. 1031, 1042 (2013). In *Bailey*, the Supreme Court refused to extend *Summers* because none of the three factors justifying detention at the scene apply with the same force to recent occupants who pose no real threat to police investigation. *Id.* at 1037.

4. **Incident To Arrest** – An arrest must be supported by probable cause. *Michigan v. Summers*, 452 U.S. 692, 700 (1981). As an incident to a lawful arrest, officers may conduct a detailed search of the person arrested, regardless of whether specific danger to the officer or of destruction of evidence is shown to exist. *United States v. Robinson*, 414 U.S. 218 (1973); *Gustafson v. Florida*, 414 U.S. 260 (1973). Many of these searches are justified as routine administrative procedure and by the significant government interest in processing suspects after arrest. *Gerstein v. Pugh*, 420 U.S. 103, 113-14 (1975); *see also Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty.*, 542 U.S. 177, 191 (2000) (holding that the government has an interest in properly identifying arrested suspects). A warrant is not required to compel a driver arrested for driving under the influence to submit to a breathalyzer test but a warrant is required to draw blood. *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2184 (2016).

**COUNTERPOINT** – Although search incident to arrest may be broad in scope, the search must be reasonable. *Amaechi v. West*, 237 F.3d 356, 361 (4th Cir. 2001) (citing *Illinois v. Lafayette*, 462 U.S. 640, 645 (1983)). Strip searches, for example, are particularly invasive searches that require a balancing test to ensure reasonableness. *United States v. Edwards*, 666 F.3d 877, 883 (4th Cir. 2011) (weighing (1) the place in which the search was conducted, (2) the scope of the particular intrusion, (3) the manner in which the search was conducted, and (4) the justification for initiating the search). In *Edwards*, the Fourth Circuit suppressed the product of an incident to arrest search because the officer’s use of a knife to remove a cocaine baggie from the arrestee’s penis posed an unreasonable risk to the arrestee. 666 F.3d at 885-87. While finding good faith reliance on a warrant, officer’s use of a proctoscope to search a defendant’s rectum was unreasonable because of the extreme invasiveness and indignity of the search. *United States v. Gray*, 669 F.3d 556, 565 (5th Cir. 2012), *vacated on other grounds*, 133 S. Ct. 151. A female officer’s strip search of a male pretrial detainee was unreasonable in *Byrd v. Maricopa County Sheriff’s Dept.*, 629 F.3d 1135, 1140-48 (9th Cir. 2011). In the absence of a specific justification, body cavity searches as an incident to arrest are unreasonable. *Schmerber v. California*, 384 U.S. 757, 770 (1966) (“Search warrants are ordinarily required for searches of dwellings, and, absent an emergency, no less could be required where intrusions into the human body are concerned.”); *see also Fuller v. M.G. Jewelry*, 950 F.2d 1437,1446 (9th Cir. 1991). As such, police illegally searched inside an arrestee’s rectum after he was booked into jail because there was “no evidence that [defendant] could have destroyed evidence or that a medical emergency existed” and where “the government does not contend that it is necessary to physically penetrate the body cavities of every person booked into” the jail. *United States v. Fowlkes*, No. 804 F.3d 954, 965-66 (9th Cir. 2015). In *Commonwealth v. Morales*, 968 N.E.2d 403, 411-12 (Mass. 2012), the Massachusetts Supreme Court affirmed the lower court’s suppression of evidence

unreasonably obtained through a public strip search incident to a drug arrest that exposed the defendant's buttocks. The Supreme Court held that officers could collect a cheek swab DNA sample in a reasonable exercise of administrative booking procedure in compliance with the Fourth Amendment. *Maryland v. King*, 133 S. Ct. 1958, 1971 (2013). In a deeply divided opinion, the Supreme Court in *King* found that the balance of reasonableness weighed in favor of the government's significant interest in DNA collection as the most reliable method of identification. *Id.* at 1971-73. The Court qualified this drastic expansion of "reasonableness" to DNA testing by limiting exposure to those persons arrested for a "serious" new crime. *Id.* However, the majority failed to define "serious" and consequently imposed a limiting factor that is largely imaginary. *Id.* at 1989 (Scalia, J., dissenting) (noting that the "serious" limitation cannot effectively curb the risk of abuse with respect to broad collection and use of DNA).

Police need a warrant to access the contents of a cell phone seized during an arrest or to use the cell phone to access other information. *Riley v. California*, 134 S. Ct. 2473, 2495 (2014). In *Riley*, the Court explained that the government has a much weaker interest in warrantless searches of cell phones because cell phone contents do not implicate the risks that justify warrantless searches of other containers seized during an arrest: cell phone contents cannot be used to harm officers or effectuate an escape, and any potential evidence can only be destroyed either by a third party remotely wiping a phone or through automatic security features "apart from any active attempt by a defendant or his associates to conceal or destroy evidence upon arrest." 134 S. Ct. at 2485-86. Also, cell phones are different from other containers that are seized during an arrest because they contain vast quantities of personal information and because most of their "contents" are in fact stored remotely. *Id.* at 2491.

The officers must actually arrest the person—not simply have the right to arrest—to justify a search. *Knowles v. Iowa*, 525 U.S. 113, 117-18 (1998) (full search of car pursuant to issuance of speeding citation violated the Fourth Amendment even though authorized by state statute). In the infamous soccer mom case, *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), the Court held that if an officer has probable cause to believe that an individual has committed even a non-jailable minor crime in his presence (failure to wear seatbelts), the officer may arrest the offender without violating the Fourth Amendment.

**COUNTERPOINT** – The search of possessions within an arrestee's control must be "roughly contemporaneous with the arrest." *United States v. Ramos-Oseguera*, 120 F.3d 1028, 1036 (9th Cir. 1997) (search of vehicle after defendant was transported to the police station was not a search incident to arrest); *United States v. Park*, No. 05-375-SI, 2007 WL 1521573, at \* 8-9 (N.D. Cal. 2007) (search of defendants' cell phones was not a "search of the person" and so the hour and a half delay caused the search to be invalid as "incident to arrest").

Police may search a vehicle incident to a recent occupant's arrest only when (1) the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search or (2) it is reasonable to believe that evidence regarding the arrest might be found in the vehicle. *Arizona v. Gant*, 556 U.S. 332, 351 (2009). *Gant* reversed the previous bright line test allowing searches of vehicles incident to arrest without regard to the rationale for the search. *Thornton v. United States*, 541 U.S. 615 (2004); *New York v. Belton*, 453 U.S. 454 (1981). Officers may not search a vehicle incident to arrest for a crime that would not yield evidence in the passenger compartment of the vehicle. *United States v. Ruckes*, 586 F.3d 713 (9th Cir. 2009) (search incident to arrest for illegal driving not upheld); accord *United States v. Edwards*, 769 F.3d 509 (7th Cir. 2014) (warrantless search of car's passenger compartment reasonable where defendant arrested on suspicion of driving without car owner's consent).

**COUNTERPOINT** – The question whether a suspect is a “recent occupant” depends on the suspect's temporal and spatial relationship to the vehicle, which should be guided by the rationales underlying *Chimel v. California*, 395 U.S. 752 (1969). *Thornton*, 541 U.S. at 622. When no vehicle is involved, the area that may be searched pursuant to this exception is limited to the reaching distance, or area in the immediate control, of the suspect. *Chimel*, 395 U.S. at 763. A backpack on a nearby park bench was not close enough to the defendant to be searched incident to arrest. *United States v. Spurrk*, No. 05-226-KI, 2005 WL 3478195, at \*5 (D. Or. Dec. 20, 2005). A backpack found 8 to 12 feet from the place of the defendant's arrest was not within the defendant's lunge area for purposes of a search incident to arrest. *United States v. Manzo-Small*, No. 05-480-HA, 2006 WL 1113584, at \*3 (D. Or. Apr. 21, 2006). The defendant must also be under arrest: where a suspect was detained in the back of a patrol car on suspicion of driving with a suspended license, the search incident to arrest exception did not justify the search of the vehicle because he was not under arrest. *United States v. Parr*, 843 F.2d 1228, 1230-31 (9th Cir. 1988); but see *United States v. Smith*, 389 F.3d 944, 951-52 (9th Cir. 2004) (search may take place prior to actual arrest).

Incident to a lawful arrest of a person in his or her home, officers may conduct a warrantless sweep of places in the house where a person could hide if the officers reasonably believe that the area to be swept harbors someone posing a danger. *Maryland v. Buie*, 494 U.S. 325 (1990). Some circuits permit a protective sweep in situations other than a home arrest, such as exigent circumstances or consent. *United States v. Miller*, 430 F.3d 93, 94-95 (2d Cir. 2005); *United States v. Martins*, 413 F.3d 139, 149-50 (1st Cir. 2005); *Leaf v. Shelnut*, 400 F.3d 1070, 1088-89 (7th Cir. 2005); *United States v. Gould*, 364 F.3d 578, 590 (5th Cir. 2004) (en banc); *United States v. Taylor*, 248 F.3d 506, 513-14 (6th Cir. 2001); *United States v. Patrick*, 959 F.2d 991, 996 (D.C. Cir. 1992).

**COUNTERPOINT** – The Ninth and Tenth Circuit limit protective sweeps only to those incident to arrest. *United States v. Torres-Castro*, 470 F.3d 992, 997 (8th Cir. 2006); *United States v. Reid*, 226 F.3d 1020, 1027 (9th Cir. 2000); see also *United States v. Hassock*, 631 F.3d 79, 87-88 (2d Cir. 2011) (permitting protective sweeps in other lawful processes with reasonable danger to officers, but not yet

extending sweeps to consent); *see also* *Guzman v. Commonwealth*, 375 S.W.3d 805, 808-09 (Ky. 2012) (prohibiting protective sweeps in consent situations); *Brumley v. Com.*, 413 S.W.3d 280, 286-87 (Ky. 2013) (officers with information that arrestee possessed firearms could not search his home simply because they heard “shuffling” noises, given that “an overwhelming amount of law abiding citizens in Kentucky have guns” and also that allowing protective sweeps upon hearing noise would allow police to “sweep almost every house where there is more than one member of the household”); *State v. Guggenmos*, 253 P.3d 1042, 1051 (Or. 2011) (officers violated the Fourth Amendment when they performed a protective sweep of consenting individuals’ home after seeing other individuals run out of home). A protective sweep is not allowed if the police detain rather than arrest the occupant. *Reid*, 226 F.3d at 1027. The purpose of the sweep is to protect officers against surprise attack by unknown co-conspirators and is narrowly confined to a cursory visual inspection of potential hiding places. *United States v. Furrow*, 229 F.3d 805, 811-12 (9th Cir. 2000); *United States v. Hassock*, 631 F.3d 79, 87-88 (2d Cir. 2011) (noting that officer safety is the only purpose of a protective sweep); *United States v. Fuentes*, 800 F. Supp. 2d 1144, 1155 (D. Or. 2011) (finding protective sweep was unjustified because no particularized information existed to lead police to reasonably believe anyone else was in the home when both occupants had been arrested). A protective sweep must be limited to the immediate vicinity of the arrest. *United States v. White*, 748 F.3d 507, 513 (3d Cir. 2014) (holding that search of a home 20 feet away from where an arrest took place was not a valid protective sweep). Even items in plain view from the point of the arrest must be suppressed where the evidence was located after the purposes of a protective sweep have been accomplished. *United States v. Murphy*, 516 F.3d 1117, 1121 (9th Cir. 2008); *United States v. Noushfar*, 78 F.3d 1442, 1447-48 (9th Cir. 1996).

In general, pretextual traffic stops and arrests are permitted, and the subjective intent of the officer is irrelevant. *Whren v. United States*, 517 U.S. 806 (1996); *see also* *Arkansas v. Sullivan*, 532 U.S. 769 (2001) (reaffirming *Whren* regarding custodial arrest). The Ninth Circuit, with a dissent from Judge Reinhardt, extended *Whren* to use of a pretextual warrant to enter a home. *United States v. Hudson*, 100 F.3d 1409 (9th Cir. 1996). In *United States v. Magallon-Lopez*, the Ninth Circuit again applied *Whren* and held the fact that an officer lied about seeing the defendant make an illegal lane change did not undermine the legality of the stop, so long as the facts objectively established reasonable suspicion to justify an investigatory stop. 817 F.3d 671, 675 (9th Cir. 2016).

**COUNTERPOINT** – Although concurring in the judgment in *Magallon-Lopez*, Judge Berzon expressed concern that *Whren* and its progeny encourage police officers to offer “phony explanations” for their actions. *Id.* at \*5 (Berzon, J., concurring) (also wondering if the Due Process Clause is implicated when officers provide a false basis for the stop). In the absence of an equal protection violation, little is probably left of the cases on pretextual traffic stops, even where an objective test finds a purpose for investigating a crime other than the traffic infraction. *See*



*United States v. Millan*, 36 F.3d 886 (9th Cir. 1994); *but see United States v. Huguenin*, 154 F.3d 547 (6th Cir. 1998) (police use of pretextual DUI roadblock aimed at drug interdiction unconstitutional). Despite *Hudson*, there still should be some room under pretext precedent for challenging the timing of the execution of a warrant in order to search a location otherwise protected by the Fourth Amendment. *See United States v. Lefkowitz*, 285 U.S. 452, 467 (1932); *Williams v. United States*, 418 F.2d 159, 161 (9th Cir. 1969), *aff'd*, 401 U.S. 646 (1971); *Taglavore v. United States*, 291 F.2d 262, 265 (9th Cir. 1961). The pretextual use of an administrative warrant to arrest an individual in the home may still violate the Fourth Amendment even after *Whren*. *Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1360-63 (9th Cir. 1994).

**5. Exigent Circumstances** – The Court has traditionally allowed an exception for warrantless searches based on exigent circumstances under the rationales for warrantless arrests in residences (*Payton v. New York*, 445 U.S. 573 (1980)), “hot pursuit” (*Warden v. Hayden*, 387 U.S. 294 (1967)), imminent fire safety needs in the aftermath of a blaze (*compare Michigan v. Tyler*, 436 U.S. 499 (1978), *with Michigan v. Clifford*, 464 U.S. 287 (1984)), or an emergency such as a report of shots fired (*see Arizona v. Hicks*, 480 U.S. 321, 324-25 (1989)). However, the warrantless search must be strictly circumscribed by the emergency that justified its initiation. *Minnesota v. Olson*, 495 U.S. 91, 101 (1990); *Mincey v. Arizona*, 437 U.S. 385 (1978) (rejecting murder scene exception to warrant requirement). In *United States v. Caraballo*, the Second Circuit ruled that exigent circumstances justified warrantless “pinging” of defendant’s cell phone by his service provider in order to locate him. No. 12-3839-cr, 2016 WL 4073248, at \*9 (2d Cir. Aug. 1, 2016).

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

a. **Preservation of evidence justification** – The premises may be secured while a warrant is obtained. *Segura v. United States*, 468 U.S. 796, 811 (1984). A warrantless detention of a resident outside a home does not violate the Fourth Amendment when the police have probable cause to believe the home contains evidence of a “jailable offense,” the seizure is temporary and prevents the resident from entering the home and destroying evidence before a warrant is obtained. *Illinois v. McArthur*, 531 U.S. 326, 331-36 (2001). The officer’s subjective motivation is irrelevant to determine whether a warrantless entry based on exigency is justified – the sole considerations are whether objective circumstances justify the action. *Michigan v. Fisher*, 130 S. Ct. 546, 548-49 (2009); *Brigham City v. Stuart*, 547 U.S. 398, 404-05 (2006).

b. **Telephonic warrants** – The availability of telephonic warrants for a period of time prior to the search severely undercuts a government claim of exigent circumstances. Surveillance of a hotel room for 90 to 120 minutes without seeking a search warrant by telephone required suppression of the products of the ensuing search in *United States v. Alvarez*, 810 F.2d 879, 881-83 (9th Cir. 1987). Further, the unavailability of the equipment needed for telephonic warrants does not excuse

failure to seek such a warrant where the procedure is provided for by law. *Alvarez*, 810 F.2d at 882-83 n.4.

c. Knowledge of suspect – Even a suspect who is dangerous and possesses evidence capable of destruction does not justify warrantless entry where the officers lacked reasonable belief that the suspect knew of, or was about to learn of, his imminent capture. *United States v. George*, 883 F.2d 1407, 1412-15 (9th Cir. 1989). Where officers demanded entrance to an apartment to investigate loud music and marijuana odor, the officers set up a wholly foreseeable risk that the occupant would seek to destroy evidence of the crime, thereby obviating the exigent circumstances exception. *United States v. Mowatt*, 513 F.3d 395, 402 (4th Cir. 2008).

d. Imminence of exigency – The Ninth Circuit has established a two-prong test to determine the constitutionality of a warrantless emergency entry: (1) considering the totality of the circumstances, did officers have an objectively reasonable basis for finding an immediate need to protect others or themselves from serious harm? and (2) were the search’s scope and manner reasonable to meet that need? *United States v. Snipe*, 515 F.3d 947, 951-42 (9th Cir. 2008). In *United States v. Camou*, the Ninth Circuit held that pursuant to *Riley*, exigent circumstances do not justify the warrantless search of a cell phone. *Camou*, 773 F.3d 932, 940 (2014). The Ninth Circuit has found no sufficient emergency where a landlord informed officers of methamphetamine chemicals’ presence in hot weather because the chemical had been in the location for over two weeks without incident. *United States v. Warner*, 843 F.2d 401, 404 (9th Cir. 1988). The products of the warrantless search of a backpack seized at the time of arrest were suppressed because there was no danger that the defendant could have removed the contents, destroyed the contents, or threatened the officers’ safety. *United States v. Robertson*, 833 F.2d 777, 785-86 (9th Cir. 1987); *but see United States v. Bradley*, 644 F.3d 1213, 1261-63 (11th Cir. 2011) (holding that warrantless seizure of business’s servers was justified by exigent circumstance because employees could easily destroy evidence). Police actions must demonstrate an objective belief that exigent circumstances exist. *United States v. Yengel*, 711 F.3d 392, 400 (4th Cir. 2013) (no exigency where police opened a safe to investigate a grenade inside because police had not ordered anyone, including a nearby infant, to evacuate and therefore could not have had subjective belief that exigency existed). “[P]olice who simply smell burning marijuana generally face no exigency and must get a warrant to enter the home.” *White v. Stanley*, 745 F.3d 237, 241 (7th Cir. 2014). A police officer’s claim that he was performing a community caretaking function by investigating a potential burglary was insufficient to justify a warrantless search of a private residence, in this case pulling back plastic from a window that exposed a marijuana grow. *United States v. Erickson*, 991 F.2d 529, 531 (9th Cir. 1993); *see also Ray v. Township of Warren*, 626 F.3d 170, 177 (3d Cir. 2010) (“The community caretaking doctrine cannot be used to justify warrantless searches of a home.”). No exigent circumstances existed when police surrounded a house after seeing an

individual holding a gun run inside, because the individual had “never aimed the weapon at the officers or anyone else, and the officers had no evidence that he had used or threatened to use it”; because the “officers had no reason to believe that illegal weapons such as explosives were present” inside or “that anyone else to whom [the individual] may have posed a danger was inside”; and because “the officers had no reason to believe [the individual] might pose a danger to the public by attempting to flee, since they had the house completely surrounded and could monitor all exit points.” *United States v. Nora*, 765 F.3d 1049, 1054-55 (9th Cir. 2014). The court also emphasized that its “conclusion that no exigency existed is buttressed by the fact that the offense involved here was a misdemeanor.” *Id.*; see also *LaLonde v. Cnty. of Riverside*, 204 F.3d 947, 956 (9th Cir. 2000) (“[A]n exigency related to a misdemeanor will seldom, if ever, justify a warrantless entry into the home.” (citing *Welsh v. Wisconsin*, 466 U.S. 740, 752–53 (1984))). The Third Circuit held that exigent circumstances, which justified the officers’ entry into the home, ended when they had the defendant in handcuffs, therefore the subsequent warrantless search for a handgun, which the defendant had been seen carrying earlier, violated the Fourth Amendment. See *United States v. Mallory*, 765 F.3d 373 (3d Cir. 2014).

Nonspecific noise from within the house, which was more consistent with someone coming to answer the door than resistance or destruction of evidence, does not establish exigency. *United States v. Mendonsa*, 989 F.2d 366, 370-71 (9th Cir. 1993). The natural metabolization of alcohol in the bloodstream does not create a per se exigency justifying nonconsensual blood testing in all drunk driving cases. *Missouri v. McNeely*, 133 S. Ct. 1552, 1556 (2013). In *McNeely*, the Supreme Court settled on a totality of the circumstances test to determine whether officers may collect a blood sample without a warrant. *Id.* The Court’s opinion was fractured along several lines, with four Justices from the majority, two separate concurrences and a dissenting opinion arguing that officers must always acquire a warrant before collecting a blood sample. *Id.* The end result is that each opportunity to collect a warrantless blood sample will be judged on a case-by-case basis. *Id.* In a pre-*McNeely* drunk-driving case, the need for evidence preservation did not justify a non-consensual blood sample where the arrestee has agreed to take a breath or urine test. *Nelson v. City of Irvine*, 143 F.3d 1196, 1207 (9th Cir. 1998); see also *McNeely*, 133 S. Ct. at 1556. Where officers had a week to plan the execution of a search warrant, shooting dogs could not be justified by exigent circumstances. *San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 976 (9th Cir. 2005). When police suspected a burglary, the fact that the intruders were known to have a personal relationship with the homeowner lessened the need for immediate action. *Frunz v. City of Tacoma*, 468 F.3d 1141, 1145 (9th Cir. 2006). Other circumstances in *Frunz* also pointed to a complete lack of exigency, including the “fact that it took the police forty minutes to respond” to the call. *Id.*

Investigation of an ongoing criminal trespass, a fourth degree misdemeanor, did not constitute an exigency that justified a warrantless search of an apartment.

*United States v. Washington*, 573 F.3d 279, 289 (6th Cir. 2009). The possibility that the defendant was manufacturing methamphetamine in his hotel room did not create a danger to the agents and hotel guests that justified the warrantless search of his luggage. *United States v. Purcell*, 526 F.3d 953, 962 (6th Cir. 2008). There were no exigent circumstances to support a search of the defendant's bedroom for a gun when the officers had secured the "very cooperative and non-combative" defendant and guarded the bedroom entrance. *United States v. Simmons*, 661 F.3d 151, 157-58 (6th Cir. 2011). "A static 911 call, which conveys even less information than a hangup call, cannot justify warrantless entry by police with no substantiating evidence of danger, injury, or foul play. Nor do the messy state of the house, the electronics boxes, and the unlocked balcony door" provide any additional support for the intrusion. *United States v. Martinez*, 643 F.3d 1292, 1296-97 (10th Cir. 2011); *but see Johnson v. City of Memphis*, 617 F.3d 864, 869-70 (6th Cir. 2010), ("the combination of a 911 hang call, an unanswered return call, and an open door with no response from within the residence is sufficient to satisfy the exigency requirement").

e. Pretext – The police can create an exigency to justify a warrantless intrusion, as long as the behavior preceding the exigency is reasonable and comports with the Fourth Amendment. *Kentucky v. King*, 131 S. Ct. 1849, 1858 (2011). "[A]t least in most circumstances, the exigent circumstances rule should not apply where the police, without a warrant or any legally sound basis for a warrantless entry, threaten that they will enter without permission unless admitted." *Id.* at 1858 n.4. The Ninth Circuit has viewed *King* as implicitly overruling precedent approving "knock and talks" based only on the subjective good faith beliefs of officers *United States v. Perea-Rey*, 680 F.3d 1179, 1187-89 (9th Cir. 2012). Where a detective had "no specific, particularized basis for believing that a crime had been committed, that his safety was threatened, or that evidence was being destroyed" when the detective heard movement after the suspect refused to answer the door, the court suppressed evidence finding no exigency existed that allowed the officers to peer through the suspect's window into the living room and eventually enter the home. *United States v. Fuentes*, 800 F. Supp. 2d 1144, 1153-54 (D. Or. 2011). The Eighth Circuit found no destruction of evidence exigency when a defendant attempted to shut the motel door upon seeing the police, who claimed to be housekeeping. *United States v. Ramirez*, 676 F.3d 755, 762 (8th Cir. 2012). The Third Circuit has held that any "knock and talk" exception to the warrant requirement does not apply when police simply knock somewhere on the house, but only to a "brief, consensual encounter that begins at the entrance used by visitors, which in most circumstances is the front door." *Carman v. Carroll*, 749 F.3d 192, 198 (3d Cir. 2014). Police looking to execute a warrantless arrest cannot rely on the "knock and talk" exception to the warrant requirement as pretext to enter the curtilage of the home at four in the morning because the implied license permitting police officers and members of the public to approach the front door of a home applies only during "normal waking hours." *United States v. Lundin*, 817 F.3d 1151, 1158-59 (9th Cir. 2016) (observing that after *Jardines*, the "knock and

talk” exception depends, at least in part, on the officer’s subjective intent). The 10th Circuit, however, found that officers did not violate the Fourth Amendment when they walked past four “no trespassing signs,” knocked on the door to the defendant’s home and asked to speak with him because the “no trespassing signs” did not revoke the public’s implied license to approach the house and knock on the front door. *United States v. Carlross*, 818 F. 3d 988, 994-95 (10th Cir. 2016). Police officers who have already spoken with a homeowner must knock and re-announce their identity and purpose when they approach an area within the curtilage of the home that they know or reasonably should know is a separate residence. *Mendez v. County of Los Angeles*, 815 F.3d 1178, 1188 (9th Cir. 2016).

f. Probable cause – The Ninth Circuit has rejected a government argument that the exigencies of “hot pursuit” allow entry into a residence upon less than probable cause. *United States v. Winsor*, 846 F.2d 1569, 1574 (9th Cir. 1988); *United States v. Howard*, 828 F.2d 552, 554-56 (9th Cir. 1987). The half-hour period during which the police lost sight of the suspect, and during which police received no new information on his whereabouts, broke the continuity of the chase required for “hot pursuit.” *United States v. Johnson*, 256 F.3d 895, 907-08 (9th Cir. 2001) (en banc). In *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984), the Court rejected the argument that a suspected drunk driver’s entry into his home justified a warrantless entry, narrowly construing the claim of exigency, especially when “the underlying offense for which there is probable cause to arrest is relatively minor.” See *LaLonde v. County of Riverside*, 204 F.3d 947 (9th Cir. 2000) (exigency related to misdemeanor will seldom if ever justify warrantless entry into home). The court found no probable cause or exigency to support a defendant’s arrest in his own back yard after a trespassing complaint. *United States v. Struckman*, 603 F.3d 731, 743-46 (9th Cir. 2010).

g. Particularized evidence – Mere speculation is not sufficient to show exigent circumstances. The government bears a heavy burden to show exigent circumstances based on particularized evidence and specific articulable facts. *United States v. Furrow*, 229 F.3d 805, 812 (9th Cir. 2000); *United States v. Reid*, 226 F.3d 1020, 1027-28 (9th Cir. 2000). There must be a reasonable basis, approaching probable cause, to connect the emergency with the place searched. *United States v. Deemer*, 354 F.3d 1130, 1132-33 (9th Cir. 2004) (911 call traced back to a hotel room did not create sufficient nexus for emergency search of a different room, despite loud noise coming from that room and the officer’s belief the call did not originate from the room traced).

h. Manner of execution – “Even if a warrant is not required, a search is not beyond Fourth Amendment scrutiny; for it must be reasonable in its scope and manner of execution. Urgent government interests are not a license for indiscriminate police behavior.” *Maryland v. King*, 133 S. Ct. 1958, 1970 (2013); see also *Bull v. City and Cnty. of S.F.*, 595 F.3d 964, 967 n.2 (9th Cir. 2010) (en banc) (“There is no doubt . . . that ‘on occasion a security guard may conduct the

search in an abusive fashion,’ and ‘[s]uch an abuse cannot be condoned.’” (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)). Likewise, in *United States v. Fowlkes*, the Ninth Circuit held that, even if exigent circumstances authorized police to search for drugs inside the rectum of an arrestee, the “conduct of the search” was “patently unreasonable” because (1) a police officer “evinced an intent to conduct any body cavity search he thought necessary long before he saw” any evidence potentially justifying the search, (2) “the scope of the search intruded beyond the surface of [the individual’s] body, interfering with his bodily integrity,” and (3) “the manner in which this search was conducted was unreasonable.” No. 11-50273, 2014 WL 4178298, at \*6 (9th Cir. Aug. 25, 2014). For this third factor, the court explained that, “[i]n evaluating whether the manner in which a search is conducted is reasonable, we consider a variety of factors including hygiene, medical training, emotional and physical trauma, and the availability of alternative methods for conducting the search.” *Id.*

**6. Automobiles And Other Vehicles** – The inherent mobility of cars and the layered protections for closed containers within cars has provided the grist for a generation of Supreme Court cases refining the scope of the automobile exception to the warrant requirement. The Court has historically allowed searches of vehicles where there is probable cause to believe the vehicle contains a seizable item. *Chambers v. Maroney*, 399 U.S. 42 (1970); *Carroll v. United States*, 267 U.S. 132 (1925). The vehicle exception includes motor homes in a “place not regularly used for residential purposes—temporary or otherwise.” *California v. Carney*, 471 U.S. 386, 392 (1985). The automobile exception does not require exigent circumstances. *Maryland v. Dyson*, 527 U.S. 465, 467 (1999); *Pennsylvania v. Labron*, 518 U.S. 938 (1996) (per curiam).

**COUNTERPOINT** – Based on language in *Coolidge v. New Hampshire*, 403 U.S. 443, 458-62 (1971), there may still be a warrant requirement for vehicles parked in private driveways. *See also Cardwell v. Lewis*, 417 U.S. 583, 593 (1974) (distinguishing *Coolidge* because that search occurred on private, not public, property). However, in *United States v. Hatley*, 15 F.3d 856, 858-59 (9th Cir. 1994), the court held that the automobile exception authorized the search of an apparently mobile car located in a residential driveway. *See also Pineda-Martinez, supra*. IRS agents’ warrantless seizure of an automobile in a private driveway was held to be unlawful in the absence of a warrant in *United States v. Main*, 598 F.2d 1086, 1092 (7th Cir. 1979). Police cannot rely on the automobile exception to justify a search of a car parked in a residential driveway, even though a drug-dog alerted on it, where no exigent circumstances existed making it impractical to first obtain a warrant. *United States v. Beene*, 818 F. 3d 157, 164-66 (5th Cir. 2016), *petition for cert. docketed* (drawing a bright line between searches incident to a lawful traffic stop and searches where the mobility of the vehicle is no longer an issue).

If probable cause exists to search the vehicle, then any container in the vehicle may also be searched for contraband. *California v. Acevedo*, 500 U.S. 565, 579-80 (1991); *United States v. Ross*, 456 U.S. 798, 824 (1982); *United States v. Johns*, 469 U.S. 478 (1985). This includes

containers belonging to passengers that are capable of concealing the object of the search. *Wyoming v. Houghton*, 526 U.S. 295 (1999).

**COUNTERPOINT** – In *United States v. Camou*, the Ninth Circuit held cellphones are not containers for purposes of the vehicle exception. *Camou*, 773 F.3d at 942 (extending *Riley* to vehicle context). The automobile exception did not apply to the search of a defendant’s vehicle when she returned to a coin shop to pick up payment four days after delivering stolen coins because the connection between crime and car was only speculative. *United States v. Perez*, 67 F.3d 1371, 1375-76 (9th Cir. 1995), *rev’d in part on other grounds*, 116 F.3d 840 (9th Cir. 1997) (en banc). Closed containers not within the automobile exception should still be subject to the warrant requirement. *See United States v. Chadwick*, 433 U.S. 1, 11-12 (1977), *abrogated on other grounds by California v. Acevedo*, 500 U.S. 565 (1991). Officers may not search closed containers in the interior of a vehicle stopped for a traffic violation when the driver has been handcuffed and secured in a squad car. *United States v. Maddox*, 614 F.3d 1046, 1048-50 (9th Cir. 2010).

7. **Inventory** – Beyond examinations during a *Terry* stop or a search incident to arrest, the government is free to promulgate policies for inventory of the personal possessions of an arrestee and the contents of vehicles without a warrant. *South Dakota v. Opperman*, 428 U.S. 364 (1976) (car); *Illinois v. Lafayette*, 462 U.S. 640 (1983) (arrestee’s pockets and shoulder bag). The regulations must be reasonably related to protection of the individual’s property and the state’s interest in being free from false claims of theft and damage. The scope of such inventories, pursuant to policy, may include closed containers, provided that the inventory is not a pretext to search indiscriminately for incriminating evidence. *Florida v. Wells*, 495 U.S. 1, 4 (1990); *see also Colorado v. Bertine*, 479 U.S. 367 (1987).

**COUNTERPOINT** – The failure of police to correctly follow state law on inventory searches requires suppression of evidence uncovered during the search. *United States v. Ramos-Oseguera*, 120 F.3d 1028, 1035-36 (9th Cir. 1997); *United States v. Johnson*, 936 F.2d 1082, 1084 (9th Cir. 1991); *United States v. Wanless*, 882 F.2d 1459, 1463-64 (9th Cir. 1987). In *United States v. Park*, No. 05-375-SI, 2007 WL 1521573, at \*11 (N.D. Cal. 2007), the court held that because the government did not prove that a policy allowing searches of cell phones was in place, nor give any reason why such a search would be necessary, the search of defendants’ cell phones was not valid as an inventory search. The Eighth Circuit refused to validate a search under the inventory exception because the searching officer failed to itemize specific property in the vehicle. *United States v. Taylor*, 636 F.3d 461, 464 (8th Cir. 2011).

Officers may not impound vehicles pursuant to their community caretaking function unless the vehicle “jeopardizes the public safety or is at risk of loss.” *Miranda v. City of Cornelius*, 429 F.3d 858, 864 (9th Cir. 2005); *see also United States v. Cervantes*, 678 F.3d 798, 805 (9th Cir. 2012) (holding that the community care-taking doctrine did not justify warrantless search of defendant’s vehicle

because police could not articulate a legitimate caretaking purpose for the search and seizure). After a lawful arrest, police lacked authority to impound and conduct an inventory search of the defendant's car, "which was lawfully parked on the street two houses away from his residence – because doing so did not serve any community caretaking purpose." *United States v. Caseres*, 533 F.3d 1064, 1074 (9th Cir. 2008).

**8. Special Needs And Administrative Searches** – A dangerously expanding area of warrantless searches falls under the category of special needs and administrative searches. These cases arose from several Warren-era opinions in which warrantless searches by building inspectors were tested under a reasonableness test balancing the need for the search or seizure against the invasion that the search or seizure entails. *Camara v. Mun. Court of San Francisco*, 387 U.S. 523 (1967); *See v. City of Seattle*, 387 U.S. 541 (1967). In a series of cases, this administrative exception has expanded to encompass large areas of interaction between government and the individual. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 (1995); *New York v. Burger*, 482 U.S. 691 (1987). The Supreme Court utilized this type of balancing test to uphold the warrantless search by a police officer of a probationer's apartment based on reasonable suspicion. *United States v. Knights*, 534 U.S. 112 (2001). The Court further extended *Knights* in *Samson v. California*, upholding as constitutional a statute that allowed for suspicionless searches of parolees. 547 U.S. 843, 847 (2006). The Court has also upheld a blanket policy of strip searches and purely visual body cavity searches for all arrestees entering detention facilities based on the rationale that it would be difficult for police to identify which detainees were likelier to carry contraband. *Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington*, 132 S. Ct. 1510 (2012).

**COUNTERPOINT** – Applying *Knights*, the Ninth Circuit reversed its prior precedent and held that probationers have greater expectations of privacy than parolees. *United States v. King*, 687 F.3d 1189 (9th Cir. 2012) (en banc). In a post-*Knights* decision, the Ninth Circuit held that a search or seizure is not reasonable if the facts that would make the search reasonable, like the suspect's parole status and outstanding warrant, are not known to the officers at the time of the search. *Moreno v. Baca*, 431 F.3d 633 (9th Cir. 2005); *see also Fitzgerald v. City of Los Angeles*, 485 F. Supp. 2d 1137, 1143 (C.D. Cal. 2007) (holding that officers must have "advance knowledge" of the parolee's status and search condition before a suspicionless search is valid). Police needed a warrant to perform an inner rectum search of an arrestee at a jail because there was no "evidence that [defendant] could have destroyed evidence or that a medical emergency existed" and because "the government does not contend that it is necessary to physically penetrate the body cavities of every person booked into" the jail. *United States v. Fowlkes*, No. 11-50273, 2014 WL 4178298, at \*4 (9th Cir. Aug. 25, 2014). Officers must have probable cause to administer a drug test on pretrial releases, even if the individual consented to suspicionless drug tests as a condition of release. *United States v. Scott*, 450 F.3d 863, 865-72 (9th Cir. 2006). Police may not perform a warrantless parole-condition search of a residence without probable cause to believe the parolee actually lives at the location. *United States v. Grandberry*, 730 F.3d 968, 982 (9th Cir. 2013); *see also United States v. Howard*, 447 F.3d 1257, 1267-68 (9th Cir.



2006) (warrantless search of parolee's acquaintance's residence violated Fourth Amendment when there was reason to believe the parolee still resided at his reported address and insufficient evidence that he lived with the acquaintance). The inclusion of dormitories in a search of a horse-racing track exceeded the scope of the regulatory purpose in *Anobile v. Pelligrino*, 303 F.3d 107 (2d Cir. 2002). In *Portillo v. United States Dist. Court*, 15 F.3d 819, 822-24 (9th Cir. 1994), the court held that a standing order requiring pre-sentence urine testing violated the Fourth Amendment where the defendant's theft offense bore no relation to drug usage. In *Way v. County of Ventura*, 445 F.3d 1157, 1163 (9th Cir. 2006), the court held that a blanket policy allowing strip searches of individuals detained on any drug charge violated the Fourth Amendment. The court held that any such policy must be "reasonably related" to a security interest. *Id.* at 1161; *see also Craft v. County of San Bernadino*, 468 F. Supp. 2d 1172, 1179 (C.D. Cal. 2006) (holding unconstitutional a blanket policy allowing the strip searches of pre-arraignment arrestees regardless of the seriousness or type of their alleged crimes).

In *United States v. Munoz*, 701 F.2d 1293, 1298-1300 (9th Cir. 1983), the court rejected the government argument that national forests are sufficiently regulated that the stopping of all vehicles to check for game violations, regardless of the absence of specific suspicion, was justified as an administrative search. *See also Tarabochia v. Adkins*, 766 F.3d 1115 (9th Cir. 2014) (holding officers' warrantless stop of commercial fishermen to inspect their catch along the highway, instead of at a commercial fishing establishment or checkpoint was not subject to the administrative search exception).

In *United States v. Bulacan*, 156 F.3d 963, 967-74 (9th Cir. 1998), the court suppressed results of a search because the purported administrative search had an impermissible criminal investigative purpose. Administrative search exceptions should be narrowly construed. *United States v. Herrera*, 444 F.3d 1238, 1246 (10th Cir. 2006) (an officer's reasonable mistake that a truck fell within the administrative exception for commercial vehicles did not justify the suspicionless search). For airport security screening for domestic flights, a search is limited to detection of weapons and explosives. *United States v. Fofana*, 620 F. Supp. 2d 857, 862-63 (S.D. Ohio 2009) (the extent of the search went beyond this scope in opening envelopes for investigative purposes). Seizing and interrogating a child at school without "a warrant, a court order, exigent circumstances, or parental consent" is unconstitutional and not a special needs search. *Greene v. Camreta*, 588 F.3d 1011, 1030 (9th Cir. 2009). A statute authorizing nonconsensual police inspections of hotel records was invalid even under the standard for administrative searches because it lacked any "essential procedural safeguard against arbitrary or abusive inspection demands" and it permitted searches based on "the 'unbridled discretion' of officers in the field, who are free to choose whom to inspect, when to inspect, and the frequency with which those inspections occur." *Patel v. City of Los Angeles*, 738 F.3d 1058, 1064 (9th Cir. 2013). The Eleventh Circuit struck down a Florida statute requiring aid applicants submit to suspicionless drug testing in order to

receive welfare benefits. *Lebron v. Sec’y of the Fla. Dep’t of Children and Families*, 772 F.3d 1352, 1377-78 (2014).

The “special needs” cases have expanded the rationale applied in administrative searches to a wider array of suspicionless searches and seizures. For example, suspicionless stops of all vehicles are permitted at police checkpoints to check for sobriety, *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 455 (1990), citizenship at the border, *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), and perhaps valid vehicle licensing, *Delaware v. Prouse*, 440 U.S. 648 (1979). In *Illinois v. Lidster*, 540 U.S. 419 (2004), the Supreme Court held that a checkpoint designed to seek information regarding a recent hit-and-run crime did not violate the Fourth Amendment because the purpose of the checkpoint was not to find evidence of crimes committed by the drivers and the scope of the stop was reasonable in context. To qualify as a “special need,” the program for suspicionless searches or seizures must satisfy a government interest beyond “ordinary criminal wrongdoing.” *City of Indianapolis v. Edmond*, 531 U.S. 32, 41 (2000). The Transportation Security Administration’s use of “advanced imaging” scanners and pat-downs at airport checkpoints constitute “reasonable administrative search.” *Corbett v. Transp. Sec. Admin.*, 568 Fed. App’x 690, 698 (11th Cir. 2014) (holding security screening lasting one hour reasonable).

**COUNTERPOINT** – When the primary purpose of the checkpoint is to detect evidence of criminal wrongdoing, the suspicionless stop violates the Fourth Amendment. *Edmond*, 531 U.S. at 39-40; *see also Collins v. Ainsworth*, 382 F.3d 529 (5th Cir. 2004) (roadblock used to discourage rock concert violated Fourth Amendment).. *Singleton v. Commonwealth*, 364 S.W.3d 97, 101-02 (Ky. 2012). In *Bourgeois v. Peters*, 387 F.3d 1303, 1311-16 (11th Cir. 2004), the court held that a city’s invocation of September 11 did not justify the use of magnetometer (metal detector) searches at a peaceful protest.

Where officers place signs along a highway falsely informing drivers that they are approaching a drug checkpoint further down the highway, but then actually set up the checkpoint on the highway’s next exit, the mere fact that a vehicle with out-of-state license plates exited the highway after seeing the “ruse” drug checkpoint did not create individualized reasonable suspicion to stop the vehicle. *United States v. Yousif*, 308 F.3d 820, 827 (8th Cir. 2002) (“reasonable suspicion cannot be manufactured by the police themselves”). A driver’s utilization of a rural exit off of the interstate after signs warning of a narcotics checkpoint did not alone provide sufficient reasonable suspicion for a *Terry* stop. *United States v. Neff*, 681 F.3d 1134, 1141-43 (10th Cir. 2012). The driver performing a u-turn and giving the trooper a stunned look after exiting did not provide sufficient additional factors to provide a particularized and objective basis for wrongdoing to justify a *Terry* stop. *Id.*

**9. Border Searches** – A search may be conducted of all persons and property entering the country without individualized suspicion. *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985). In *United States v. Ramsey*, 431 U.S. 606 (1977), the Court held that the opening of international packages at the port of entry fell within the border search exception. Therefore, no

probable cause or warrant was necessary when a customs official opened suspicious-looking packages from Thailand. Similarly, the search of a package from Canada that had been stored at a local post office for nine days was justified as an “extended border search” because the ICE agents had reasonable suspicion that the package contained contraband. *United States v. Sahanaja*, 430 F.3d 1049, 1054 (9th Cir. 2005). The Court has also held that border patrol officials may stop ships on the open sea for documents inspection without articulable suspicion. *United States v. Villamonte-Marquez*, 462 U.S. 579, 588-89 (1983). Border patrol agents do not need reasonable suspicion to conduct any search of vehicles at the border so long as (1) the search does not seriously damage the vehicle in a way that reduces its safety or functionality and (2) the search is not carried out in an offensive manner. *United States v. Flores-Montano*, 541 U.S. 149 (2004) (fuel tank disassembly); *United States v. Hernandez*, 424 F.3d 1056 (9th Cir. 2005) (removal of door panels); *United States v. Chaudhry*, 424 F.3d 1051 (9th Cir. 2005) (drilling into bed of truck); *United States v. Cortez-Rocha*, 394 F.3d 1115 (9th Cir. 2005) (slashing spare tire); *United States v. Camacho*, 368 F.3d 1182 (9th Cir. 2004) (x-ray search of tire). “[R]easonable suspicion is not needed . . . to search a laptop or other personal electronic storage devices at the border.” *United States v. Arnold*, 533 F.3d 1003, 1008 (9th Cir. 2008).

**COUNTERPOINT** – Border searches that are particularly invasive of personal privacy, such as strip searches and x-ray searches, or that impair a vehicle’s safe operation, may require reasonable suspicion. *See Flores-Montano*, 541 U.S. at 152; *Montoya de Hernandez*, 473 U.S. at 541; *United States v. Rivas*, 157 F.3d 364, 367 (5th Cir. 1998) (drilling into the frame of a vehicle requires reasonable suspicion); *Cortez-Rocha*, 394 F.3d at 1119-20 (distinguishing a search that causes property damage and thus does not require reasonable suspicion with a search that “decreases the safety or operation of the vehicle”). Likewise, reasonable suspicion is required for a more “comprehensive and intrusive” border search, such as an offsite “forensic examination” of a laptop seized at the border. *United States v. Cotterman*, 709 F.3d 952, 963-64 (9th Cir. 2013) (en banc). The court in *Cotterman* explained that *Arnold*’s exception to the warrant requirement was limited to a “quick look and unintrusive search” and did not apply to the forensic examination in question, which was conducted 170 miles from the border and lasted two days. However, the court did not specify exactly when a border “property search is sufficiently ‘comprehensive and intrusive’ to require reasonable suspicion.” *Id.* at 981 (Smith, J., dissenting). The Sixth Circuit has since explained that reasonable suspicion may be required for any search that occurs *after* property is cleared for entry. *United States v. Stewart*, 729 F.3d 517, 526 (6th Cir. 2013); *see also United States v. Saboonchi*, 990 F. Supp. 2d 536, 548 (D. Md. 2014) (holding the “the level of suspicion required depends on whether the forensic search . . . was a routine search”); *United States v. Martinez*, 13CR3560-WQH, 2014 WL 3671271 (S.D. Cal. July 22, 2014) (distinguishing a process that “retrieves the phone numbers of phone calls to the phone and phone calls made from [a] phone, as well as text messages, photos and videos” from “the comprehensive forensic evaluation conducted in *Cotterman*”).

In *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), the Court limited the warrantless border search to the immediate vicinity of the border or the functional equivalent thereof.

**COUNTERPOINT** – Law enforcement officials on roving patrols *near* the border need reasonable suspicion to stop a motor vehicle. *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Nicacio v. United States*, 797 F.2d 700, 702 (9th Cir. 1985). In *United States v. Whiting*, 781 F.2d 692, 696-98 (9th Cir. 1986), the court refused to apply the border search exception where the search was undertaken by a Department of Commerce agent who did not have the same statutory authorization as INS and Customs agents. The inspection of Federal Express packages destined overseas may constitute an extended border search, requiring reasonable suspicion, where conducted far from an international border. *United States v. Cardona*, 769 F.2d 625, 628-29 (9th Cir. 1985). A statute that authorized customs officials to conduct warrantless searches of “private lands but not dwellings” within a certain radius of the border did not permit searches of the curtilage. *United States v. Romero-Bustamente*, 337 F.3d 1104, 1107-10 (9th Cir. 2003). Searches of private living quarters in a ship cabin at the functional equivalent of a border must be supported by reasonable suspicion of criminal activity. *United States v. Whitted*, 541 F.3d 480, 488-89 (3d Cir. 2008).

## H. Fruit Of The Poisonous Tree

The basic rule of *Wong Sun v. United States*, 371 U.S. 471, 484-86 (1963), is that evidence seized as a result of a Fourth Amendment violation and evidence derived therefrom is inadmissible in criminal trials. The contraction of Fourth Amendment rights in recent years is paralleled by the expansion of exceptions and limitations to the fruit of the poisonous tree doctrine.

1. **Independent Source Rule** – In *Murray v. United States*, 487 U.S. 533, 538 (1988), the Court elaborated on the independent source rule, which allows evidence to be used that was the product of an unlawful intrusion as long as a separate and distinct evidentiary trail led to the same place. In *Murray*, agents unlawfully entered a warehouse and saw bales of marijuana. Without seizing anything, the officers drafted a warrant affidavit referring only to information in their possession prior to the entry; all reference to the illegal search was omitted. The Court approved the procedure for establishing an independent basis for the seizure of the marijuana. The independent source rule has been applied to cell phone records. *United States v. Moody*, 664 F.3d 164, 168 (7th Cir. 2011) (subpoena of defendant’s cell phone records was independent of and untainted by invalid search two years prior).

**COUNTERPOINT** – When a warrant has been tainted by an illegal search, the government must prove that the decision to seek the warrant was not prompted by the unlawfully viewed evidence, and that probable cause existed in the absence of the tainted evidence. *See Murray*, 487 U.S. at 542-44 (remanding case for a determination of whether the agents’ decision to seek a warrant was a product of the illegal entry and search); *accord United States v. Duran-Orozco*, 192 F.3d 1277,

1281 (9th Cir. 1999) (applying *Murray* and ruling that the officers' decision to seek the warrant cannot be prompted by what they saw during the prior, unlawful search) (citing *United States v. Hill*, 55 F.3d 479, 481 (9th Cir. 1995)). The independent source doctrine did not render admissible weapons and drugs seized in a warranted search of an apartment that followed an illegal warrantless entry into the same apartment. *United States v. Mowatt*, 513 F.3d 395, 404-05 (4th Cir. 2008).

2. **Inevitable Discovery** –. In *Nix v. Williams*, the Court approved the hypothetical inevitable discovery doctrine, allowing the evidence where the government established that the illegally obtained evidence would have been discovered through legitimate means independent of official misconduct. 467 U.S. 431, 445-47 (1984). Because the contents of a vehicle invalidly searched incident to arrest would have been discovered through a later vehicle inventory, the Seventh Circuit refused to suppress evidence discovered in violation of *Gant* under the inevitable discovery doctrine. *United States v. Cartwright*, 630 F.3d 610, 614-16 (7th Cir. 2010). The Fifth Circuit came to a similar conclusion in *United States v. Ochoa*, 667 F.3d 643, 650 (5th Cir. 2012), holding that the inevitable discovery exception made admissible evidence from the call logs of a cell phone searched without a warrant incident to an arrest because the phone would have been searched during the vehicle's inventory search.

**COUNTERPOINT** – There is disagreement among the circuits as to the extent of the inevitable discovery doctrine. The Fifth, Eighth, and Eleventh Circuits will apply it only when an active investigation was already underway prior to the unlawful act. *United States v. Johnson*, 777 F.3d 1270, 1274 (11th Cir.), *cert. denied*, 136 S. Ct. 178, 193 (2015); *United States v. Jackson*, 596 F.3d 236, 241 (5th Cir. 2010); *United States v. Hammons*, 152 F.3d 1025, 1029 (8th Cir. 1998). *But see United States v. Lamas*, 930 F.3d 1099, 1104 (5th Cir. 1991) (questioning continued application of the active-pursuit requirement). In the First, Second, Sixth, Seventh and Ninth Circuits, proof of a prior, active investigation is not required, rather the government can meet its burden by establishing that, by following routine procedures, the police inevitably would have uncovered the evidence. *United States v. Brown*, 328 F.3d 352, 357 (7th Cir. 2003); *United States v. Kennedy*, 61 F.3d 494, 499 (6th Cir. 1995); *United States v. Infante-Ruiz*, 13 F.3d 498, 504 (1st Cir. 1994); *United States v. Ramirez-Sandoval*, 872 F.2d 1392, 1399 (9th Cir. 1989); *United States v. Gorski*, 852 F.2d 692, 696 (2d Cir. 1988). Speculation as to what routine procedures an officer may have followed to lawfully generate the disputed evidence is insufficient to invoke inevitable discovery. *United States v. Davis*, 332 F.3d 1163, 1170 (9th Cir. 2003) (refusing to apply inevitable discovery where police failed to identify the specific practices, which if followed, would have inevitably led to defendant's gun); *United States v. Lopez-Soto*, 205 F.3d 1101 (9th Cir. 2000) (same). Probable cause alone does not bring evidence within the inevitable discovery exception. *See e.g., United States v. Young*, 573 F.3d 711, 722-23 (9th Cir. 2009) (rejecting the government's argument that the inevitable discovery doctrine applied where the police had probable cause to search but simply failed to obtain a warrant); *United States v. Brown*, 64 F.3d 1083, 1085 (7th Cir. 1995) (noting it is probable cause plus a chain of events that would have led to a

warrant that makes a discovery “inevitable”). To apply the inevitable discovery exception, a court must have a “high level of confidence” that the warrant in fact would have been issued and the evidence would have been obtained by lawful means. *United States v. Heath*, 455 F.3d 52, 59-60 (2d. 2006) (noting it is not enough merely to show a judge *could* have validly issue the warrant but that he or she *would* have); *see also United States v. Cunningham*, 413 F.3d 1199, 1203 (10th Cir.2005) (same). *But see United States v. Chambers*, 132 Fed. Appx. 25, 33 (5th Cir.2005) (requiring only that there be a “reasonable probability that the contested evidence would have been discovered by lawful means in the absence of the police misconduct”); *Jefferson v. Fountain*, 382 F.3d 1286, 1296 (11th Cir.2004). In *United States v. Johnson*, 380 F.3d 1013, 1018 (7th Cir. 2004), the court held that neither the inevitable discovery nor the independent source exception may be premised on the violation of another’s constitutional rights.

**3. Attenuation** – In *Utah v. Strieff*, the Court applied the three factors set out in *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975), to determine whether the attenuation doctrine permits the introduction of evidence otherwise tainted by a Fourth Amendment violation: (1) temporal proximity of the illegal conduct and the later statement; (2) the existence of intervening circumstances; and (3) the flagrancy of the initial misconduct. 136 S. Ct. 2056, 2061-62 (2016). In *Strieff*, the Court held that, absent flagrant police misconduct, where an officer stops an individual without reasonable suspicion, and thereafter discovers a valid, pre-existing arrest warrant, evidence seized pursuant to the arrest is admissible because discovery of the warrant attenuated the connection between the illegal stop and the evidence found. *Id.* at 2063. The defendant’s consent to a search of his apartment was sufficiently attenuated from an invalid entry into his father’s home two hours earlier given intervening facts, including *Miranda* warnings. *United States v. Conrad*, 673 F.3d 728, 733-37 (7th Cir. 2012); *see also United States v. Whisenton*, 765 F.3d 938 (8th Cir. 2014) (holding that the fifteen minutes defendant spent smoking a cigarette and discussing his options with the police before consenting to a search purged the taint of illegal entry).

**COUNTERPOINT** – In her dissent in *Strieff*, Justice Sotomayor argued that discovery of the arrest warrant was not an intervening circumstance as such a discovery cannot be considered unanticipated, particularly in light of the backlog of outstanding warrants and the officer’s investigatory purpose for the stop. 136 S. Ct. at 2066. Justice Sotomayor also argued that an officer’s negligence weighs against, rather than in favor, of attenuation. *Id.* Justice Sotomayor further disagreed with the majority’s characterization of the illegal stop as an “isolated incident” and a “negligibly burdensome precaution.” *Id.* at 2067-68.

Although the police failed to read the defendant his *Miranda* rights, the defendant’s voluntary statements attenuated the connection between the physical evidence derived therefrom and the *Miranda* violation. *United States v. Patane*, 542 U.S. 630, 642 (2004). Where the police have probable cause to arrest a suspect but lack the requisite warrant to enter his home to do so, a suspect’s statement taken at the police station is not subject to the exclusionary rule. *New York v. Harris*, 495 U.S. 14, 21 (1990) (emphasizing the fact that the statement was made at the police

station, as opposed to inside the home, purged the taint of the warrantless entry); *accord United States v. Crawford*, 372 F.3d 1048 (9th Cir. 2004) (en banc) (holding the presence of probable cause to arrest defendant attenuated the connection between the unlawful seizure and subsequent confession).

**COUNTERPOINT** – In *United States v. Villa-Gonzalez*, 623 F.3d 526, 535 (8th Cir. 2010), the court, finding *Patane* inapplicable, suppressed defendant’s statements made following an illegal seizure and in violation of *Miranda*. In determining whether a statement must be suppressed following an illegal search, the government has the burden of showing the statements were “a product of free will.” *Brown v. Illinois*, 422 U.S. 590, 604 (1975). Consent obtained after an illegal arrest is invalid, even after *Miranda* warnings, in the absence of evidence breaking the chain of causation. *Kaupp v. Texas*, 538 U.S. 626, 633 (2003); *United States v. Lopez-Arias*, 344 F.3d 623, 629-30 (6th Cir. 2003); *United States v. Washington*, 387 F.3d 1060, 1072-77 (9th Cir. 2004) (finding insufficient attenuation based on temporal proximity, lack of intervening circumstances, and flagrancy of misconduct). *United States v. Nora*, 765 F.3d 1049, 1057 (9th Cir. 2014) (ordering suppression of incriminating statements made by an individual immediately after police illegally recovered drugs and cash from his person because “his answers were likely influenced by his knowledge that the police had already discovered” the drugs and cash). An illegal seizure without an arrest also “weighs toward suppression.” *United States v. Washington*, 490 F.3d 765, 777 (9th Cir. 2007).

4. **Witness Testimony** – Causation is more difficult to establish where the product of the illegal search is witness testimony. Because witnesses might independently come forward regardless of the primary illegality, the witness’s testimony is only excluded if there is a close and direct link between the illegality and the witness testimony. *United States v. Ceccolini*, 435 U.S. 268, 279-80 (1978).

**COUNTERPOINT** – In *United States v. Padilla*, 960 F.2d 854, 862-63 (9th Cir. 1992), *rev’d on other grounds*, 508 U.S. 77 (1993), the court suppressed evidence derived from an illegal stop of a drug courier, including live witnesses who were induced to testify through cooperation agreements. *See also United States v. Ramirez-Sandoval*, 872 F.2d 1392, 1396-99 (9th Cir. 1989).

In *United States v. Crews*, 445 U.S. 463, 471-72 (1980), the Court held that in-court identification testimony need not be suppressed where a pretrial identification procedure was the product of an illegal arrest.

**COUNTERPOINT** – Testimony describing the defendant at the time of arrest should be suppressed if it is the fruit of an illegal arrest. *See United States v. Terry*, 760 F.2d 939, 943 (9th Cir. 1985).

5. **Impeachment** – A testifying defendant can be impeached with the products of an illegal search or seizure if he or she testifies on direct examination in a manner that is contradicted

by the tainted evidence. *Walder v. United States*, 347 U.S. 62, 65-66 (1954). In *United States v. Havens*, 446 U.S. 620, 628 (1980), the Court expanded allowable impeachment of the defendant with the product of an illegal search and seizure to statements elicited in cross-examination that were “plainly within the scope” of the direct. However, the Court limited the impeachment exception to the exclusionary rule by reversing a case in which a defense witness, rather than the defendant, provided the inconsistent testimony. *James v. Illinois*, 493 U.S. 307, 320 (1990).

**6. Nature Of Illegal Intrusion** – The exclusionary rule is generally considered a remedy for violations of the Fourth Amendment only and does not apply to other types of non-constitutional protections. In *United States v. Caceres*, 440 U.S. 741, 751-52 (1979), conversations recorded in violation of IRS regulations were held to be admissible at trial. Violations of certain statutes, such as the limitations on the use of wiretaps under Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §§ 2210-2225), may require suppression. *See United States v. Gonzalez, Inc.*, 412 F.3d 1102, 1111 (9th Cir. 2005) (suppressing wiretap evidence under Title III because agents failed to provide a full and complete statement that traditional investigative techniques had failed or that they were unlikely to succeed or dangerous).

**7. Type Of Proceeding** – The Supreme Court has repeatedly refused to extend the exclusionary rule outside the criminal context. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984) (civil deportation proceeding); *United States v. Janis*, 428 U.S. 433, 448 (1976) (civil tax proceeding); *United States v. Calandra*, 414 U.S. 338, 343-46 (1974) (grand jury proceedings). The exclusionary rule also does not apply at parole revocation hearings. *Pa. Board of Probation and Parole v. Scott*, 524 U.S. 357, 364 (1998). The Ninth Circuit held that the good faith exception does not apply to motions for return of property under Rule 41(e). *J.B. Manning Corp. v. United States*, 86 F.3d 926, 927-28 (9th Cir. 1996).

**COUNTERPOINT** – The exclusionary rule has been applied in civil forfeiture proceedings. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 702 (1965) Under some circumstances, the exclusionary rule may apply to sentencing proceedings. *See United States v. Perez*, 67 F.3d 1371, 1376 (9th Cir. 1995); *United States v. Kidd*, 734 F.2d 409, 414 (9th Cir. 1984); *Verdugo v. United States*, 402 F.2d 599, 612-13 (9th Cir. 1968); *but see United States v. Lynch*, 934 F.2d 1226, 1234-37 (11th Cir. 1991); *United States v. McCrory*, 930 F.2d 63, 67-69 (D.C. Cir. 1991); *United States v. Torres*, 926 F.2d 321, 322-25 (3d Cir. 1991). Where the Fourth Amendment violation is egregious, due process requires suppression of evidence even in civil and administrative proceedings. *Orhorhaghe v. INS*, 38 F.3d 488, 501-04 (9th Cir. 1994); *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1448-52 (9th Cir. 1994).

The admissibility of identity information in criminal cases, especially in immigration prosecutions under 8 U.S.C. § 1326, is the subject of a major conflict between the Circuits, as well as among district courts in the Ninth Circuit. *See United States v. Ortiz-Hernandez*, 427 F.3d 567, 576-77 (9th Cir. 2005), *petition for panel reh’g and reh’g en banc denied*, 441 F.3d 1061 (9th Cir. 2006) (Paez, J.,



and eight other judges dissenting from denial of rehearing); *United States v. Garcia-Beltran*, 443 F.3d 1126, 1135 (9th Cir. 2006).