A Practitioner's Primer to the Fourth Amendment

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TABLE OF CONTENTS

I. Introduction ............................................. 413
II. In General .............................................. 414
   A. Fourth Amendment Terms Defined ................. 415
   B. Establishing Probable Cause ...................... 416
      1. Using Common Sense ............................ 416
      2. It's the Magistrate's Decision ................. 417
   C. Necessity of Obtaining a Warrant and What It
      Means to Say That a Warrant Must be Obtained .... 419
      1. Arrests ........................................ 421
      2. Search and Seizure ............................ 422
   D. Particularity in Describing Situs of Search or Items
      to be Seized ..................................... 422
   E. Reasonable Scope of Search ........................ 424
   F. Place to be Searched ................................ 424
III. Exceptions to the Warrant Requirement ............... 424
   A. Good Faith ....................................... 424
   B. Search Incident to Arrest .......................... 426
   C. Consent ........................................... 426
   D. Plain View ....................................... 427
   E. Automobiles ....................................... 428
   F. Emergency Situations .............................. 430
      1. Hot Pursuit ..................................... 430
      2. Imminent Threat to Safety ...................... 430
      3. Destruction of Evidence ........................ 430
   G. Administrative and Other Regulatory Searches .... 431
   H. Stops, Frisks and Protective Sweeps ............. 433
IV. Reasonable Expectation of Privacy .................... 435

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FOURTH AMENDMENT

V. Standing .................................................. 435
VI. The Exclusionary Rule .................................... 438
   A. Hearings Related to the Criminal Trial ............... 438
   B. Impeachment of the Defendant .......................... 438
   C. Independent Source; Inevitable Discovery .............. 439
VII. Fruit of the Poisoned Tree .............................. 441
   A. How Poisoned is the Tree? ............................. 441
   B. How Far From the Tree? ................................. 442
   C. What Type of Fruit? ..................................... 443
   D. What Intervened? ....................................... 443
VIII. Escalating Cause: One Thing Leads to Another .......... 444
IX. Conclusion ................................................ 445

I. INTRODUCTION

As criminal defense lawyers and prosecutors well know, fourth amendment law is constantly evolving and constantly being modified by the Supreme Court of the United States. This Article provides an up-to-date rendition of the status and trends in fourth amendment law as interpreted by the Court. The purpose is a modest one: to provide a starting point for practicing lawyers faced with fourth amendment issues.

Some opinions defining the meaning and scope of the fourth amendment are simply the Supreme Court's attempt to apply fourth amendment law to modern technology never anticipated by the founding fathers.1 More recently, however, a Court opinion defining the meaning and scope of the fourth amendment often reflects an effort to provide greater opportunity for law enforcement to "get the job done." What seems increasingly to be determinative is the reasonableness of law enforcement activity as measured by (1) the societal importance of the law enforcement goal and (2) how much that law enforcement activity intrudes on an asserted privacy interest. As the Court recently put it, "It goes without saying that the Fourth Amendment bars only unreasonable searches and seizures. . . . Our cases show that in determining reasonableness, we have balanced the intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."2

The current approach to fourth amendment interpretation forms the backdrop for evaluating cases and preparing arguments. Consistent with this approach, for example, the absence of a warrant is part

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1. A prime example is the Court's effort to apply the language of the amendment—"particularly describing the place to be searched, and the persons or things to be seized"—to electronic surveillance activity. See Katz v. United States, 389 U.S. 347 (1967); Berger v. New York, 388 U.S. 41 (1967).
of a measure of reasonableness but rarely the entire story. What often matters more is how the competing law enforcement and privacy interests are valued and how careful law enforcement officers were in doing their job.

The law of search, seizure, and arrest is governed by (1) the direct language of the fourth amendment to the Constitution of the United States; (2) caselaw, by state and federal courts, interpreting the fourth amendment; (3) occasional statutes, state and federal, that prescribe a higher standard than that required by the fourth amendment and caselaw interpreting such statutes; and (4) in some states, the direct language of a state constitutional provision and state caselaw interpreting that provision.

With respect to an interpretation of the fourth amendment, the opinion of the Supreme Court of the United States of course trumps all other opinions, state and federal. With respect to an interpretation of a state statute or constitutional provision equivalent to the fourth amendment, the state supreme court in that state provides the last word so long as its interpretation grants a defendant more rights than those afforded by the prevailing interpretation of the federal fourth amendment. If a state opinion attempts to restrict rights afforded under the federal fourth amendment, however, then the federal fourth amendment controls.

II. IN GENERAL

The fourth amendment to the Constitution of the United States provides that:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The express language of the fourth amendment puts four things directly at issue: probable cause; particularity in describing items to be seized or location or objects to be searched; the reasonableness of the search that was conducted; and (4) the need for a warrant. The Supreme Court of the United States has also focused in its opinions on two requirements not addressed expressly by the language of the fourth amendment: (1) standing to raise a fourth amendment violation; and (2) the exclusionary rule as remedy. Today the exclusionary

rule debate most often surfaces as a *Wong Sun*\(^5\) issue—how far is the reach of a fourth amendment violation in terms of exclusion of evidence derived from a search or seizure that violates the fourth amendment.

A. Fourth Amendment Terms Defined

(1) "Seizure": Formally arresting or taking a suspect into custody; constraining a suspect's freedom of movement (or his freedom to refuse to move) in a significant enough way that it is treated as the equivalent of an arrest.\(^6\)

(2) "Stop": Constraining a suspect's freedom of movement in a less significant way than a seizure for both a limited period of time and for a limited purpose.\(^7\)

(3) "Search": Any intrusion of a protected privacy interest other than a frisk.\(^8\)

(4) "Frisk": An intrusion of a protected privacy interest less significant than that of a search and whose purpose is to discover weapons, not evidence; a frisk must be conducted in a way that is the least intrusive possible under the circumstances.\(^9\)

(5) "Protective sweep": A quick, limited search of an area confined to a cursory visual inspection of those places in which a person might hide.\(^10\)

(6) "Probable Cause": The degree of evidentiary certainty that

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5. *Wong Sun* v. United States, 371 U.S. 471 (1963). *Wong Sun* is a rich source for understanding the law of standing and the meaning of attenuation in deciding when a primary taint has been sufficiently dissipated to permit introduction of evidence derived from the primary taint.

6. A "seizure" has two definitions in fourth amendment law: it both is defined as defined in the text and is the generic term that covers arrests and their equivalents as well as stops.

   The Court last term held that there was no seizure of the person in a situation in which two officers with badges, one obviously armed, boarded a bus, accosted the defendant and asked to see his ticket and some identification. According to the Court, there was no seizure because defendant's confinement was "the natural result of his decision to take the bus." Florida v. Bostick, 111 S. Ct. 2382 (1991).

7. See Florida v. Royer, 460 U.S. 491 (1983). It is neither a seizure nor a stop for a law enforcement officer to approach an individual in a public place and ask him questions to which he is willing to listen or for an officer to follow behind or along the side of an individual and then chase that individual when he begins to run after seeing the officer. *Id*; California v. Hodari D., 111 S. Ct. 1547 (1991)(no seizure where suspect refuses to yield upon show of authority); Michigan v. Chester, 486 U.S. 567 (1988).

8. A "search" has two definitions in fourth amendment law: it both is defined as defined in the text and is the generic term that covers any intrusion of a protected privacy interest, including a frisk.


permits a law enforcement officer to search or directly to seize. Probable cause means that the known facts and circumstances are such that a person of "reasonable caution" would feel a fair degree of confidence that he knows what is going on and can take action in response. In dealing with probable cause . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."

(7) "Reasonable Suspicion": The degree of evidentiary certainty that permits a law enforcement officer to stop or frisk or conduct a protective sweep beyond the scope of a protective sweep justified as a search incident to arrest. Reasonable suspicion requires a quantum of objective data, less than that necessary to show probable cause, that is reflected in specific, articulable reasons advanced by a law enforcement officer to explain his suspicion.

B. Establishing Probable Cause

1. Using Common Sense

What does it mean to make a common sense, nontechnical decision about probable cause? Suppose a one-car automobile accident occurs in the early morning hours of January 1st on a winding, mountain road. The driver is not talking; the one passenger in the car is dead. It is a clear night; the officer on the scene sees no skid marks on the road. A witness to the accident estimates that the car was going at a speed of at least sixty-five miles an hour. The two people in the car are dressed in evening clothes. The officer on the scene finds a party invitation in the purse belonging to the passenger.

Is there probable cause to believe that the driver was driving drunk? Based on the type accident that occurred, the fact it was New Year's Eve, the fact driver and passenger were dressed for a party, and what we know of New Year's Eve parties, the answer likely is yes. In fact, the answer might be yes even if the officer had not found the party invitation and there had been no witness to estimate the speed at which the car was traveling.

In arguing against a determination of probable cause, it is never sufficient simply to suggest alternative, innocent explanations for what occurred. Probable cause does not mean that the government's explanation is the only explanation that covers the facts, that the government's explanation is more likely than not to be the correct expla-
nation,14 or even that the government’s is the most likely explanation. Probable cause means simply that the government has offered a reasonable and plausible explanation of the available data.

An experienced officer who believes that there is probable cause may well be correct in her belief. The problem that often arises is that a prosecutor does an inadequate job in assisting the officer to articulate the facts on which she relied to form her conclusion.

Return to the New Year’s Eve accident. Suppose that the officer on the scene arrested the driver for driving while intoxicated. Suppose that during a search incident to arrest the officer found a leafy substance that turned out to be marijuana.

At a pretrial hearing on a motion to suppress the marijuana from use at trial, the defense argues that the marijuana must be suppressed because there was no probable cause to arrest the driver. The arresting officer testifies only that she thought the driver was drunk because it was a one-car accident and it happened on New Year’s Eve. This testimony would be insufficient to establish probable cause. The prosecutor’s job is to extract the facts as to how the driver and passenger were dressed, the party invitation, the weather conditions, and the absence of skid marks. These facts, while unmentioned by the officer in her conclusory statement, were used by the officer in reaching her conclusion.

With a good, experienced officer, the more facts she relates to support her conclusion, the more likely that a magistrate will find probable cause. Here facts are a prosecutor’s friend. Conversely, with an inexperienced officer or one with the reputation of making hasty judgments, adducing underlying facts may help the defense show just how unsupported (or badly reasoned) was the officer’s conclusion.

2. It’s the Magistrate’s Decision

A probable cause determination must be made by a “neutral and detached magistrate,”15 either before the fact in issuing a warrant or after the fact in permitting the introduction at trial of evidence that was seized. While the evidence relied on to make a probable cause determination need not be evidence that would be admissible at trial,16 the information upon which a magistrate relies may not simply be conclusory statements made by the affiant (or by the informer).

A magistrate always has two questions to answer in deciding whether there is probable cause to support a search and seizure. First, is the person who provided the first-hand information credible and re-

14. A preponderance of the evidence standard requires that a conclusion must be more likely true than not.
liable? Second, are the conclusions that the person reached reasonable under the circumstances?

Suppose that the information provided to a magistrate is that Sam Suspect was seen running out of a bank in which a robbery had just occurred and that Sam was carrying a gun and pulling a stocking off his head as he ran. Those facts, if true, certainly are sufficient to establish probable cause that Sam robbed the bank. But the question left unanswered is whether the person who provided the information was telling the truth.

Now turn the hypothetical around and suppose that the information provided the magistrate comes from a person who the magistrate is convinced is honest and forthright. This time, however, the only information provided is the simple statement that Sam Suspect robbed a bank. Now the question left unanswered is whether the person who supplied the information reached conclusions that were justified by the factual information underlying his conclusions. To make clear the problem here, suppose that the person formed his conclusion about Sam on the sole basis that he saw Sam drive out of the bank's parking lot at about the time the bank was robbed. No matter how truthful the person is who provided that information, the information, by itself, does not show probable cause that Sam robbed the bank.

These two separate considerations (reliability of informer and reasonableness of conclusion) form the Agilar-Spinelli two-pronged test. Under Agilar-Spinelli each prong had to be satisfied independently of the other with sufficient underlying information for an independent magistrate to make her own conclusions about each. The rigid requirements of the two-pronged test have been superceded by a test focused on the totality of the circumstances. But in deciding whether the totality of the circumstances shows probable cause, focusing on the two prongs of Agilar-Spinelli still helps to evaluate the type and sufficiency of the information provided.

Suppose that a law enforcement officer seeks a search warrant. The officer is under oath. He also is someone known to the magistrate as reliable. Today, either fact by itself likely satisfies any concern about his reliability (prong one) in providing information on which the magistrate will rely in deciding whether to issue the warrant. In deciding whether sufficient facts are provided to evaluate the officer's conclusion (prong 2) that a warrant is appropriate, the Supreme Court directs the magistrate to consider the number and specificity of the facts provided (whether or not the specificity relates directly to criminality) as well as to rely on the officer's expertise in drawing particu-

19. Id.
lar inferences from the facts that he has.\textsuperscript{21}

If the officer's conclusion comes not from personal observation but from information provided by an informer, the magistrate must evaluate the informer's reliability as well as the reasonableness of the conclusion that he reached. The informer's reliability may be satisfied by the informer's past track record with tips or by the officer's recitation of why he trusts the informer. If the information provided constitutes a statement against the informer's penal interest, that also helps to demonstrate informer reliability.\textsuperscript{22}

Under the \textit{Aguilar-Spinelli} two-pronged test a deficiency in informer-provided information on one prong could be compensated for by law enforcement activity that corroborated or bolstered the information. For example, if the tip was from an informer unknown even to the officer, then the officer still could demonstrate reliability (prong one) by corroborating details provided by the informer. Corroboration also could derive from the fact that the suspect identified by the informer was one "known to the officer" to deal in drugs.

Under the totality of the circumstances test a deficiency still may be satisfied by corroboration. What is new is that a deficiency on one prong also may be satisfied by a "strong showing on the other."\textsuperscript{23}

Under the totality of the circumstances test, evidence on both prongs is relevant to an overall probable cause determination; a deficiency on one or the other prong does not per se establish a failure to demonstrate probable cause.

The probable cause decision, however, remains the responsibility of the magistrate. She therefore still needs to have enough underlying information—whatever the nature of the information and on whichever prong it belongs—from which she can exercise her own common sense and make an independent decision as to the existence of probable cause.

C. Necessity of Obtaining a Warrant and What It Means to Say That a Warrant Must be Obtained

The warrant requirement is separate from the requirement that there be probable cause. All full searches (\textit{i.e.}, not frisks); and all full seizures (\textit{i.e.}, not stops) must be supported by a probable cause determination. Except for administrative and other regulatory searches, discussed \textit{infra}, to conduct a search or to effect a seizure there must be probable cause that a crime has been committed and (1) that the person against whom the warrant issued committed the crime (showing necessary for arrest); or (2) that evidence of the crime may be found

\begin{flushleft}
\textsuperscript{21} \textit{Id.}
\textsuperscript{23} \textit{Id.} at 233.
\end{flushleft}
at the place to be searched (showing necessary for search); or (3) that the item to be seized is evidence, an instrumentality, or fruit of a crime (showing necessary for seizure). 24

There are situations in which the Supreme Court of the United States has held that law enforcement activity need never be predicated on a warrant authorizing the activity (public felony arrests, for example). There are other situations in which the Supreme Court of the United States has held that law enforcement activity must be predicated on a warrant (arrests in a private home, for example).

Whenever the law does not require a warrant, then the government never is faced with the need to justify why, on the circumstances of the particular case, no warrant was obtained. The government has no obligation to justify its conduct because there is no predicate requirement that was breached.

Whenever the law requires that a warrant issue, then either a warrant must have issued OR in the particular circumstances an exception to the warrant requirement must be applicable and must excuse the absence of a warrant. In other words, to say that a warrant is necessary is not to say that its absence requires suppression of evidence obtained. It is simply to say that the government must justify its warrantless activity by pointing to an emergency (or other exception recognized by the Court) that obviates the need to first obtain a warrant.

When a law enforcement officer acts pursuant to warrant, a magistrate at a motion to suppress (or a later appellate court) pays "great deference" to the probable cause decision embodied in the decision to issue the warrant. 25 By contrast, in the situation in which no warrant was obtained, 26 there has been no determination by a magistrate. At a motion to suppress, then, the magistrate cannot defer to an antecedent judicial decision because there is no antecedent judicial decision to which to defer. As a consequence, the government bears the burden of persuading the magistrate that there was probable cause for its actions. 27 If a law enforcement officer did something that normally may be done only on warrant, then the government also bears the burden

26. I here am talking about searches and seizures. A law enforcement officer never has to act pursuant to warrant for a public felony arrest. She thus never has to justify a warrantless public felony arrest.
27. In a case in which reasonable suspicion is enough to justify the level of law enforcement activity undertaken, then the government bears the burden of persuading the magistrate that the law enforcement activity was prompted by a reasonable suspicion.
of persuading the magistrate that the circumstances fell within an exception to the warrant requirement.

1. Arrests

Historically, felony arrests were warrantless. In most American jurisdictions today, there is no warrant requirement either for public felony arrests or for arrests for misdemeanors committed in the presence of an arresting officer. This means that, while the government later has to satisfy a magistrate that there was probable cause to justify the arrest (or any evidence obtained during a search incident to the arrest will be suppressed), the government need make no showing of special circumstances to justify the failure to obtain a warrant.

An arrest in a private home, by contrast, must be on warrant. If the arrest is in a home that the suspect owns or rents (even though the suspect has a reasonable expectation of privacy), then an arrest warrant will be sufficient to enter the home and to search for the suspect. If the home to be entered belongs to someone other than the suspect (even though the suspect does not have a reasonable expectation of privacy), then a search warrant is necessary for entry.

A defendant must have standing—in other words, a sufficient privacy nexus with a place searched—in order to challenge the introduction of evidence found as a result of a search. The privacy nexus necessary for standing to move to suppress evidence found in a home likely is coextensive with the privacy nexus that permits entry in a private home on an arrest (rather than a search) warrant. One general rule, therefore, is that any time a defendant has standing to challenge an entry into a private home by definition that is a situation in which an arrest warrant was sufficient to achieve entry. A second general rule is that any time a search warrant is constitutionally required to achieve entry but only an arrest warrant was obtained, then a defendant will lack standing to challenge the entry qua enter and may challenge the introduction of only that evidence with which he has a privacy nexus. He will have standing to challenge the illegal entry qua entry (as well as any evidence obtained as a direct result of

28. The requirements for obtaining an arrest warrant vary little from jurisdiction to jurisdiction. For federal prosecutions, these requirements are covered in Fed. R. Crim. P. 4(d)(4) (pre-information or indictment) and 9(c)(2) (on information or indictment). For a warrant to issue there must be probable cause to believe that a crime was committed and that the defendant committed it. Probable cause must be shown on the face of the complaint, affidavit, or information. [Fact of indictment establishes probable cause.] After arrest the arrested person must be taken "without unnecessary delay" to the nearest magistrate. Fed. R. Crim. P. 5.


30. Id. at 455 n.21.

the illegal entry and suppressible only on that ground) only if the law enforcement officers had neither an arrest nor a search warrant.

Consider an illustration. Huey, Louie, and Dewey are all fifteen years old and are drinking beer at Mary's house. This is their first visit. The police suspect the boys of possession of alcohol; they enter Mary's house with an arrest warrant for the boys. Mary has standing to challenge the entry without search warrant as it is her house. By contrast, Huey, Dewey, and Louie cannot challenge the entry because, as to them, the police are lawfully there. Thus, a charge of possession will stick. If, however, the police had no warrant at all, then the boys have standing to challenge the entry.

2. Search and Seizure

By contrast to felony arrests, for a search or seizure the formal presumption is that a warrant is necessary. As a formal matter, that means that the government will succeed on a motion to suppress only if it either produces a warrant or establishes the existence of an exception to the warrant requirement. It is useful to phrase the government's burden in terms of formal presumptions and formal matters of proof because some exceptions to the warrant requirement operate automatically. Foremost among this type of exception are the automobile exception and the exception for a search conducted incident to arrest. All that the government need establish for an automobile exception to apply is that the search was of a car. Virtually all that the government need establish for a search incident to arrest warrant exception to apply is that the suspect was arrested.

D. Particularity in Describing Situs of Search or Items to be Seized

The particularity requirement operates to assist in a probable cause determination at the outset; it is applicable, of course, both to warrant-
less searches or seizures and those on warrant. Normally, however, the particularity requirement is evaluated in the context of searches and seizures on warrant as it is this type of law enforcement activity that precludes any possibility of providing a reason for the law enforcement activity that was adjusted after the fact to conform to what actually was found.

The place or person to be searched must be named or identified with reasonable particularity either in the warrant application or in the accompanying affidavit. With some reasonable level of particularity the items constituting the object of the search also must be stated.35

Where a warrant in terms is overbroad in some but not all respects (warrant named items A, B, C, D, and "other items") some magistrates will sever the two specifications and treat them as separate warrants, evaluating each in terms of the particularity requirement. If treated separately, the first warrant is good as to the named items A, B, C, D and the second warrant is invalid as overbroad.36 What should be clear, however, is that an overbroad warrant that names no particular items or class of items cannot be saved without emasculating the warrant requirement.

Where a warrant contains tainted information that should not have been used in making a probable cause determination, a magistrate likely will evaluate the warrant without regard to the tainted information to decide if this other, untainted information is sufficient to uphold the probable cause determination. If so, then the warrant is good notwithstanding the taint.37

A warrant that seems unambiguous when issued but turns out to be ambiguous when executed nonetheless may be valid where the officer's mistake that led to the ambiguity was reasonable under the circumstances.38

36. See, e.g., People v. Hellemeyer, 28 Ill. App. 3d 491, 328 N.E. 2d 626 (1975). There now are cases, moreover, in which a warrant lacking in specificity has been saved by application of the good faith exception. See, e.g., United States v. Buck, 813 F.2d 588 (2d Cir. 1987)(warrant permitted search of house and seizure of anything related to named crime; good faith exception applied to save search).
38. Maryland v. Garrison, 480 U.S. 79 (1988)(place identified as "third-floor apartment" at particular address where police did not know there were two third-floor apartments and where apartment searched was not the one police intended to search when applying for warrant). See also Hamilton v. Mississippi, 556 So.2d 685 (Miss. 1990)(adjacent buildings; warrant authorized search of one when the other was the building police wanted to, and did, search).
E. Reasonable Scope of Search

With probable cause, and with or without a warrant, the fourth amendment also directs that the scope of a search must be reasonable. In this sense, the particularity requirement operates not only to assist in a probable cause determination at the outset but it also controls the permissible scope of a search. A law enforcement officer may not look in a letter envelope if the object of the search is a stolen television set. Nor may he check stereo equipment for serial numbers when his initial purpose in entering and searching is to look for weapons and the person who used them.39

An officer is entitled to search for a suspect anywhere that he believes the suspect may be hiding. If the only “item” sought is the suspect, however, then, once the suspect is found and arrested, a full search of the premises must stop. The Supreme Court recently held that law enforcement officers are entitled to conduct a protective sweep of areas of a home or other premises to look for a person other than the suspect who may hiding on the premises and pose a danger to law enforcement officers.40

F. Place to be Searched

Third-party premises may be searched even though the third party is not suspected of criminal activity.41 If a person is on the premises when a warrant is executed—and is not himself designated in the warrant—there must be some quantum of cause (or some exception to the warrant requirement) before that person may be searched.42 On the other hand, a search warrant carries with it limited authority to hold a person on the premises while a search is conducted.43

III. EXCEPTIONS TO THE WARRANT REQUIREMENT

A. Good Faith

When a law enforcement officer in good faith relies on a warrant ultimately found defective then evidence discovered pursuant to that warrant nonetheless is admissible.44 Good faith is defined as “an objectively reasonable basis” for believing in the validity of a warrant. The outer boundaries of the good faith exception are clear. At one extreme, in which the good faith exception always applies, is a situation in which there is a technical problem with the authorizing war-

rant as, for example, when the authorizing warrant is defective because the wrong warrant form is used. At the other extreme, in which the good faith exception never applies, is a situation in which there was deceit in obtaining the warrant. Between the extremes sit the hard cases. While the good faith exception applies when the authorizing warrant is defective due to an erroneous probable cause decision by a magistrate on facts that present a close call as to the existence of probable cause, the exception does not apply to save a probable cause determination when there clearly was insufficient information on which a magistrate could decide that there was probable cause (what is called a “barebones” affidavit).

The reason given by the Court for the good faith exception is that it encourages law enforcement officers to apply for warrants since they need not fear an overtechnical after-the-fact review of the magistrate's probable cause decision. This clear preference for warrants strongly suggests that the good faith exception will not be applied by the Court generally in warrantless search situations but will continue to be applied only to searches made on warrant or near equivalent—as, for example, when a law enforcement officer relies on specific statutory authorization to proceed without warrant where that statute later is held unconstitutional.

The fact that the good faith exception applies to warrants and their near equivalents means that there is a two-step process involved in evaluating the merits of a good faith claim. The first step is to see if in fact the search was on warrant or near equivalent. If not, then the government's good faith claim should fail without regard to whether the law enforcement officers acted in an objectively reasonable manner. If there was a warrant or near equivalent, then and only then

46. The Sixth Circuit recently considered a novel situation under the good faith exception. United States v. Bowling, 900 F.2d 926 (6th Cir. 1990). Officers obtained a search warrant but, before executing it, they acquired information that called into question the magistrate's probable cause decision. This information resulted from a search conducted on consent that yielded no evidence. Therefore the information the officers had was that nothing might be found during their search. In these circumstances, according to the court, the officers should return to the magistrate for a new probable cause determination. Failure to do so possibly may not constitute good faith. (On the facts, although the officers did not so return, the search was upheld since the court decided a magistrate still would have found probable cause.)
47. Id.
48. An illustration of a "barebones" affidavit may be found in United States v. Barrington, 806 F.2d 529 (5th Cir. 1986)(no good faith exception). The only information provided to the magistrate to support the officer affiant's belief that he would find the named item in the named place was the officer's statement that he received information from an informant who in the past had provided information that led to arrests and convictions. Id. at 530.
should the second step be reached. That step is to evaluate the objective reasonableness of what the officers did.

B. Search Incident to Arrest

Since Chimel v. California\(^5\) was decided more than twenty years ago, the law has been clear that on any arrest, and for no additional reason stated, an officer may search the person and effects of a person under arrest and whatever is in the immediate reach of that person. The search incident to arrest exception to the warrant requirement permitted a full search of places and items within "armsreach" of the suspect in which evidence or weapons might be discovered.\(^5\) The search incident to arrest warrant exception also permitted such a search before or after formal arrest so long as the search was reasonably proximate to the time and place of the arrest.\(^5\)

The law regarding the appropriate scope of a search incident to arrest is expanded to permit a protective sweep in areas in which a search incident to arrest would have been unjustified under Chimel.\(^5\) Law enforcement officers conducting a protective sweep as a search incident to arrest may go beyond armsreach to look in closets and other spaces immediately adjacent to the place of arrest that are large enough to hide a person. As the Court describes a protective sweep, it is not a full search but is a visual inspection of an area in which a person dangerous to the police might be hiding (the visual inspection, however, allows the police to open a closet door, for example). A search-incident-to-arrest protective sweep may be conducted automatically on an arrest in the same way that the Chimel search incident to arrest is allowed on no additional cause beyond the fact of the arrest.

C. Consent

A person may consent to a search that would otherwise be invalid either for lack of a warrant or for lack of probable cause to search.\(^5\) He need not be told that he has the right to refuse a search.\(^5\) Consent is not involuntary simply because consent comes after arrest.\(^5\)

\(^{50}\) 395 U.S. 752 (1969).
\(^{51}\) If the arrest was of someone in an automobile, then the search incident to arrest exception permitted a search of the passenger compartment of the car, including glove compartment, and any items, closed or open, found in the passenger compartment. New York v. Belton, 453 U.S. 454 (1981).
\(^{55}\) Id.
with other exceptions to the warrant requirement, it is the government's burden to show that in the circumstances a consent was voluntary.57

Certainly a law enforcement officer may act on the consent of a person who has a significant relationship to the premises58—at least if no one objects who is present at the time of the search and has equal or greater authority over the premises.59 In deciding whether the person who consented actually had the authority to consent, law enforcement officers reasonably may rely on the apparent authority of a third person.60

D. Plain View

When a law enforcement officer otherwise legitimately is on the premises, then, without the necessity of first obtaining a warrant, he may seize an item in plain view if the item, itself or together with other information that the officer has, sings out its criminality. In other words, an item that is in plain view may be seized if the officer who sees it has probable cause to believe that the item is contraband or evidence of a crime.61 If the item in plain view, itself or together with other information that the officer has, gives the officer a reasonable suspicion that the item is contraband or evidence of a crime then he may hold the item in place for a reasonable period of time that permits him to investigate further.62 So long as the item is in plain view and the police legitimately are present, then it does not matter that before arriving on the premises the police had reason to believe the item would be found there (put in the language of the case, the discovery of the item in plain view need not be inadvertent).63

Except for a limited exception regarding automobiles, the plain view exception never supports a search because if it is necessary to search to find the item or to verify that it is suspicious in character,

59. Some courts have held, or at least suggested, that, even with a significant relationship to the premises, a third party may not consent to a search if the suspect is present and refuses consent. See, e.g., State v. Leach, 113 Wash. 2d 735, 782 P.2d 1035 (1989)(consent to search invalid if objected to by person on premises with equal authority to consent); Ledda v. State, 564 A.2d 1125 (1989)(driver's consent to search valid where owner present and did not object); People v. Veiga, 214 Cal. App. 3d 817, 262 Cal. Rptr. 919 (1989)(consent to search given by tenant not present valid at least when those on scene do not object); United States v. Elrod, 441 F.2d 353 (5th Cir. 1971).
then, by definition, the item is not in plain view.\textsuperscript{64} Note that if an officer properly may search in a particular place for item A and in so doing finds item B, then item B is in plain view at that point even though it was not earlier in plain view and even though the officer had no cause to search for item B.

When an officer is not already on the premises but instead is legitimately in a place from which she observes something in plain view, and her observations do not invade a reasonable expectation of privacy, then she may use her observations to establish probable cause to enter the premises.\textsuperscript{65} Subsequent entry or seizure requires a warrant only if it is a non-exigent situation and the warrant requirement applies to the particular premises to be entered or the item to be taken.\textsuperscript{66}

E. Automobiles

The Supreme Court has engrafted an automobile exception onto the operation of the fourth amendment broader than all other exceptions. The Court has advanced several reasons to explain its different treatment of automobiles: (1) automobile use historically and currently is regulated in a way that use of a private home is not and could not be regulated; (2) a person does not have the same expectation of privacy in an automobile that he has in a private home; and (3) automobiles are always an exigent circumstance because theoretically they always are mobile (even when factually they are not). Whatever the reason for the automobile exception, one thing is clear: statements of fourth amendment law sitting in cases involving automobiles do not transfer automatically to fourth amendment cases not involving automobiles.

A brief recitation of the law involving automobiles is as follows:

1. On a Terry stop and frisk theory, where reasonable suspicion is enough to justify law enforcement action, the automobile exception permits a search anywhere in the passenger compartment of a car in which a weapon might be hidden.\textsuperscript{67} Although the purpose of the search, as with all Terry searches, is to locate weapons, the search is not dependent on a factual demonstration that the suspect could have reached a weapon.\textsuperscript{68}

\textsuperscript{64} Arizona v. Hicks, 480 U.S. 321 (1987).
\textsuperscript{68} Id. (search permitted of entire passenger compartment of car even though suspect out of car and unable to reach in).
2. On a Terry stop and frisk theory, where reasonable suspicion is enough to justify law enforcement action, the automobile exception permits a stop of an automobile for a reasonable time (twenty minutes for a license check is presumptively reasonable) to investigate and quell the suspicion.

3. On a search incident to arrest theory, the automobile exception permits a search of the entire passenger compartment of a car, including closed containers.

4. On a theory of probable cause to search a car, the automobile exception permits a search of the entire car and anything in it that could contain the items being searched for at any time up to at least eight hours after seizure of the car.

5. On a theory of probable cause to search and seize a particular item (and probable cause to believe that the item is in the car), the automobile exception permits a search of the car to find the item as well as a search and seizure of the item once it is found.

6. On a theory of probable cause to search and seize a particular item (and probable cause to believe that the item is in the car), the automobile exception permits a search for that item up to at least three days after seizure of the car.

7. On a theory of inventory search, the automobile exception permits a search of an automobile found on the street and towed because of overdue parking tickets as well as a search of closed containers found within the car. The theory of inventory search, moreover, includes a search of a car towed after the suspect’s arrest.

69. United States v. Sharpe, 470 U.S. 675 (1985) (determination if material was marijuana). The Supreme Court recently denied a petition for a writ of certiorari in a case in which the Virginia Court of Appeals upheld a motor vehicle stop. Limonja v. Virginia, 8 Va. App. 532, 383 S.E.2d 476 (1989), cert. denied, 110 S. Ct. 1925 (1990). In Limonja, the driver ran a stop sign at a toll booth. The driver first consented to a search of the car but later withdrew her consent. After consent was withdrawn, there was a 22-minute wait for a drug-sniffing dog to arrive at the scene to check the contents of the package. The Virginia Court of Appeals decided that the delay was not overlong, given that the officers knew (1) the car was rented in Florida and was driven along a drug trafficker route; (2) defendant’s car was equipped with a radar device illegal in the state; (3) defendant lied as to why she ran the stop sign; (4) the car’s passenger was nervous when the package was found in the car; and (5) the passenger gave a confused explanation for errors in the address on the package.


76. Id.

8. On a theory of plain view, the automobile exception permits reaching into an automobile and moving papers in order to read a Vehicle Identification Number (VIN).78

F. Emergency Situations

1. Hot Pursuit

A law enforcement officer may make a warrantless entry of a private home when in hot pursuit of a suspect whom he has probable cause to arrest or search. Thereafter, the officer may search anywhere in the home that the suspect may have hidden himself (or where he may have hidden something incriminating that the officer has probable cause to believe is present).79 Pursuit need not be all that hot nor need the officer personally have witnessed the crime and begun a pursuit at that point.80 The crime committed by the suspect, however, must be more than a nonjailable traffic offense to justify a nighttime warrantless entry.81

2. Imminent Threat to Safety

Obviously law enforcement officers may enter premises if they have probable cause to believe that there is a danger to inhabitants or that a (serious) crime is in progress. Similarly, fire inspectors may search without warrant on prompt reentry after a fire to prevent its recurrence.82 Safety concerns are legitimate, however, only when there is reason to believe that the danger is immediately present. They may not be used as a subterfuge to gain, retain, or regain entry. For example, the fact of a fire does not justify warrantless reentry to search for evidence of a crime once the danger of fire has passed.83 Nor does the fact that a homicide occurred in a home, even if just an hour earlier, justify a warrantless search for evidence.84

3. Destruction of Evidence

A law enforcement officer may make a warrantless search or seizure when a delay to obtain a warrant might mean destruction of evidence.85 For this exception to apply, however, the officer must have probable cause to believe that the evidence is in the place to be

80. See id.
83. Id.
searched. He likely also must have probable cause to believe that de-
struction of evidence will result if he delays and his investiga-
tive needs (as reason for why he did not apply earlier for the warrant) must be legitimate and not a subterfuge.

G. Administrative and Other Regulatory Searches

Historically, administrative searches were those searches whose main purpose related to legitimate health, safety, and police power regulatory interests, not law enforcement interests. In theory, whenever the main purpose of a search is to investigate a particular crime thought to be committed by a particular individual, then an administrative search rationale will not support the search. In practice, particularly in the past ten years, the line separating health/safety/regulatory and criminal investigations has blurred.86

Administrative searches may be conducted without probable cause directed at a particular individual or premises and frequently may be conducted without a warrant.87 The probable cause determination that supports an administrative search is best explained as one based on a statistical probability that in a given class of searches a number of violations will be uncovered.

Some searches, even when conducted by law enforcement officers specifically to search for evidence of crime, are treated as equivalent to an administrative search. They are upheld routinely when procedures are set forth in writing and in advance of law enforcement activity and the Court perceives a significant law enforcement or societal interest. Today, drug testing is a prime example of a significant societal interest—so significant that testing is permitted even in the face of significant privacy intrusions and on evidence that the statistical probability of finding something is quite low, even miniscule.

The cases dealing with administrative searches are not entirely in harmony. Several factors support an administrative search rationale

86. See Michigan v. Tyler, 436 U.S. 488 (1978)(fire inspectors checking for arson several days after fire need administrative warrant once “reasonable time” has passed and they need traditional search warrant once there is probable cause to believe fire caused by arson).
for conducting a search (they are the same factors that support conducting an administrative search without warrant): an industry that is heavily regulated; a specific statutory scheme and specific procedures adopted to govern conduct and timing of searches; a pressing public interest in having such searches; an insubstantial intrusion on a privacy interest—or a substantial intrusion on what the Court considers an insubstantial privacy interest; and the absence, or dearth, of alternatives for effecting the regulatory scheme.

Several administrative searches are of particular relevance to law enforcement.

1. Inventory searches when conducted according to established procedures articulated in advance.\textsuperscript{88}

In the context of a search of an impounded automobile, the Court recently decided that established procedures may leave some discretion to the officer doing an inventory search to evaluate the particular circumstances in deciding on the extent of the search that is necessary.\textsuperscript{89} What this means is that, while inventory search procedures need to provide guidelines for when and how searches will be conducted, the guidelines need not state all-or-nothing rules regarding the type and extent of a search that is conducted. Instead, the guidelines may allow the officer on the scene some discretion to decide the type action necessary under the circumstances.

Suppose a written guideline governs procedures to be followed with regard to treatment of locked containers in a car impounded after the arrest of its driver. The guideline need say neither that locked containers always must be opened nor that locked containers never may be opened. Instead, the guideline might direct the officer to evaluate the following factors in deciding whether to open a locked container: (1) the seriousness of the crime for which the suspect was arrested; (2) the conduct of the suspect at the scene; (3) the possibility that the container might have valuables (a fancy suitcase, for example) or perishables in it; (4) the possibility that the officer would be subject to a damage claim (as, for example, if the container appears damaged or the car was involved in an accident); and (5) the officer's ability to ascertain the contents of a container from its exterior.

2. Automobile stops when conducted according to clear policy governing the frequency and duration of the stop activity and stated rules governing selection of the automobiles to be stopped.\textsuperscript{90}

The Supreme Court recently upheld the constitutionality of a sobriety checkpoint system even though, on the particular facts, the benefit to law enforcement seemed negligible.\textsuperscript{91} During the time that the

\textsuperscript{89} Florida v. Wells, 495 U.S. 1163 (1990).
\textsuperscript{91} Michigan Dept. of State Police v. Sitz, 110 S. Ct. 2481 (1990).
police operated the checkpoint, 126 cars were stopped (entailing an average delay of twenty-five seconds per car); two drivers were required to take a sobriety test; one of these was arrested for drunk driving; and one driver was arrested after attempting to run the checkpoint.

3. Searches and detentions at United States' borders and their functional equivalents.92

The Court has held that the fourth amendment does not apply to restrain the outside-United States activity of law enforcement officers, at least when the suspect is a foreign national.

4. Searches of prisoners, probationers, and parolees.93

5. Drug testing of employees at least in some sensitive government and industry jobs.94

Because the drug problem is perceived to be pervasive and serious, it is a fair prediction that the Court that will uphold more and more drug testing situations on an administrative search rationale.

H. Stops, Frisks and Protected Sweeps95

The law of stop and frisk began with Terry v. Ohio96 but has evolved well past the Terry facts. Today, stop and frisk law includes the opportunity to conduct a protective sweep beyond the scope of a protective sweep justified as a search incident to arrest.

A stop, frisk, or protective sweep may be undertaken when a law enforcement officer has a reasonable suspicion, for which he has specific, articulable reasons, that a crime has been committed97 and:

(1) either that a particular individual committed it or that evidence or fruit of a crime may be found in a particular item or on a particular individual (showing necessary for stop); or

(2) that a dangerous person is hiding nearby who threatens the safety of an officer (showing necessary for protective sweep); or


95. See infra Part IV, for a full discussion of the law of stop and frisk.


(3) that the suspect has a weapon (showing necessary for frisk).

The specific, articulable reasons articulated by the officer who makes the stop, frisk, or protective sweep98 may be based on her personal observations on facts developed by her, on factors derived from an offender profile that sets forth characteristics normally shared by offenders committing a particular type crime,99 or even on information provided by an anonymous informer.100 In virtually all cases involving an anonymous tip, reasonable suspicion will be present only if law enforcement officers corroborate some of the information provided by the informer as otherwise there will be no evidence of the informer's credibility and reliability. According to the Court, the most powerful information that can be provided by such an anonymous informer is information that predicts what a suspect's future actions will be.101

A stop may be for a period of time reasonable in the circumstances to investigate and attempt to substantiate or dispel a reasonable suspicion.102

A frisk (other than perhaps for fingerprints taken at the place of the stop103) is permitted only to search for weapons and includes the person of the suspect and anything in her armsreach where a weapon might be.104 A frisk of the person requires a preliminary pat-down unless the circumstances make it dangerous for the officer to begin

100. Alabama v. White, 110 S. Ct. 2412 (1990). The facts provided by the anonymous informer were that (1) a woman (2) named White (3) would leave a named apartment (4) at a named time (time informer stated was not in record; Court assumed on facts that the time named was immediately after call), (5) would drive away in (6) a brown Plymouth station wagon with a broken right taillight lens, (7) proceed to a named motel, and (8) deliver one ounce of cocaine (9) in a brown attache case.

The police went to the apartment building and saw the Plymouth, as described, parked outside. They also saw a woman (name unknown) leave the building (apartment unknown) and drive away in the Plymouth, taking the most direct route (a route involving several turns) to the named motel. The police stopped the car before it arrived at the hotel and obtained consent to search the car. They found marijuana in an unlocked brown attache case. They found cocaine in the woman's purse.

The Supreme Court described White as a close case for establishing reasonable suspicion. It nonetheless concluded that there was sufficient corroboration.

101. Id.
103. The Court recently suggested the possibility that fingerprinting of a suspect, if done without transporting him somewhere else, might be a permissible frisk if supported by reasonable suspicion. Hayes v. Florida, 470 U.S. 811 (1985).
104. Where automobiles are concerned, an armsreach search includes the passenger compartment of the car. Michigan v. Long, 463 U.S. 1032 (1983)(search permitted
with a pat-down.\textsuperscript{105}

A protective sweep is a cursory visual inspection. When justified on \textit{Terry} stop and frisk theory, the sweep must be to protect the safety of law enforcement officers or others and confined to places in which a person might be hiding who poses a threat to officers on the premises.\textsuperscript{106} If, in conducting a protective sweep, law enforcement officers find it necessary to open a door or lift a blanket, etc., in order to achieve a visual inspection of a hiding place, such limited touching beyond the visual is permissible. A protective sweep must end once the suspect is under arrest and law enforcement officers and suspect are off the premises.

\textbf{IV. REASONABLE EXPECTATION OF PRIVACY}

A search and seizure violates the fourth amendment only when the government invades a protected fourth amendment interest. The old law of search and seizure defined a protected interest in terms of the law of property and trespass. Today a protected interest is defined in terms of a reasonable expectation of privacy.\textsuperscript{107} The reasonable expectation of privacy test requires as preconditions that (1) the defendant have an expectation of privacy; and (2) factually it might be said that the particular circumstances or the particular actions taken by the defendant made that expectation reasonable;\textsuperscript{108} and (3) a defendant's expectation of privacy is one that the law (the Court) deems it reasonable to protect.\textsuperscript{109}

\textbf{V. STANDING}

Perhaps the least understood aspect of fourth amendment law (and, more generally, the law of the exclusionary rule as remedy)\textsuperscript{110} is
the requirement that a person must have standing to raise a fourth amendment violation. Put another way, the law of the exclusionary rule as remedy requires that a reasonable expectation of privacy be one that is personal to the defendant. Standing doctrine means that a "stranger" to a fourth amendment violation cannot succeed in suppressing evidence on the basis of that violation. The mere fact that evidence derived from illegal law enforcement activity is to be introduced into evidence against a defendant does not give that defendant standing to challenge its admission on the ground that it invaded his protected fourth amendment interest. Nor does a defendant achieve standing merely by demonstrating that somebody had a reasonable expectation of privacy in the item seized or the place searched.

To establish standing, a defendant must demonstrate two things:

1. That a protected privacy interest was invaded by law enforcement officers; and
2. That the invaded protected privacy interest was a privacy interest personal to the defendant.111

If a defendant cannot establish that he has standing to raise a fourth amendment claim then—as to that defendant—there also never can be a fruit of the poisoned tree problem running from the initial illegality. That means, of course, that all items derived from the illegal official activity are admissible against that defendant.

To illustrate standing principles consider the following two hypotheticals.

HYPOTHETICAL 1

CONSTITUTIONALLY INFIRM LAW ENFORCEMENT ACTIVITY REGARDING FIRST SUSPECT FOLLOWED BY CONSTITUTIONALLY CORRECT LAW ENFORCEMENT ACTIVITY REGARDING OTHER SUSPECTS

Assume Officer Experience makes an illegal arrest of Sam Suspect (the defect in the arrest is that Officer Experience lacked probable cause) and then questions him without reading him Miranda warnings. Sam's personal fourth amendment right clearly has been invaded by the illegal arrest (so too his fifth amendment privilege against self incrimination was offended by the illegal questioning). Sam now tells Officer Experience that two people—John and Jim Jackson—are involved in drug dealing and that he has supplied drugs to them. He describes the mobile home out of which the Jacksons deal drugs and tells Officer Experience that he has purchased drugs there.

Officer Experience goes to the mobile home (out of uniform of course) and makes a buy. He then arrests both John and Jim. He

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FOURTH AMENDMENT

reads them their *Miranda* rights. They talk to him, identify the drugs as supplied by Sam, and implicate themselves and Sam in two robberies.

As to Sam, all the evidence obtained at the Jackson home—Sam’s involvement in drugs and his involvement in the robberies—may turn out to be inadmissible as it was the initial invasion of his personal constitutional rights that led to all this later evidence. As to John and Jim, by contrast, all the evidence is admissible as no personal right of theirs was offended. In other words, as to John and Jim, the poisoned tree is growing in somebody else’s backyard.

**HYPOTHETICAL 2**

**CONSTITUTIONALLY CORRECT LAW ENFORCEMENT ACTIVITY REGARDING FIRST SUSPECT FOLLOWED BY CONSTITUTIONALLY INFIRM LAW ENFORCEMENT ACTIVITY REGARDING OTHER SUSPECTS**

Assume that Officer Experience makes a legal arrest of Sam Suspect, gives him his *Miranda* rights, and then questions him. This time there has been no intrusion of any of Sam’s protected constitutional rights. Sam again tells Officer Experience that John and Jim Jackson are involved in drug dealing and that he has supplied drugs to them. He also gives Officer Experience the address of the mobile home where the Jacksons live.

Officer Experience goes to the mobile home and, without a warrant, forces his way in and conducts a search. He finds drugs. He then arrests both John and Jim and questions them without first reading them their *Miranda* rights. They talk to him, identify the drugs as supplied by Sam, and implicate themselves and Sam in two robberies. As to John and Jim, all the evidence is inadmissible (except for anything that Sam may testify to at their trial) because the evidence resulted from an unconstitutional search and an unconstitutional questioning.

As to Sam, by contrast, all the evidence provided by the Jacksons is admissible. This is true even if Sam can demonstrate that without his information Officer Experience never would have found the Jacksons. Sam has standing to suppress neither the drugs found at the Jackson home nor the statements made by them because there was no law enforcement illegality that led Sam to hand over the Jacksons. Even though John and Jim have had their rights invaded—and can move to suppress the drugs and their statements—Sam cannot successfully move to suppress the evidence because the constitutional invasion of the Jacksons’ rights was not a constitutional invasion of any of Sam’s

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112. The question as to Sam will be whether any of the evidence is sufficiently attenuated from the primary taint to be admissible notwithstanding the constitutional violation. See *infra*. 
In other words, as to Sam, the poisoned tree is not in his own backyard even though he provided the map that located the tree.

VI. THE EXCLUSIONARY RULE

The exclusionary rule operates to exclude from consideration at a particular defendant's criminal trial any evidence obtained in violation of that defendant's personal reasonable expectation of privacy protected by the fourth amendment. A motion to suppress evidence normally must be made before trial. Failure to move pretrial normally is a waiver that may be excused only on good cause shown.

The exclusionary rule applies only when (1) the allegedly tainted evidence is sought to be introduced at the defendant's criminal trial; (2) the law (Court) recognizes a reasonable expectation of privacy in the person, place, or item searched or in the person or item seized; and (3) the defendant has a personal privacy interest giving him standing. Even when all these factors are present, there are several situations in which the exclusionary rule still will not apply.

A. Hearings Related to the Criminal Trial

Evidence that is obtained in violation of a particular person's fourth amendment protected privacy interest nonetheless may be admitted against him at grand jury proceedings and at sentencing hearings.

B. Impeachment of the Defendant

Evidence that is obtained in violation of a particular defendant's fourth amendment protected privacy interest nonetheless may be used to impeach his in-court testimony. The impeachment use of the evidence permits asking any question that is "reasonably suggested" by the defendant's testimony on direct examination. This likely means that a question or line of questions will be permitted any time it fits under rules otherwise applicable to decide the scope of permissible cross-examination.

113. Of course, the statements made by the Jacksons are inadmissible at Sam's trial since their introduction violates Sam's sixth amendment right of confrontation.
115. See id.
117. Evidence obtained in violation of a particular's person's fourth amendment protected privacy interest probably also is admissible at parole and probation revocation hearings. See United States v. Calandra, 414 U.S. 338 (1974).
The Court recently made clear that the government may not impeach defense witnesses other than the defendant by the use of a defendant's statement made by him after an arrest lacking in probable cause. In *James v. Illinois,* the defendant's statement was excluded from the government's case-in-chief as fruit of the poisoned tree but, had the defendant testified, could have been used to impeach his in-court testimony. What the government did, and the Supreme Court rejected, was to use the statement to impeach the credibility of one of the other defense witnesses. There is language in the opinion that would limit impeachment use of any illegally seized evidence—not just defendant statements—to the defendant.

C. Independent Source; Inevitable Discovery

Evidence that is obtained in violation of a particular defendant's fourth amendment protected privacy interest nonetheless may be used as direct evidence against him at his criminal trial if the government can show that the evidence had a source independent of the taint or inevitably would have been discovered anyway.

The poisoned tree and evidence derived therefrom constitute one line from the defendant to the evidence. Because of the poisoned tree, this line requires suppression. Independent source means that there is a separate, untainted line that runs from the defendant to the evidence. Inevitable discovery means that, had not the illegality intervened, there would have been a separate, untainted line running from the defendant to the evidence. The rationale for the independent source/inevitable discovery exceptions is that the introduction of the evidence has nothing to do with any law enforcement illegality as the evidence is not the product of any illegality.

To visualize the operation of the inevitable discovery exception, consider, as an example, a situation in which Officer Experience sees Sam Suspect driving in a car with the left rear light out. Officer Experience stops Sam to give him a ticket (in Officer Experience's state this type traffic infraction is handled by citation, never by arrest). Officer Experience smells liquor on Sam's breath, suspects that Sam has been driving while under the influence of alcohol, and requests that Sam perform a series of sobriety tests. Sam fails the tests.

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121. *Id.*
122. *Id.*
125. For the facts, more or less, on which the hypothetical in the body of the text was based, see *State v. Waddell,* 14 Kan. App. 2d 129, 784 P.2d 381 (1989).
Officer Experience then radioes for a roving breathalyzer van so that he may give Sam a breathalyzer test. He also conducts a quick search of Sam's person and the interior of Sam's car.

On Sam's person Officer Experience finds a list of names and addresses with what appears to be information as to the amount of cocaine to be delivered to each. In the car Officer Experience finds two sawed-off shotguns (possession of sawed-off shotguns is illegal in this state), drug paraphernalia, a box of glassine envelopes, and a suitcase full of a white powdery substance. Officer Experience field tests the powder and concludes that it is cocaine. All this takes approximately ten minutes. At this point the breathalyzer van arrives. Sam takes the breathalyzer test and is shown to have a blood alcohol level of .154. He then is placed under arrest.

Sam moves to suppress all the evidence found in the search of him and his car. At the suppression hearing Officer Experience testifies that he was not in fear of Sam nor had he any reason to suspect that Sam carried weapons or was dangerous. The magistrate makes three findings: (1) when Officer Experience searched Sam and the car he had no probable cause for the search; (2) since Officer Experience did not suspect the existence of a weapon, his search could not be upheld as a Terry frisk; and (3) since no arrest was made the search could not be upheld as a search incident to arrest. The consequence of these three findings is that all the evidence requires suppression.

EXCEPT . . .

Now consider the inevitable discovery exception to the exclusionary rule. To evaluate the application of the inevitable discovery exception, what is required is to trace what would have happened had there been no illegality.

On the facts as detailed above, the breathalyzer van arrived within minutes after Officer Experience searched Sam and the interior of the car. Suppose that once Sam failed the sobriety test Officer Experience conducted no search but instead waited for the arrival of the van. Suppose, moreover, that the routine procedure in Officer Experience's state—or the routine procedure of Officer Experience—is that a driver is arrested if he fails a breathalyzer test. What that means is that once Officer Experience had the results of Sam's breathalyzer test, he would have arrested Sam. At that point he lawfully could have searched Sam and the car's interior as a search incident to arrest. He lawfully would have found the drugs, guns, and list, and he lawfully would have developed probable cause to search the car's trunk.

All this would have happened without regard to the illegality of the actions Officer Experience actually took. On the theory of inevitable discovery, therefore, there is a fair chance that all the evidence will be admissible in Sam's criminal trial.
VII. FRUIT OF THE POISONED TREE

A violation of a fourth amendment protected privacy interest operates to exclude evidence that is the direct product of the violation and evidence derived from the primary violation up to the point at which later evidence is found to be "sufficiently attenuated" from the primary taint. In other words, if the tree (initial illegality constituting primary taint) is poisoned, so too may be at least some of its fruit (evidence).

One precondition to success in excluding evidence from trial as fruit of the poisoned tree is that the defendant making the motion to suppress must have standing running from the poisoned tree. If the poisoned tree is not in A's backyard, then the tree is admissible against A and so too any of its fruit.

For a defendant with standing the major question regarding suppression of poisoned fruit is how much, if any, of the fruit was corrupted by the poisoned tree. To answer this, four considerations are relevant: (1) the degree to which the tree was poisoned [in other words, the seriousness of the single fourth amendment violation or the number of fourth, fifth, and sixth amendment violations that were committed]; (2) the distance in time and place between the fruit and the poisoned tree; (3) the type fruit involved; and (4) the factors that intervened to dissipate the taint produced by the poisoned tree. The more poisoned the tree the farther along the line one has to go and the more intervening factors will be necessary before one reaches evidence that is "sufficiently attenuated."

A. How Poisoned is the Tree?

A simple rule applies: the more serious the violation, the more poisoned the tree. Thinking about it in terms of size, the more

127. Of course, a piece of evidence that is the poisoned fruit of an earlier illegality may also itself represent a primary taint. In other words, the fruit of a poisoned tree may itself be another poisoned tree. If so, a defendant with standing to challenge the new primary taint may do so even if she has no standing to challenge the earlier illegality. For example, suppose law enforcement officials arrest A illegally (no probable cause) and then question him illegally (no Miranda warnings). A gives up B. The police then illegally arrest B (no probable cause) and then question him illegally (no Miranda warnings). B has no standing to challenge the poisoned tree running from A. As such, B cannot challenge the introduction of his statement as a fruit of that poisoned tree. On the other hand, B does have standing to challenge his own poisoned tree—the illegal arrest and questioning of him—in its own right and without regard to its connection to an illegality running to A.
130. See, e.g., id.
poisoned the tree, the larger the tree is. A tree may be very poisoned (very large) because the category of constitutional violation is high on the hierarchy of fourth amendment (or other constitutional) violations, because several violations occurred at once, or because, no matter where the category of fourth amendment violation sits on the hierarchy, the law enforcement officer's conduct in committing the violation was particularly egregious. A rough hierarchy of fourth amendment violations (by category from least to most serious or, in other words, by category from acorn to mighty oak) is as follows:

1. A stop made in public unsupported by reasonable suspicion;
2. A warrantless arrest on probable cause made in the home in violation of the Payton requirement that a warrant be obtained for nonemergency in-home arrests;\footnote{New York v. Harris, 495 U.S. 14 (1990). Frankly, I would have placed this violation a little higher on my hierarchy. I moved it down based on the Court's opinion in \textit{Harris}.} 
3. A seizure of an item in plain view but where there is no probable cause to suspect the criminality of the item;
4. A search of premises supported by probable cause but without warrant or exception to the warrant requirement;
5. An arrest made in public unsupported by probable cause;
6. A frisk unsupported by reasonable suspicion;
7. A protective sweep of a home unsupported by reasonable suspicion and outside the area covered by the search incident to arrest exception;
8. A search of a place other than a private home unsupported either by probable cause or warrant (or warrant exception);
9. A warrantless search of a person when supported by probable cause;
10. A search of a private home unsupported by either probable cause or a warrant (or warrant exception);
11. A search of a person unsupported either by probable cause or a warrant (or warrant exception);
12. A body cavity search unsupported by either probable cause or a warrant (or warrant exception).

Combined with a hierarchy of violations by category is the conduct of law enforcement officers in committing a particular violation. Breaking into a locked office, particularly at night, with neither warrant nor probable cause is a more egregious violation (a larger tree) than an office entry achieved by knocking on a closed door and then entering without consent. The at-night break-in of the office may even be as serious a fourth amendment violation as a search that by classification is more serious but which was conducted in a less egregious fashion (as, for example, a warrantless search of the person on probable cause that involved no force and was effected during daylight).

B. How Far From the Tree?

How far away in time and place the fruit must be before the taint
of the tree is dissipated is the most difficult factor for which to provide criteria outside the context of a particular factual setting since this factor primarily is dependent on the nature of the violation. A return to the above-provided rough equation of the size of the tree with the degree of seriousness of the violation may help explain the Court’s treatment of attenuation.

Visualize a tree on the horizon that looks two inches high. The closer a person is to the tree, the smaller the tree need be in actuality to look two inches high to the person observing it. Conversely, the farther a person is from the tree, the larger the tree need be in actuality to look the same two inches high to the person observing it. Translate the experience with trees on the horizon to the law of attenuation. Assume that the Court has a rough view that sufficient attenuation is achieved when a violation looks to an observer to be the equivalent of two inches high. Then, as with trees on the horizon, the more serious the violation, the more distant the fruit must be from the tree before the taint is dissipated.

Although clearly the question of how much must occur to attenuate is fact-dependent, two things nonetheless may be said with some degree of confidence. First, physical evidence obtained from a search incident to an illegal arrest is too close in time ever to be admissible. Second, *Miranda* warnings by themselves will not sufficiently dissipate the taint of an arrest unsupported by probable cause to make admissible a statement made subsequent and reasonably proximate to that arrest.\(^3\)

C. What Type of Fruit?

There is a difference between physical evidence discovered by the police and information or evidence that is acquired through questioning of a person.\(^4\) While physical evidence has no choice but to “speak,” a person may refuse. Evidence that comes from questioning someone, even though that person has been identified or found only because of the primary illegality, thus likely never will require more attenuation than physical evidence that comes to light from the same initial illegality and is equally distant from that illegality. It is even possible that third person information today always is sufficiently attenuated.

D. What Intervened?

Again visualize a tree on the horizon. There normally are objects (hills, telephone poles, houses, cars, etc.) between the observer and the tree. Some of these objects are large enough or opaque enough or situ-

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ated in a way that they block an observer's view of the tree; others are not. As with objects between a tree on the horizon and an observer, so too with factors that intervene between a poisoned tree and later discovered fruit.

If later fruit (evidence) is provided by the defendant himself, then intervening factors are (1) the giving of *Miranda* warnings, (2) the defendant's consultation with a lawyer after the primary illegality, (3) the willingness of the defendant to come forward to provide evidence, (4) independent provoking incidents (a coconspirator confessed; a witness came forward with information; independent of the taint incriminating evidence is found) that may be said to have spurred the defendant to provide information, (5) the length of time between the illegality and the later acquisition of the defendant's evidence. Willingness to provide information and passage of time from the primary illegality also are relevant when the information comes from someone other than the defendant.

VIII. ESCALATING CAUSE: ONE THING LEADS TO ANOTHER

In evaluating a law enforcement officer's conduct under the fourth amendment the sequence of events needs always to be considered. Information derived at any particular stage constitutionally may be used to permit additional intrusion that would have been unjustified by what was known at the outset of a law enforcement encounter with a suspect or at any earlier stage of law enforcement activity. In other words, escalating cause means that information or evidence uncovered at Stage 1 will justify law enforcement activity at Stage 2 that would have been unconstitutional if done immediately at Stage 1.

Return to my earlier example in which Officer Experience sees Sam Suspect driving in a car with the left rear light out. Officer Experience again stops Sam to give him a ticket and smells liquor on Sam's breath. Again Sam takes and fails a sobriety test. This time, however, Officer Experience does it right: when Sam fails the tests Officer Experience arrests him for driving while intoxicated.

As in the earlier rendition of this hypothetical, Officer Experience then conducts a search of Sam's person and the interior of the car, finds the customer list, the two sawed-off shotguns, drug paraphernalia, the box of glassine envelopes, and the suitcase full of cocaine. As before, he then opens the trunk of the car and finds a gun and three more suitcases filled with cocaine.

At the suppression hearing Officer Experience again testifies that at no time was he in fear of Sam nor had he any reason to suspect that Sam carried weapons or was dangerous.

Certainly at the initiation of the encounter between Officer Experience and Sam there was no authority to arrest Sam and no probable
cause or reasonable suspicion to suspect that Sam was driving while intoxicated or that he carried weapons or drugs either on his person or in his car. At the time of the stop a Terry frisk would have been illegal since there was no reason to suspect danger to the officer. Once Sam failed the sobriety tests, Officer Experience then had probable cause to believe that Sam was driving while intoxicated. He then arrested Sam—a good arrest—and that triggered a permissible search incident to arrest of Sam’s person and the interior of the car. The search of the car’s trunk, however, could not be justified on a search incident to arrest rationale. After what turned up on the search incident to arrest, however, there likely was probable cause to support the search of the car’s trunk.

The sequence of events, and the cause that escalated at each stage with additional information obtained, operated to make admissible all the evidence found.

The above example illustrates that in considering the constitutionality of a fourth amendment intrusion (or in considering whether on the facts there was an intrusion) an attempt must be made to dissect what occurred at each stage of the law enforcement/citizen encounter, to focus on the level of cause the law enforcement officer had at that particular stage, and to evaluate what he did next in light of the information he had at that stage. This task may not be easy. At the very least there likely will be a factfinding necessary to resolve a conflict in the evidence as to what transpired, and when.

IX. CONCLUSION

The law of search and seizure is constantly evolving, can be quite complicated, and is often confusing. What is provided in this Article is a straightforward, expositional guide to dealing with fourth amendment issues that hopefully will serve as a practitioner’s primer on the present status of search and seizure law.