DEVELOPMENTS IN FEDERAL SEARCH AND SEIZURE LAW

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A. Introduction

The revolution of the Warren Court, especially in the area of search and seizure under the Fourth Amendment, was largely an expansion of federal constitutional rights in the face of state practices that limited the protection of individual rights embodied in the Bill of Rights. The following outline of federal cases construing the protections of the Fourth Amendment reflects a dynamic tension between the need to secure evidence to convict law-breakers and the protection of citizens' reasonable expectations of privacy. The result has been an overall contraction of protection of the right to privacy. From the basic principles and counterpoints, criminal defense lawyers 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).

In order to most effectively serve clients, recent developments in Supreme Court construction of the Fourth Amendment must be followed. Rather than dwelling on the negative aspects of the recent trends, the purpose of this article is to trace recent developments in selected areas and juxtapose the lead cases with federal court cases in which the defendant prevailed. The counterpoints are not intended to be exhaustive, but are provided to encourage creative use of the available precedents that may make a decisive difference for clients in state or federal court.

B. What Constitutes A Search?

The definition of a search has, with major exceptions, been contracted by an increasingly narrow view of expectations of privacy that will be deemed reasonable. The first requirement for a search is government action, because private intrusions, no matter how invasive, do not implicate the Fourth Amendment. *Burdeau v. McDowell*, 256 U.S. 465 (1921). The products of private searches are not covered by the exclusionary rule. *Walter v. United States*, 447 U.S. 649 (1980).

> **COUNTERPOINT** -- In determining whether the actions of a private person working with the police 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 or to further his or her own ends. *United States v. Walther*, 652 F.2d 788, 791-92 (9th Cir. 1981) (holding that an airport employee's examination of luggage constituted a Fourth Amendment search). This test was applied to invalidate a warrantless search of a hotel guest's room conducted by the hotel manager in the presence of police officers. *United States v. Reed*, 15 F.3d 928, 130-33 (9th Cir. 1994). The government exceeded the scope of a private party search when it examined, without a warrant, computer disks that the private party had not viewed. *United States v. Runyan,* 275 F.3d 449, 463-64 (5th Cir. 2001).

The Warren Court freed the scope of the Fourth Amendment 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, 360 (1967) (Harlan, J., concurring). The Court in recent years has imposed a restrictive reading of what expectations of privacy are reasonable. For example, in *California v. Greenwood*, 486 U.S. 35 (1988), the Court approved warrantless police searches of trash left in garbage bags at the curb in front of the defendant's house. In *California v. Ciraolo*, 476 U.S. 207 (1986), the Court found unreasonable the defendant's expectation of privacy from surveillance by airplane 1,000 feet over his fenced backyard. *See also Florida v. Riley*, 488 U.S. 445 (1989) (surveillance of backyard by helicopter hovering at 400 feet not a search).

> **COUNTERPOINT** -- 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 homeless person had a reasonable expectation of privacy in a closed container permissively stored in another's garage in *United States v. Fultz*, 146 F.3d

1102, 1105 (9th Cir. 1998). An occasional overnight houseguest had an expectation of privacy in a gym bag he left under his girlfriend's bed. *United States v. Davis*, 332 F.3d 1163, 1167-68 (9th Cir. 2003). 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. *United States v. Oaxaca*, 233 F.3d 1154, 1157 (9th Cir. 2000).

The Court's restrictive view of privacy rights is also reflected in the its limitation of Fourth Amendment protections to the curtilage of the dwelling, not the open fields surrounding it. *Oliver v. United States*, 466 U.S. 170 (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 (9th Cir. 2004) (visual observation of the interior of an unoccupied travel trailer did not constitute a search because the officer was in an open field rather than curtilage). Further, the Court found in *United States v. Dunn*, 480 U.S. 294 (1987), that a barn was not within the curtilage because, in that case, the defendant had not manifested an expectation of privacy in the interior of the barn, even presuming society was prepared to accept such an expectation as legitimate.

COUNTERPOINT -- In *Wattenburg v. United States*, 388 F.2d 853 (9th Cir. 1968), the court found that a woodpile 20-35 feet from the house was within the curtilage. Similarly, in *United States v. Depew*, 8 F.3d 1424, 1426-28 (9th Cir. 1993), the curtilage included a driveway area 50-60 feet from the house because of the defendant's efforts to maintain privacy. The court considered the end of a driveway, by a utility pole, 82 feet from the dwelling, within the curtilage because the area showed evidence of personal use and was naturally enclosed in *United States v. Diehl*, 276 F.3d 32 (1st Cir. 2002). *See generally United States v. Johnson*, 256 F.3d 895 (9th Cir. 2001) (en banc).

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 (2001). However, the Court has approved the installation and subsequent surveillance by electronic beepers as implicating no Fourth Amendment interests, except when used in private residences. *United States v. Karo*, 468 U.S. 705 (1984); *United States v. Knotts*, 460 U.S. 276 (1983).

In *California v. Ciraolo*, 476 U.S. 207, 211 (1986), the Court applied a two-part test to determine whether aerial photography constituted a Fourth Amendment search: 1) Has the

individual manifested a subjective expectation of privacy in the object of the challenged search? and 2) Is society willing to recognize that expectation as reasonable? *See also Smith v. Maryland*, 442 U.S. 735 (1979). In *Dow Chemical Co. v. United States*, 476 U.S. 227 (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 above or sufficiently near the area for the reach of cameras." 476 U.S. at 239. As to the use of an aerial mapping camera, "[t]he mere fact that human vision is enhanced somewhat . . . does not give rise to constitutional problems." 476 U.S. at 238.

> **COUNTERPOINT** -- Visual observations into the interior of a home may constitute a search. *LaDuke v. Castillo*, 455 F. Supp. 209, 210 (E.D. Wash. 1978) (shining a flashlight into the windows of units temporarily housing farm workers constituted a search), *aff'd, LaDuke v. Nelson,* 762 F.2d 1318, 1332 n.19 (9th Cir. 1985); *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, video surveillance of the defendants in the room after the informants left 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, 603-06 (9th Cir. 2000).

Dog sniff presents a sui generis search problem. In *Illinois v. Caballes*, 125 S. Ct. 834 (2005), the Supreme Court held that use of a narcotics-detection dog around a lawfully stopped car does not implicate the Fourth Amendment because it 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 to detect narcotics).

> **COUNTERPOINT** -- In *Caballes*, the dog sniff was lawful because it did not extend the duration of the lawful traffic stop. 125 S. Ct. at 837. However, in *Place*, the 90-minute detention of the luggage for the sniff test was unreasonable. *Place*, 462 U.S. at 707-10; *see United States v. $191,910.00*, 16 F.3d 1051, 1058 (9th Cir. 1994). In *United States v. Thomas*, 757 F.2d 1359, 1367 (2d Cir. 1985), the court held that the use of a marijuana-sniffing dog outside an apartment constitutes a search. But in *United States v. Lingenfelter*, 997 F.2d 632, 638 (9th Cir. 1993), the Ninth Circuit rejected the *Thomas* position, permitting a dog sniff of contraband in a package located in a sealed commercial warehouse because there could be no legitimate expectation of

privacy in contraband. 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).

Relying on *Place*, in *United States v. Jacobsen*, 466 U.S. 109, 122-24 (1984), the Court found that, by field testing white powder obtained from a private Federal Express examination of a package, federal officers did not engage in an additional intrusion sufficient to implicate the Fourth Amendment.

COUNTERPOINT -- In *United States v. Mulder*, 808 F.2d 1346, 1348 (9th Cir. 1987), the court held that, despite *Jacobsen*, a Fourth Amendment search occurred where pills seized by a private individual were subjected to government chemical test to reveal the substance's molecular structure and identity several days after the pills were seized. By analogy to closed container cases, courts have recognized a reasonable expectation of privacy in the memory of phone numbers in a defendant's electronic pager. *United States v. Lynch,* 908 F. Supp. 284, 287 (D.V.I. 1995); *United States v. Chan*, 830 F. Supp. 531, 533-35 (N.D. Cal. 1993).

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 that the officer suspected was stolen. The officer moved a turntable to read and record serial numbers that established that the equipment was stolen. Justice Scalia wrote for the majority 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. In rejecting the dissent's claim that cursory inspections were generally approved and do not constitute a "search," the majority stated:

> Justice Powell's dissent reasonably asks what it is we would have had Officer Nelson do in these circumstances. The answer depends, of course, upon whether he had probable cause to conduct a search, a question that was not preserved in this case. If he had, then he should have done precisely what he did. If not, then he should have followed up his suspicions, if possible, by means other than a search -- just as he would have had to do if, while walking along the street, he had noticed the same suspicious stereo equipment sitting inside a house a few feet away from him, beneath an open window. It may well be that, in such circumstances, no effective means short of a search exist. But there is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all. Our disagreement with the dissenters pertains to where the proper balance should

be struck; we choose to adhere to the textual and traditional standards of probable cause.

Hicks, 480 U.S. at 329 (citations omitted).

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 (2000), the Court held that an officer's physical manipulation of the outside of stowed luggage 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).

C. What Constitutes A Seizure?

An increasingly restrictive definition of what constitutes a seizure has provided law enforcement with an expanded range of intrusions free from Fourth Amendment limitations. A "seizure" of an item occurs when "there is some meaningful interference with an individual's possessory interests in that property." *Karo*, 468 U.S. at 712 (citing *Jacobsen*, 466 U.S. at 113). 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." *Florida v. Royer*, 460 U.S. 491, 502 (1983) (plurality opinion) (examination and retention of driver's license and ticket rendered airport request by federal officers to accompany them a seizure); *United States v. Mendenhall*, 446 U.S. 544 (1980) (no seizure in airport of passenger who was approached, questioned, and asked for ticket and identification).

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). Fourth Amendment seizures include official action assisting in legal, forceful eviction of mobile home park tenants and their mobile home from the park even though no privacy interests were implicated by the seizure. *Soldal v. Cook County*, 506 U.S. 56 (1992). By blocking the defendant's driveway, the sheriff went beyond a voluntary encounter between officer and citizen -- a seizure occurred. *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 while

continuing with other investigation. *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's license during questioning, a seizure occurred. A seizure occurred, and was unlawful, when employees of a suspected corporation were held incommunicado, without probable cause, unless they submitted to interrogations. *Ganwich v. Knapp*, 319 F.3d 1115 (9th Cir. 2003).

In *Florida v. Bostick*, 501 U.S. 429 (1991), the Court rejected the Florida Supreme Court's finding that the general policy of questioning bus passengers and requesting consent to search violated the Fourth Amendment. The Court noted that each case must be examined on its individual facts to determine whether the degree of intrusion constituted a seizure. In *United States v. Drayton,* 536 U.S. 194 (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 -- In *United States v. Cuevas-Ceja*, 58 F. Supp. 2d 1175 (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 mental state of the suspect; 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).

The definition of the seizure of an individual underwent a dramatic restriction in *California v. Hodari D.*, 499 U.S. 621 (1991). Previously, the Court had left open the question of whether a person who flees after an officer communicates that the suspect is not free to leave has a Fourth Amendment interest to assert. *Michigan v. Chesternut*, 486 U.S. 567, 575 n.9 (1988). In *Hodari*, Justice Scalia, referring to common law standards, wrote that no seizure occurred unless the officer physically touched the suspect or the suspect submitted to the show of authority. 499 U.S. at 625.

COUNTERPOINT -- 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, reconsidered almost immediately, and ran off, was held to have been seized under *Hodari*.

The balance between consensual conversations and temporary seizures tilted against the individual in *INS v. Delgado*, 466 U.S. 210 (1984). In *Delgado*, the INS surrounded a factory and began approaching workers at work stations and exits regarding their immigration status. The Court held that, because there was insufficient evidence that workers did not feel free to leave, no seizures occurred. 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).

> **COUNTERPOINT** -- In *LaDuke v. Nelson*, 762 F.2d 1318, 1321 (9th Cir. 1985), *modified by* 796 F.2d 309 (9th Cir. 1986), the court distinguished *Delgado* in holding that INS 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." In *Martinez v. Nygaard*, 831 F.2d 822, 827 (9th Cir. 1987), the court held that temporary detentions of an employee by INS agents during a factory sweep "exceeded any detention approved in *Delgado*." A home visit by INS officers was a seizure without a sufficient articulable basis in *Orhorhaghe v. INS*, 38 F.3d 488, 494-99 (9th Cir. 1994). 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, 689-93 (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).

D. Standing

Proof that a defendant had "standing" was once a cornerstone of any Fourth Amendment challenge. *See, e.g., Rawlings v. Kentucky*, 448 U.S. 98 (1980) (under totality of circumstances, petitioner lacked standing to challenge search of friend's purse in which he placed drugs); *United States v. Salvucci*, 448 U.S. 83 (1980) (individuals charged with possession of stolen mail did not have standing to challenge search of mother's apartment where incriminating checks were found); *Rakas v. Illinois*, 439 U.S. 128 (1978) (passenger who failed to claim interest in weaponry seized from car lacked standing); *Jones v. United States*, 362 U.S. 257 (1960); *see also United States v. Padilla*, 508 U.S. 77 (1993) (participation in a conspiracy gave co-conspirators no special standing to challenge a search of their co-conspirator's car unless they demonstrate a reasonable expectation of privacy under the usual standing rules); *Simmons v. United States*, 390 U.S. 377 (1968) (defendant has a limited immunity to claim standing for the purposes of the motion to suppress; incriminating statements may not be used against the defendant at trial on the issue of guilt

unless no objection is made). Recently, however, the Court emphasized that it has rejected the standing doctrine as a method of analyzing Fourth Amendment violations. *Minnesota v. Carter*, 525 U.S. 83 (1998). Instead, the relevant question is simply whether the defendant personally has an expectation of privacy in the place searched, and whether that expectation is reasonable based on concepts of real or personal property or on "understandings that are recognized and permitted by society." *Carter*, 525 U.S. at 88. In *Carter*, the defendants, who were in another person's apartment for a short time to package cocaine, had no legitimate expectation of privacy.

> **COUNTERPOINT** -- Overnight visitors have a reasonable expectation of privacy in their temporary shelter because "staying overnight in another's house is a long-standing social custom that serves functions recognized as valuable by society. . . . We are at our most vulnerable when we are asleep because we cannot monitor our own safety or the security of our belongings." *Minnesota v. Olson*, 495 U.S. 91, 98-99 (1990). The *Olson* phrasing may provide expanded protection for some defendants. *See, e.g., United States v. Gamez-Orduno*, 235 F.3d 453, 458-61 (9th Cir. 2000) (marijuana smugglers who stayed overnight in trailer had expectation of privacy); *United States v. Fultz*, 146 F.3d 1102 (9th Cir. 1998) (homeless person had reasonable expectation of privacy in the contents of cardboard boxes stored in acquaintance's garage). Even though the car rental had expired, the defendant still had an expectation of privacy in his rental car where the company's policies and practices extended reasonable possession of the vehicle beyond checkout time. *United States v. Henderson*, 241 F.3d 638, 646-47 (9th Cir. 2000); *see United States v. Dorais,* 241 F.3d 1124 (9th Cir. 2001) (same test for hotel guest after checkout time). A hotel guest still maintains a reasonable expectation of privacy, despite unconfirmed reports that the room was rented with a stolen credit card, until the hotel management takes affirmative steps to end the tenancy. *United States v. Bautista*, 362 F.3d 584 (9th Cir. 2004); *cf. United States v. Cunag*, 386 F.3d 888 (9th Cir. 2004) (holding that expectation of privacy in hotel room procured by fraud was extinguished when the hotel manager locked defendant out of the room). Presence in a vehicle gave occupants standing, even though they had no possessory or ownership interest in the car. *United States v. Colin*, 314 F.3d 439, 442-43 (9th Cir. 2002). An occasional overnight visitor had a reasonable expectation of privacy in a gym bag he left under the bed in his girlfriend's apartment. *United States v. Davis*, 332 F.3d 1163, 1167 (9th Cir. 2003).

The judiciary has been somewhat hostile to the government's adoption of inconsistent positions by challenging standing at the same time as claiming at trial that 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). The necessary interest may be established by the joint interest with a co-defendant or a co-conspirator. *United States v. Perez*, 689 F.2d 1336, 1338 (9th Cir. 1982); *United States v. Broadhurst*, 805 F.2d 849, 852 (9th Cir. 1986); *see also United States v. Taketa*, 923 F.2d 665, 671-72 (9th Cir. 1991); *United States v. Pollock*, 726 F.2d 1456, 1465 (9th Cir. 1984). In *United States v. Gomez*, 276 F.3d 694, 697 (5th Cir. 2001), a homeowner had a privacy interest in a car parked in his driveway that was owned and operated by a criminal associate. An uncontroverted affidavit claiming residence establishes the requisite expectation of privacy. *United States v. Peterson*, 812 F.2d 486, 490 (9th Cir. 1987). Although a defendant has no expectation of privacy in abandoned property, the government bears the burden of proving abandonment. *United States v. Basinski*, 226 F.3d 829 (7th Cir. 2000) (outlining forms of abandonment). An inmate who left computer CDs with a friend for safekeeping, then instructed that the CDs be destroyed, did not abandon his expectation of privacy in the CDs. *United States v. James*, 353 F.3d 606, 615-16 (8th Cir. 2003).

E. Probable Cause

1. Probable Cause To Search

The major change in the area of probable cause to issue a search warrant has come through the abandonment of the *Aguilar-Spinelli* requirement (*Spinelli v. United States*, 393 U.S. 410 (1969); *Aguilar v. Texas*, 378 U.S. 108 (1964)) that probable cause from an informant must include the basis for the informant's knowledge and a basis for finding the informant to be reliable. In *Illinois v. Gates*, 462 U.S. 213 (1983), the Court rejected reliance on the "two-pronged test" 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 for the magistrate'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.

COUNTERPOINT -- Even under the looser *Gates* standard, the government has fallen short of probable cause. *See, e.g., United States v. Gourde*, 382 F.3d 1003 (9th Cir. 2004) (subscription to pornography Web site did not create probable cause to believe that child pornography would be found on defendant's computer); *United States v. Brown*, 951 F.2d 999, 1003 (9th Cir. 1991) (allegation of corruption and large amounts of money insufficient); *United States v. Ramos*, 923 F.2d 1346, 1352-53 (9th Cir. 1991) (no nexus between place to be searched and criminal activity); *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 crouching behind 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). A dog sniff of supposed drug money was insufficient to establish probable cause based on expert evidence 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). To find probable cause based solely on a dog sniff, the prosecution must show that the dog is reliable. *United States v. Cruz-Roman*, 312 F. Supp. 2d 1355 (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 team was not certified and the dog had no track record of reliability). The court found no qualified immunity and no probable cause where officers arrested the plaintiff for rape based on unreliable canine identification, suggestive eyewitness identification procedures, and mere resemblance to a general description of the attacker. *Grant v. City of Long Beach*, 315 F.3d 1081 (9th Cir. 2002). *See also Graves v. City of Coeur D'Alene*, 339 F.3d 828 (9th Cir. 2003) (defendant's refusal to provide his name or consent to search his backpack did not support probable cause).

2. Probable Cause To Arrest

In *Maryland v. Pringle*, 540 U.S. 366 (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. In *Devenpeck v. Alford*, 125 S. Ct. 588, 593 (2004), the Supreme Court again expanded the permissible bases for arrest, holding that an arrest is

lawful even though there is no probable cause to support the offense cited by the arresting officer, so long as the facts known to the officer establish probable cause as to some offense, even if that offense is not closely related.

> **COUNTERPOINT** -- The inference that everyone on the scene of a crime is a party to it evaporates where there is information to single out the guilty person. *United States v. Di Re*, 332 U.S. 581, 594 (1948). A warrant application establishing probable cause to search a tavern and the bartender for heroin did not provide probable cause to search patrons of the tavern who were present when the warrant was executed. *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979); *see United States v. Robertson*, 833 F.2d 777, 782-83 (9th Cir. 1987) (presence in a house being searched based on probable cause 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, 1313 (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).

F. Searches And Seizures Pursuant To A Warrant

An important limitation on the scope of the exclusionary rule is the good faith exception carved out in *United States v. Leon*, 468 U.S. 897 (1984), and *Massachusetts v. Sheppard*, 468 U.S. 981 (1984). In *Leon* and *Sheppard*, the Court held that evidence derived from the execution of an invalid search warrant was admissible as long as the officers were acting in good faith. The good faith exception to the exclusionary rule has also been applied indirectly to reasonable errors in the description of the place searched (*Maryland v. Garrison*, 480 U.S. 79 (1987)) and directly to warrantless searches based on a statute subsequently held to be unconstitutional (*Illinois v. Krull*, 480 U.S. 340 (1987)). The Court has also found the arrest of a suspect based on a quashed warrant that remained outstanding due to a clerical error to be within the good faith exception to the exclusionary rule. *Arizona v. Evans*, 514 U.S. 1 (1995).

> **COUNTERPOINT** -- The officer's use of a search warrant does not mean suppression is unavailable. There are at least six areas that can develop a basis for suppression, notwithstanding *Leon*.

1. <u>Controverted Warrant Affidavit</u> -- *Leon* expressly excepts from the scope of its holding warrants that are challenged under *Franks v. Delaware*, 438 U.S. 154 (1978). *Leon*, 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. If the affidavit, cleansed of the challenged statements, does not establish probable cause, the defendant is entitled to suppression of the derivative evidence. *Franks*, 438 U.S. at 171-72. 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*, 769 F.2d 1410 (9th Cir. 1985). 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 deliberately false or reckless inclusion of perceptions of sight, smell, and sound -- given the court's reliance on officers' experience -- is "unforgiveable." *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 is 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. 1992).

2. <u>Overbreadth And Particularity</u> -- Where the warrant is facially overbroad, the officer cannot reasonably rely on its validity. *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). 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 (9th Cir. 2003). To cure the warrant, the application must specifically allege that the business is "permeated with fraud." *Id.* The warrant may also be seen to lack particularity. *Leon*, 468 U.S. at 923; *United States v. Collins*, 830 F.2d 145, 146 (9th Cir. 1987). Lack of particularity in a warrant cannot be cured by a detailed warrant affidavit unless it is specifically incorporated by reference. *Groh v. Ramirez*, 540 U.S. 551 (2004). Warrants to search individuals present at the place to be searched must be particularized and supported by probable cause. *Ybarra v. Illinois*, 444 U.S. 85 (1979); *Marks v. Clarke*, 102 F.3d 1012, 1027-29 (9th Cir. 1996). An anticipatory warrant must identify the triggering event on which the warrant was conditioned within the warrant itself. *United States v. Hotal*, 143 F.3d

1223, 1226-28 (9th Cir. 1998). The Tenth Circuit approves blanket suppression where the search had an improper ulterior motive. *United States v. Foster*, 100 F.3d 846, 849-53 (10th Cir. 1996).

3. 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; *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). "[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). Similarly, officers did not reasonably rely on a warrant when the only evidence to support probable cause was a subscription to a website that offered child pornography, and further investigation could have yielded additional evidence. *United States v. Gourde*, 382 F.3d 1003 (9th Cir. 2004); *see United States v. Greathouse*, 297 F. Supp. 2d 1264, 1272-73 (D. Or. 2003) (same based on staleness). 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).

4. 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); *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); *United States v. Jay*, 242 F. Supp. 2d 960, 974-76 (D. Or. 2003). A defendant who lacks standing to contest the primary illegality will also lack standing to contest the warrant affidavit. *Shamaeizadeh v. Cunigan*, 338 F.3d 535 (6th Cir. 2003).

5. Manner Of Execution -- The manner in which the warrant is executed may render the search unreasonable. *United States v. Winsor*, 846 F.2d 1569, 1579 (9th Cir. 1988) (en banc); *United States v. Warner*, 843 F.2d 401, 405 (9th Cir. 1988); *United States v. Echegoyen*, 799 F.2d 1271, 1279 n.4 (9th Cir. 1986). Violation of the knock-and-announce requirements of 18 U.S.C. § 3109 requires 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 recently rejected the Ninth Circuit's knock-and-announce test, allowing 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 (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 evidence that drug evidence could be destroyed and that 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). Exigent circumstances will authorize a forcible entry within 15 to 20 seconds after knocking if it is reasonable for officers to believe that drugs may be destroyed within that time. *United States v. Banks*, 540 U.S. 31 (2003); *cf. United States v. Sherman*, 334 F. Supp. 2d 223 (D. Me. 2004) (delay of less than 5 seconds after knock is not valid in absence of exigent circumstances).

Unreasonable execution of a search warrant may also require suppression when the police fail to provide a complete copy of the warrant before beginning a search to a person on the premises who requests a copy. *United States v. Gantt*, 194 F.3d 987 (9th Cir. 1999). Use of a flash-bang device in the execution of a search warrant was unreasonable in one case because, despite officer safety concerns in the execution of the warrant, the search team threw the device "blind" into a room occupied by innocent bystanders and failed to consider less dangerous alternatives. *Boyd v. Benton County*, 374 F.3d 773, 778-80 (9th Cir. 2004).

6. <u>Role Of Magistrate</u> -- 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).

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. *Kirk*, 536 U.S. at 638. The existence of an arrest warrant allows entry into a dwelling in which the defendant lives, but entry into the home of a third party must be supported by a search warrant or exigent circumstances. *Steagald v. United States*, 451 U.S. 204, 211-22 (1981). A non-exigent entry

to effect an arrest of an overnight guest of a third party requires at least an arrest warrant to comply with the Fourth Amendment. *Minnesota v. Olson*, 495 U.S. 91 (1990).

> **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). 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).

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). However, the government argument that the warrant requirement only applies to dwellings -- unanimously rejected in *United States v. Chadwick*, 433 U.S. 1, 7 (1977) -- has been well received by Justices Scalia and Thomas. *See California v. Acevedo*, 500 U.S. 565, 581 (1991) (Scalia, J., concurring). The exceptions to the warrant requirement have generally been given increasingly broad readings. In his dissent to *Groh v. Ramirez*, 540 U.S. 551, 572-73 (2004), 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." Determinations of probable cause and reasonable suspicion are given *de novo* review by the appellate courts. *Ornelas v. United States*, 517 U.S. 690 (1996).

1. **Consent** -- 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); *Schneckloth v. Bustamonte*, 412 U.S. 218

(1973). Under the totality of the circumstances analysis, the Ninth Circuit specifically considers five factors: (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 she had a right not to consent; and (5) whether the defendant had been told a search warrant could be obtained. *United States v. Soriano*, 346 F.3d 963 (9th Cir. 2003) (holding mother's consent to search hotel room 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 relevance of *Miranda* warnings to voluntariness of consent).

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 (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. 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.'" *Kaupp*, 538 U.S. at 631.

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 INS 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). 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 United States v. Garibay*, 143 F.3d 534, 537-39 (9th Cir. 1998) (invalid *Miranda* waiver). The officer's hand on his gun, on a deserted stretch of highway, with no advice of 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). Police officers' show of authority

and failure to inform bus passengers of the right to refuse consent rendered consent involuntary in *United States v. Guapi*, 144 F.3d 1393 (11th Cir. 1998), and *United States v. Washington*, 151 F.3d 1354 (11th Cir. 1998). 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 (W.D. Wash. 2004).

The scope of consent is generally determined objectively by the expressed object of the search. *Florida v. Jimeno*, 500 U.S. 248 (1991) (consent to search car for narcotics included search of paper bag in car); *United States v. Reeves*, 6 F.3d 660 (9th Cir. 1993) (consent to "complete search" of car included search of briefcase in trunk of car).

COUNTERPOINT -- Intrusions that exceed the reasonable scope of the consent violate the Fourth Amendment. *United States v. Blake*, 888 F.2d 795 (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 locked trunk did not include consent to pull seats out of car, without causing damage, to look in trunk); *see United States v. Lemmons,* 282 F.3d 920 (7th Cir. 2002) (written consent to search trailer did not include contents of computer, but defendant later consented to expanded search). After an initial consent to search a home to look for a burglar, the officers exceeded the scope of the consent in conducting second and third searches for drugs. *Shamaeizadeh v. Cunigan*, 338 F.3d 535, 547-48 (6th Cir. 2003). 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. The routine nature of police restraints is irrelevant to the effect of the restraints on the subject, and the absence of resistance to restraint is not a waiver of Fourth Amendment protection. *Kaupp*, 538 U.S. at 632.

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). In a major expansion of the consent exception to the warrant requirement, the apparent authority of a third party consenter is

sufficient to make the search lawful as long as the mistake is reasonable. *Illinois v. Rodriguez*, 497 U.S. 177 (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).

COUNTERPOINT -- Police officers had no apparent authority to search belongings where the lessee identified a houseguest's belongings in a gym bag under a bed. *United States v. Davis*, 332 F.3d 1163, 1170 (9th Cir. 2003); *see also 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), *overruled in part on other grounds by United States v. Kim,* 105 F.3d 1579, 1581 (9th Cir. 1997), the court held the consent given by the defendant's boyfriend to search the defendant's purse, which was located in a car they had joint control over, was invalid 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), *overruled in part on other grounds by United States v. Kim,* 105 F.3d 1579, 1581 (9th Cir. 1997), the court held that an ATF agent's reliance on consent from a caretaker was unreasonable, even though the agent knew that the caretaker had been in the bedroom on prior occasions, because there was nothing to indicate that the prior access was authorized, the bedroom door was closed at the time of the search, and the agent knew that the caretaker's relationship with the homeowner 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, was invalid because the information known at the time did not support a reasonable belief in the girlfriend's authority to consent. 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). Third party consent that stems from prior government illegality is not valid. *United States v. Oaxaca*, 233 F.3d 1154, 1158 (9th Cir. 2000).

Refusal of consent by a person with greater authority over the property will override the consent of another with less authority. *United States. v. Jones*, 335 F.3d 527 (6th Cir. 2003) (holding that consent given by the handyman was insufficient when officers knew that the homeowner had already refused consent). But courts have struggled when two people with equal authority to consent disagree. The Georgia Supreme Court recently held that the consent

of one co-owner of property is not sufficient to establish consent when another co-owner refuses. *State v. Randolph*, 604 S.E.2d 835, 836 (Ga. 2004); *but see Primus v. State*, 813 N.E.2d 370, (Ind. Ct. App. 2004) (holding consent of an absent co-resident is valid).

2. **Plain View** -- In *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), the plurality opinion articulated the plain view doctrine as allowing a warrantless seizure where the officers inadvertently observed an item in a place where they have a right to be, and probable cause to believe the item is subject to seizure is readily apparent. In *Horton v. California*, 496 U.S. 128 (1990), the Court shaved back the test to eliminate the requirement of inadvertence. In *Horton*, the Court approved the seizure of weapons not named in the search warrant for rings that were the proceeds of an armed robbery; the incriminating nature of the guns was readily apparent to the searching officer, and the officer was lawfully present on the premises deliberately to search for evidence.

COUNTERPOINT -- After ATF agents had fully executed their search warrant, the plain view doctrine was no longer applicable because they were no longer lawfully on the premises when they saw the rifle that was seized. *United States v. Limatoc*, 807 F.2d 792, 795 (9th Cir. 1987); *see also United States v. Spilotro*, 800 F.2d 959, 968 (9th Cir. 1986) (plain view seizure of jewelry during execution of general warrant held invalid); *United States v. Miller*, 769 F.2d 554, 560 (9th Cir. 1985) (after field test of bag's contents revealed innocuous white powder, further probing and puncturing of bag's contents held invalid). Where the warrant failed to particularly describe the items to be seized, material that is not contraband in plain view is suppressed. *United States v. Van Damme*, 48 F.3d 461, 465-67 (9th Cir. 1995).

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. The stop must be based on a reasonable, individualized suspicion based on articulable facts, and the frisk is limited to a pat-down for weapons. An anonymous tip that a person is carrying a gun is not, by itself, sufficient to justify a stop and frisk. *Florida v. J.L*, 529 U.S. 266 (2000). A refusal to cooperate does not furnish the objective justification required for a stop. *Florida v. Bostick*, 501 U.S. 429, 437 (1991). On the other hand, 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). After a *Terry* stop, the police officers may seize non-threatening contraband detected through the

sense of touch during a protective pat-down search. *Minnesota v. Dickerson*, 508 U.S. 366 (1993).

COUNTERPOINT -- 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.

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 same requirement of founded 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 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). The police may order passengers and the driver out of the vehicle pending completion of the stop. *Maryland v. Wilson*, 519 U.S. 408 (1997); *Pennsylvania v. Mimms*, 434 U.S. 106 (1977). 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"). The "reasonable suspicion" standard cannot justify questioning an individual at his home. *United States v. Washington*, 387 F.3d 1060, 1067-68 (9th Cir. 2004).

COUNTERPOINT -- In the following cases, the Ninth Circuit rejected a claim that founded 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). Because investigative stops cannot exceed the scope of the initial purpose for the stop, questioning and consent following the decision not to write a ticket were the product of an illegal seizure despite the driver's extreme nervousness in *United States v. Chavez-Valenzuela*, 268 F.3d 719 (9th Cir. 2001); *see also State v. Maginnis*, 150 S.W.3d 117, 121 (Mo. Ct. App. 2004) (rejecting use of questioning during a traffic stop to investigate other crimes); *People v. Hall*, 814 N.E.2d 1011 (Ill. App. Ct. 2004) (holding that questioning after warning was issued and defendant was informed he was free to go exceeded the scope of the stop). 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); s*ee United States v. Higareda Santa-Cruz*, 826 F. Supp. 355, 358-59 (D. Or. 1993).

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. 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. In *United States v. Golab*, 325 F.3d 63, 66-67 (1st Cir. 2003), the court held that an INS 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.

A mistake of law cannot justify a vehicle stop, and there is no good faith exception for officers who rely on erroneous training. *United States v. Lopez-Soto*, 205 F.3d 1101 (9th Cir. 2000) (erroneous belief that a registration sticker was required); *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. Mariscal*, 285 F.3d 1127 (9th Cir. 2002) (no reasonable suspicion where failure to signal right turn did not affect traffic as required for a violation under state law). In *United States v. Colin*, 314 F.3d

439, 443-47 (9th Cir. 2003), the court conducted a careful analysis of the traffic laws to conclude that the officers did not have reasonable suspicion to stop the defendant's car for lane straddling or for driving under the influence where the driver did not cross over the line and in fact made a safe lane change.

"[E]ven 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, 1232 (9th Cir. 1988). The level of intrusion during a stop may also trigger the probable cause requirement. *United States v. Lopez-Arias*, 344 F.3d 623 (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).

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 *State v. Affsprung*, 87 P.3d 1088 (N.M. Ct. App. 2004), the New Mexico Court of Appeals held that, after lawfully pulling a vehicle over for a traffic violation, the officer exceed the scope of the *Terry* stop when he asked for and obtained the passenger's identification to run a wants and warrants check. The court pointed out that the scope of the stop permitted investigative detention of the vehicle and driver only, not the passenger. *Affsprung*, 87 P.3d at 1094. 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.

4. <u>Incident To Arrest</u> -- 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). 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 (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

(failure to wear seatbelts) in his presence, he may arrest the offender without violating the Fourth Amendment.

> **COUNTERPOINT** -- In the absence of a specific justification, body cavity searches as an incident to arrest are unreasonable. *Fuller v. M.G. Jewelry*, 950 F.2d 1437,1446 (9th Cir. 1991).

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 v. California*, 395 U.S. 752 (1969). When an officer makes a lawful arrest of the occupants of an automobile, or recent occupants of a vehicle, the officers may contemporaneously search the passenger compartment, but not the trunk, for weapons. *Thornton v. United States*, 124 S. Ct. 2127 (2004); *New York v. Belton*, 453 U.S. 454, 460-61 (1981). In *Thornton*, the court upheld a search of a vehicle incident to arrest despite the fact that the defendant had been arrested, handcuffed, and placed in the back of the patrol vehicle when the search took place. *Thornton*, 124 S. Ct. at 2129. The area of the search may also include the open cargo area of a hatchback, whether covered or uncovered. *United States v. Mayo*, 394 F.3d 1271 (9th Cir. 2004).

> **COUNTERPOINT** -- The search 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). 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). 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*. *Thornton*, 124 S. Ct. at 2132-33.

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).

> **COUNTERPOINT** – If the police detain rather than arrest the resident, no protective sweep is allowed. *United States v. Reid,* 226 F.3d 1020, 1027 (9th Cir. 2000). 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). Even items in plain view must be suppressed where the evidence was located after the purposes of a protective sweep have been accomplished. *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).

COUNTERPOINT -- 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, Md. Penitentiary 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 (*Arizona v. Hicks*, 480 U.S. 321, 326 (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). 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 (2001).

COUNTERPOINT -- The Ninth Circuit has placed a number of restrictions on the exigent circumstances justification for warrantless searches and seizures.

a. 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 it is provided for by law. *Alvarez*, 810 F.2d at 882-83 n.4.

b. 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).

c. Imminence of exigency -- 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). 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). 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. 1992). In a drunk-driving case, the need for evidence preservation does 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 (9th Cir. 1998).

d. Pretext -- The police cannot create the exigency by which they seek to justify the intrusion. *United States v. Allard*, 600 F.2d 1301,1304 n.2 (9th Cir. 1979); *United States v. Cruz-Roman*, 312 F. Supp. 2d 1355, 1365 (W.D. Wash. 2004). Pretext is a relevant inquiry post-*Whren* in the context of a search based on the emergency exception, which must not be primarily motivated by an intent to arrest and seize evidence. *United States v. Cervantes*, 219 F.3d 882, 890 (9th Cir. 2000). Where officers had conducted extensive surveillance, had established probable cause, and chose not to seek a warrant, they could not justify the warrantless search by exigent circumstances created when they conducted a knock and talk visit to the home. *United States v. Chambers*, 395 F.3d 563, 566-69 (6th Cir. 2005).

e. 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, 1571 (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).

f. 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).

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 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** -- There may still be a warrant requirement for vehicles parked in private driveways; the scope of such protection is derived from *Coolidge v. New Hampshire*, 403 U.S. 443, 458-62 (1971); *see also Cardwell v. Lewis*, 417 U.S. 583, 593 (1974). 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. 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).

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 (1991); *United States v. Ross*, 456 U.S. 798 (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** -- 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 (1977).

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). 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).

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. Municipal Court of San Francisco*, 387 U.S. 523 (1967); *See v. 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 School District 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).

COUNTERPOINT -- In a post-*Knights* decision, the Ninth Circuit held that an officer must have reasonable suspicion of criminal wrongdoing to search and arrest a parolee, despite the parolee's reduced expectation of privacy under the Fourth Amendment. *Moreno v. Baca*, 400 F.3d 1152 (9th Cir. 2005). 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 (2nd Cir. 2002). In *Portillo v. United States District Court*, 15 F.3d 819, 922-24 (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 *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. 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.

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).

> **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). 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 magnometer searches at a peaceful protest.

9. <u>Border Searches</u> -- 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. 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 gas tank searches and x-ray density searches of vehicles. *United States v. Flores-Montano*, 541 U.S. 149 (2004) (authorizing fuel tank disassembly); *United States v. Camacho*, 368 F.3d 1182 (9th Cir. 2004) (authorizing x-ray search of tire). Border agents may also slash a vehicle's spare tire to search for contraband without reasonable suspicion. *United States v. Cortez-Rocha*, 383 F.3d 1093 (9th Cir. 2004), *amended by* 394 F.3d 1115 (9th Cir. 2005) (reasoning that the search causes property damage, but does not impair the safe operation of the vehicle).

> **COUNTERPOINT** -- 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. Also, border officials on roving patrols must have a reasonable suspicion before stopping 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. "Non-routine" border searches that are particularly invasive of personal privacy, such as strip searches and x-ray searches, or that impair the vehicle's safe operation, may require reasonable suspicion. *See Flores-Montano*, 541 U.S. at 152; *United States v. Rivas*, 157 F.3d 364, 367 (5th Cir. 1998) (drilling into the frame of a vehicle requires reasonable suspicion); *Cortez-Rocha*, 383 F.3d at 1096 (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"). 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 (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).

H. Fruit Of The Poisonous Tree

The basic rule of *Wong Sun v. United States*, 371 U.S. 471 (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 (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.

COUNTERPOINT -- However, the Court remanded the case for a determination whether the agents' decision to seek a warrant was a product of the illegal entry and search. *Murray*, 487 U.S. at 542-44; *accord United States v. Hill*, 55 F.3d 479, 481 (9th Cir. 1995). When a warrant has been tainted by

an illegal search, the government must prove both 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. *United States v. Duran-Orozco,* 192 F.3d 1277, 1281 (9th Cir. 1999).

2. **Inevitable Discovery** -- In *Nix v. Williams*, 467 U.S. 431 (1984), the Court revisited the "Christian burial speech" case in which the Court earlier found that a confession leading to the discovery of a murder victim's body violated the Sixth Amendment. On remand, the state established that, with the massive search ongoing at the time of the confession, the body would have been found in a short time anyway. In *Nix*, the Court approved the hypothetical inevitable discovery doctrine allowing the evidence where the government can establish that the illegally obtained evidence would have been discovered through legitimate means independent of official misconduct.

COUNTERPOINT -- In *United States v. Echegoyen*, 799 F.2d 1271, 1280 n.7 (9th Cir. 1986), the court rejected a government claim that, if the illegal search had not occurred, a warrant would have been sought and obtained. The court stated that the means by which the hypothetical inevitable discovery would have occurred must parallel, not follow, the primary illegality. *See also United States v. Conner*, 127 F.3d 663, 667 (8th Cir. 1997); *United States v. Ramirez-Sandoval*, 872 F.2d 1392, 1399-1400 (9th Cir. 1989); *United States v. Maxwell*, 734 F. Supp. 280, 282-83 (S.D. Tex. 1990); *but see United States v. Boatwright*, 822 F.2d 862, 864-65 (9th Cir. 1987). In both *United States v. Mejia*, 69 F.3d 309, 319-20 (9th Cir. 1995), and *United States v. Reilly*, 224 F.3d 986, 994 (9th Cir. 2000), the court rejected 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. The court rejected speculative application of the inevitable discovery rule in *United States v. Lopez-Soto,* 205 F.3d 1101 (9th Cir. 2000), when the government offered no evidence of the procedures that would have been followed had the illegal car stop not occurred. *See also United States v. Davis*, 332 F.3d 1163, 1170 (9th Cir. 2003) (no inevitable discovery where police were only looking for defendant and could not establish that the firearm would inevitably have been found.) In *United States v. Johnson*, 380 F.3d 1013 (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 *Brown v. Illinois*, 422 U.S. 590, 604-05 (1975), the Court set out factors to be examined in determining whether a *Mirandized* statement obtained after an illegal arrest must be suppressed. In finding that the statement must be suppressed, the Court weighed three factors: 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.

Accord Kaupp v. Texas, 538 U.S. 626, 632-33 (2003); *see also United States v. Davis*, 332 F.3d 1163, 1170 (9th Cir. 2003) (no attenuation between illegal search and later non-custodial statements). This methodology applies to the Fourth Amendment. *United States v. Patzer*, 277 F.3d 1080, 1084-85 (9th Cir. 2002); *United States v. Ricardo D.*, 912 F.2d 337, 342-43 (9th Cir. 1990); *United States v. Delgadillo-Velasquez*, 856 F.2d 1292, 1299-1300 (9th Cir. 1988); *United States v. Perez-Esparza*, 609 F.2d 1284, 1290-91 (9th Cir. 1979). However, a *Miranda* violation does not require suppression of resulting physical evidence under the exclusionary rules. *United States v. Patane*, 124 S. Ct. 2620 (2004). A warrantless arrest in the home, with probable cause and without exigent circumstances, did not require suppression of the subsequent confession in *New York v. Harris*, 495 U.S. 14, 21 (1990); *accord United States v. Crawford*, 372 F.3d 1048 (9th Cir. 2004) (en banc) (illegal seizure in home and illegal search of home did not require suppression of later confession).

> **COUNTERPOINT** -- Consent obtained after an illegal arrest is invalid, even after *Miranda* warnings, in the absence of evidence breaking the chain of causation. *Kaupp*, 538 U.S. at 633; *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).

4. <u>Witness Testimony</u> -- 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 (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 held that all evidence based on an illegal stop of a drug courier was tainted by the stop and subject to suppression, 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 (1954). In *United States v. Havens*, 446 U.S. 620 (1980), the Court expanded allowable impeachment of the defendant with the product of an illegal search and seizure to statements elicited in cross-examination "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 (1990).

6. **Nature Of Illegal Intrusion** -- The exclusionary rule is generally considered a remedy for violations of the Fourth Amendment rather than non-constitutional protections. In *United States v. Caceres*, 440 U.S. 741 (1979), conversations recorded in violation of IRS regulations were held to be admissible at trial. However, violation of 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 also United States v. Eide*, 875 F.2d 1429, 1434-37 (9th Cir. 1989) (V.A. drug records should have been suppressed because of confidentiality statute).

7. **Type Of Proceeding** -- In addition to criminal trials, the exclusionary rule applies to civil forfeiture proceedings. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965). However, the Supreme Court has allowed the use of illegally seized evidence in non-criminal contexts such as civil tax cases (*United States v. Janis*, 428 U.S. 433 (1976)), civil deportation hearings (*INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984)), and grand juries (*United States v. Calandra*, 414 U.S. 338 (1974)). The federal exclusionary rule does not bar the introduction at parole revocation hearings of evidence seized in violation of parolees' Fourth Amendment rights. *Pa. Board of Probation and Parole v. Scott*, 524 U.S. 357 (1998).

> **COUNTERPOINT** -- 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 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).

The admissibility of identity information in criminal cases, especially in immigration prosecutions under 8 U.S.C. § 1326, has been resolved in favor of suppression when the identification information -- such as fingerprints -- was obtained for investigative purposes. *United States v. Garcia-Beltran*, 389 F.3d 864 (9th Cir. 2004); *United States v. Guevara-Martinez*, 262 F.3d 751, 754 (8th Cir. 2001). Historically, some courts misread *Lopez-Mendoza*, the civil INS case, to foreclose suppression of identification information in criminal proceedings. In *Garcia-Beltran* and *Guevara-Martinez*, the courts recognized that suppression of identity information in criminal proceedings should be controlled by prior Supreme Court decisions applying the exclusionary rule to fingerprint evidence obtained as a result of unlawful arrests, citing *Davis v. Mississippi*, 394 U.S. 721 (1969), and *Hayes v. Florida*, 470 U.S. 811 (1985). *Accord United States v. Olivares-Rangel*, 324 F. Supp. 2d 1218, 1222-24 (D.N.M. 2004); *United States v. Ortiz-Hernandez*, 276 F. Supp. 2d 1113, *subsequent proceedings*, 276 F. Supp. 2d 1119 (D. Or. 2003) (pending).

I. Supreme Court Update

Recent Supreme Court decisions, which have been incorporated in this outline, continue the trend towards narrowing the reach of the Fourth Amendment. The following are case summaries by Oregon FPD Law Clerk Elizabeth Gillingham.

- DOG SNIFF
  Illinois v. Caballes, 125 S. Ct. 834 (2005)

Illinois State Trooper Daniel Gillette stopped Roy Caballes for speeding on an interstate highway. While he was writing a ticket for Caballes, another officer walked a narcotics detection dog around Caballes's car. The officers searched the trunk based on the dog's alert and found marijuana. The entire incident lasted ten minutes. The state court had found Officer Gillette did not impermissibly extend the duration of the stop to allow the dog sniff to occur.

Writing for seven members of the court (Chief Justice Rehnquist took no part in the decision), Justice Stevens held, "A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment." Since a dog sniff only reveals the possession of contraband, it does not compromise any legitimate privacy interest. Although drug detection dogs may alert falsely, the court agreed with the trial judge that a dog sniff is sufficiently reliable to establish probable cause. The Court distinguished *Kyllo v. United States*, 533 U.S. 27 (2001), which had imposed a warrant requirement on the use of thermal imaging devices, because the technology was capable of detecting lawful activity such as, "'at

what hour each night the lady of the house takes her daily sauna and bath.'" *Caballes*, 125 S. Ct. at 838 (quoting *Kyllo*, 533 U.S. at 38).

In dissent, Justice Souter rejected the court's conclusion that dog sniffs are *sui generis* because they reveal only the presence of contraband. Souter argued that the dog sniff provides officers with information about the contents of private spaces beyond anything that human senses could perceive, and that since that even well-trained dogs are not infallible, the dog sniff amounts to a search under the Fourth Amendment.

Justice Ginsburg's dissent refused to address whether dog sniffs generally fall within the scope of the Fourth Amendment, and instead argued that the dog sniff violated the Fourth Amendment in this case because it was not reasonably related in scope to the circumstances justifying the intrusion, as required by *Terry v. Ohio*, 392 U.S. 1, 20 (1968). Although the dog sniff did not extend the duration of the stop, Justice Ginsburg argued that the action changed the character of the encounter from a traffic stop to a drug search.

Both Justices Souter and Ginsburg relied on the spectre of suspicionless, dog-accompanied drug sweeps of parked cars along sidewalks and in parking lots. Both, however, hinted that the situation would be entirely different if it involved a dog trained to detect explosives. Justice Ginsburg stated, "[T]he immediate, present danger of explosives would likely justify a bomb sniff under the special needs doctrine." *Id.* at 847 (Ginsburg, J., dissenting). Justice Souter agreed, "All of us are concerned not to prejudice a claim of authority to detect explosives and dangerous chemical or biological weapons that might be carried by a terrorist who prompts no individualized suspicion." *Id.* at 843 n.7 (Souter, J., dissenting).

- PROBABLE CAUSE TO ARREST
  Devenpeck v. Alford, 125 S. Ct. 588 (2004)

In a bizarre encounter, officers arrested Jerome Alford for violating the Washington Privacy Act when he tape recorded his conversation with the police officers. The plaintiff, Jerome Alford, pulled off of State Route 16 in Pierce County, Washington to assist a disabled vehicle. He activated "wig wag" taillights when he pulled over, then helped the motorists change a flat tire. When Officer Joi Haner pulled over to check on the two vehicles, Alford hurriedly returned to his car and drove away. The stranded motorists told Officer Haner that they believed Alford was a "cop."

Concerned that Alford was impersonating a police officer, Haner pursued Alford and pulled him over, observing handcuffs and a hand-held police radio in the car. He also noticed that Alford had been listening to the Kitsap County Sherrif's Office police frequency on a special radio. When Officer Devenpeck arrived to assist, he saw the tape recorder sitting on

the passenger seat with the "Play" and "Record" buttons depressed. Devenpeck informed Alford that he was under arrest for violating the Washington Privacy Act.

After reviewing the law and conversing with a county prosecutor by phone, Devenpeck felt that possible criminal offenses included violating the Privacy Act, impersonating a police officer, making a false representation to an officer, and obstructing a public servant. Devenpeck stated that, as a matter of policy, he does not "stack charges" against an arrestee. At booking, Officer Haner charged Alford with violating the Privacy Act.

Alford filed an unsuccessful § 1983 suit against the arresting officers based on an unlawful arrest, but the Ninth Circuit reversed the jury's verdict. The court of appeals concluded that tape recording a traffic stop is not a crime in Washington. The court further held that the other facts establishing probable cause of impersonating a police officer and obstructing a police officer were insufficient to support the arrest because they were not "closely related" to the offense invoked by Devenpeck when he took Alford into custody.

- ♦ The Supreme Court reversed and remanded, holding that the offense cited by the arresting officer need not be closely related to the offense for which probable cause exists.

- ♦ The court based this holding on the doctrine that an arresting officer's subjective intent is irrelevant, bolstered by the fact that an arresting officer is not legally required to state any offense in order to take a defendant into custody. Imposing the "closely related offense" rule would, according to the Court, cause officers either to withhold any statement of an offense at the time of the arrest, or provide every possible basis for arrest that could possibly exist.

• EXECUTION OF SEARCH WARRANT
Muehler v. Mena, 125 S. Ct. 1465 (2005)

At 7:00 a.m. on February 3, 1998, a SWAT team executed a search warrant for the home of Iris Mena, based on suspicion that a gang member involved in a drive-by shooting lived at that address. SWAT team members, clad in helmets and black vests, awoke Mena in her bed and handcuffed her at gunpoint. She was placed in a converted garage with the other occupants of the house and held in handcuffs for the duration of the search, approximately two to three hours. During the search, INS agents questioned Mena regarding her immigration status.

Mena filed a § 1983 suit against the officers and obtained a jury verdict, affirmed by the district court and by the Court of Appeals. The Supreme Court reversed and remanded the case to the Ninth Circuit.

Writing for five justices, Chief Justice Rehnquist held that the authority to detain occupants of a house for the entire duration of a search is categorical and does not depend on any quantum of proof justifying the detention. The Court also held that the use of the handcuffs was more intrusive than merely detaining her in the garage, but that the marginal intrusion was justified by the officer's safety concerns because they were searching the home of a wanted gang member for weapons. The fact that the handcuffs remained in place for the duration of the search was not unreasonable because it allowed only two armed officers to detain four occupants in an inherently dangerous situation.

In concurrence, Justice Kennedy emphasized that the holding should be limited to the circumstances of the case and should not permit the use of excessive force on occupants who are not themselves suspected of criminal activity during the execution of search warrants. Justices Stevens, Souter, Ginsburg, and Breyer argued that it was not objectively reasonable of the officers to keep Mena in handcuffs for the duration of the search because she posed no threat to the officers. These four justices concurred in the judgment to remand the case to the Ninth Circuit to determine the sufficiency of the evidence to support the jury's verdict.

- EXCESSIVE FORCE
  Brosseau v. Haugen, 125 S. Ct. 596 (2004)

Ducking the Fourth Amendment issue presented in this case, the Supreme Court held that an officer's use of excessive force against an unarmed felony suspect, who was attempting to escape, did not clearly establish a constitutional violation.

Officer Rochelle Brosseau went to the home of Kenneth Haugen, who was suspected of selling drugs and stealing the tools of a co-worker. When Haugen saw Officer Brosseau approach, he jumped in his Jeep, and ignored the officer's warnings to stop, even when she smashed a hole in the window of his Jeep. Brosseau shot Haugen in the back as he drove away, and Haugen subsequently filed a suit for damages under 42 U.S.C. § 1983.

The Court held that claims of excessive force should be judged based on a standard of "objective reasonableness," requiring that the suspect pose a threat of serious physical harm to the officer or to others. *Brosseau*, 125 S. Ct. at 589 (citing *Tennessee v. Garner*, 471 U.S. 1, 11 (1985), and *Graham v. Connor*, 490 U.S. 386, 388 (1989)). The Court restated that "[q]ualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehended the law governing the circumstances she confronted." *Id.* Under this standard, the Court held that Brosseau was entitled to qualified immunity because the case fell into the "hazy border between excessive and acceptable force." *Id.* at 591 (quoting *Saucier v. Katz*, 533 U.S. 194, 206 (2001)).