

Still the American Frontier: Fourth Amendment Litigation

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United States Constitution: The Fourth Amendment

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.

Wisconsin State Constitution Article 1 Sec. 11

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 warrant 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.

Identical. And (usually unfortunately) most of Wisconsin's state court rulings are identical to decisions by the United States Supreme Court.

The Exclusionary Rule

When searches and seizures violate the Fourth Amendment, the evidence is to be excluded from court proceedings. *Weeks v. United States*, 232 U.S. 383 (1914). In *Mapp v. Ohio*, 367 U.S. 643 (1961), the court ruled the Fourth Amendment applies to the states via the Fourteenth Amendment guarantee of due process. However, evidence obtained in violation of the Fourth Amendment is admissible at parole revocation hearings. *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357(1988). When police act in good faith relying on current United States Supreme Court precedent and the court later revises its rulings, evidence will not be excluded because police acted reasonably in relying on then existing judicial precedent and there is no deterrent purpose in excluding the evidence. *Davis v. United States*, 131 S. Ct. 2419 (2010).

The Fruit of the Poisonous Tree Doctrine

Evidence that is obtained or derived as a result of the unlawful search or seizure is also excluded as the "fruit of the poisonous tree". *Wong Sun v. United States*, 371 U.S. 471 (1963). The tainted evidence can be tangible physical evidence, items observed or words overheard, confessions, fingerprints and the out of court identification of a defendant, *United States v. Crews*, 445 U.S. 463 (1980). Property abandoned as the result of unlawful police conduct must be suppressed. *Massachusetts v. Painten*, 368 F.2d 142 (1st Cir 1966), cert gr 386 U.S. 931, cert dismd 389 U.S. 560.

Additional Wisconsin Cases:

State v. Anderson, 165 Wis.2d 441 (1991); Identification evidence may be suppressible if derived from an unlawful seizure. *State v. Walker*, 154 Wis.2d 158 (1990).

Attenuation

The fruit of the poisonous tree analysis is subject to the attenuation doctrine; evidence is still admissible when the “chain of causation has become so attenuated by some intervening circumstance so as to remove the ‘taint’ of the initial illegality”, *Crews, Id.* at 471. When a confession which is elicited after an unlawful arrest should be suppressed unless it is attenuated, that is, if there is a break between the causal connection (the arrest) and the confession so that the confession is “sufficiently an act of free will to purge the primary taint”. *Taylor v. Alabama*, 457 U.S. 687, 690 (1982), citing *Brown v. Illinois*, 422 U.S. 5990, 602 (1975) and *Dunaway v. New York*, 442 U.S. 200 (1979). Reading Miranda rights, standing alone, is insufficient to purge the taint of an unlawful arrest. *Kaupp v. Texas*, 538 U.S. 626, 633 (2003).

Additional Wisconsin Cases:

When a search or seizure of evidence is sufficiently attenuated from the unlawful police conduct, court is not to suppress the evidence. *State v. Richter*, 2000 WI 58. Court is to evaluate three factors:

- The temporal proximity of the official misconduct and seizure of the evidence;
- The presence of intervening circumstances; and
- The purpose and flagrancy of the official misconduct.

Statements made pursuant to an unlawful arrest and/or entry may be suppressed if not sufficiently attenuated from unlawful police conduct, *State v. Kiekhefer*, 212 Wis.2d 460 (Ct. App. 1997); *State v. Tobias*, 196 Wis.2d 537 (Ct. App. 1995). Length of time alone is an insufficient basis to find attenuation, and non-confrontational interviews with police during intervening period are not significant intervening events, *United States v. Reed*, 349 F.3d 457 (7th Cir. 2003).

Inevitable Discovery

Under the “inevitable discovery” exception to the exclusionary rule if a preponderance of the evidence demonstrates that evidence of a crime would have ultimately or inevitably would have been discovered by lawful means then any evidence obtained without a valid search warrant should be admitted in court, *Nix v. Williams*, 467 U.S. 431 (1984).

Additional Wisconsin Case:

State v. Weber, 163 Wis. 2d 116 (1991). If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means -- here the volunteers' search -- then the deterrence rationale has so little basis that the evidence should be received. *Id.*

Independent Source

When an unlawful entry occurs but police later return with a valid warrant for which probable cause existed prior to the illegal entry, evidence discovered for the first time during the lawful search is admissible and is not the fruit of the poisonous tree. *Segura v. United States*, 468 U.S. 796 (1984). If there is an independent source for the evidence, seized evidence can still be admissible, *Murray v. United States*, 487 U.S. 533 (1988).

Other exceptions to the Fruit of the Poisonous Tree Doctrine

There are a few areas in which later evidence is admissible, whether due to the attenuation doctrine or other circumstances. In court identification is not suppressible due to a Fourth Amendment violation, *Crews, Id.* (although it may be suppressed due to unduly suggestive pretrial identification procedures which impact on identification, *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977)). Live witness testimony is generally considered attenuated because a witness has their own independent memory and volition, *United States v. Ceccolini*, 435 U.S. 268 (1978). Criminal conduct by a suspect occurring after an unlawful police intrusion is attenuated and not suppressible, see *United States v. Nooks*, 446 F.2d 1283 (5th Cir. 1971), cert. den. 404 U.S. 945. When police have probable cause to arrest a suspect, his statement is admissible even if he is arrested in his home without a warrant or consent to enter, *New York v. Harris*, 495 U.S. 14 (1990).

Applicability of the Fourth Amendment: The Expectation of Privacy

In *Katz v. United States*, 389 U.S. 387, 349-50(1967), the court held that the Fourth Amendment protects persons, not places, and is applicable in venues outside of the home. Thus the Fourth Amendment applies whenever a person has a reasonable expectation of privacy in a particular location, regardless of whether or not it is that person's home, *Id.* at 353. A crucial factor is whether a person knowingly exposes something to the public or seeks to keep it private, regardless of location *Id.* Legal ownership of property is not required for a person to have a reasonable expectation of privacy, *Jones v. United States*, 362 U.S. 257 (1960). The precautions taken must insure privacy from outside observers not only at street level, but those looking from a higher vantage point. *California v. Ciraolo*, 476 U.S. 207 (1986).

However the test is both subjective and objective, the court looks to not only an individual's expectations but also to what society reasonably recognizes as private, thus there is no expectation of privacy in one's garbage put out to the curb for collection, *California v. Greenwood*, 486 U.S. 35 (1988).

Both business owners and employees have a reasonable expectation of privacy in non-public areas of a workplace. *O'Conner v. Ortega*, 480 U.S. 709 (1987).

Additional Wisconsin Case:

State v Fillyaw, 104 Wis.2d 700 (1981). General Test for Expectation of Privacy:

- Is there complete dominion and control, including right to exclude others;
- Whether one takes precautions consistent with seeking privacy;
- Is property put to private use;
- Is the claim consistent with historical notions of privacy

Multi-Dwelling Units

Courts have differed on when a person has a reasonable expectation of privacy and therefore standing to challenge entries into multi-dwelling units. Generally courts have held that there is no reasonable expectation of privacy in the common areas of apartment buildings, regardless of whether have locked entries, *United States v. Holland*, 755 F.2d 253 (2nd Cir.1985). This lack of a privacy expectation includes the corridors of a rooming house. *United States v. Eisler*, 567

F.2d 814 (8th Cir. 1977) and basements, *United States v. McGrane*, 746 F.2d 632 (8th Cir. 1984); *Penny v. United States*, 694 A.2d 872 (Dc Cir.1997), *United States v. Hawkins*, 139 F.3d 29 (1st Cir.1998). However one court held that entry into locked apartment building without a warrant or consent of a tenant or landlord is not permitted. *United States v. Carringer*, 541 F.2d 545 (6th Cir. 1976). Some courts have found a reasonable expectation of privacy found where tenant lived in buildings that only contain a couple of apartments as opposed to multi-tenant unit. *United States v. Fluker*, 543 F.2d 709 (9th 1976).

Additional Wisconsin Cases:

Basement. A tenant's expectation of privacy in the common areas of multiple unit buildings is decided on a case-by-case basis. When third parties had unfettered access to the basement of multi-unit building, no subjective expectation of privacy. *State v. Eskridge*, 2002 WI App 158.

Stairway. Existence of reasonable expectation of privacy in a stairway leading to the upper levels of a dwelling is decided case-by-case, rather than under bright-line rule. Privacy interest found when defendants were the only ones with unlimited access to the stairway, which they regulated with a deadbolt lock. *State v. Trecroci*, 2001 WI App 126.

Cars

Passengers may challenge the stop of a vehicle, *Brendlin v. California*, 551 U.S. 249 (2007). However, only drivers and car owners have the right to suppress the search of a vehicle, *Rakas v. Illinois*, 439 U.S. 128 (1978).

Additional Wisconsin Cases:

When police stop a vehicle, all of the occupants of that vehicle are seized and have standing to challenge the stop *State v. Harris*, 206 Wis. 2d 243 (1996).

Vehicle passengers lack standing to challenge police questioning of driver in traffic stop where officer notices suspicious items in car. *State v. Malone*, 2004 WI 108.

No expectation of privacy in abandoned vehicle. *State v Roberts*, 196 Wis.2d 445 (Ct. App. 1995); *State v. Knight*, 232 Wis.2d 305 (Ct. App. 1999).

Whether an individual may have a reasonable expectation of privacy in personal property found inside a vehicle that he or she does not have a reasonable expectation of privacy in is not governed by a bright-line rule, *State v. Bruski*, 2007 WI 25. Sole occupant found asleep in vehicle who did not have registered owner's consent to be in car and couldn't produce evidence to show why he was in car or that he had authorization to be in car lacked expectation of privacy in car and in closed containers therein, *Id.*

Drug Sniffing Dog. Use of dog to sniff airspace around vehicle permitted, no expectation of privacy in open and accessible parking lot. *State v. Garcia*, 195 Wis.2d 68 (Ct. App. 1995).

Sample list of areas the court has found to private and non-private.

Courts analyze these locations on a case-by-case basis; what one trial or appellate court determines to be an area where a person has a reasonable expectation of privacy may be regarded differently when there is a slight twist of the factual circumstances:

Areas Where Individuals are Deemed to have a Privacy Interest:

- Curtilage of a Home. *United States v. Dunn*, 480 U.S. 294 (1987).
- Home when an overnight guest. *Minnesota v. Olson*, 495 U.S. 91 (1990).
- Hotel Room. *United States v. Jeffers*, 342 U.S. 48 (1951).
- Fire Damaged Home. *Michigan v. Clifford*, 464 US 287 (1984).
- Commercial Premises. *See v. City of Seattle*, 387 U.S. 541(1967).
- Offices shared with other employees. *Macusi v. DeForte*, 392 U.S. 364(1968).
- Desks and filing cabinets in office. *O'Conner v. Ortega*, 480 U.S. 709 (1987).
- Luggage. *United States v. Chadwick*, 433 U.S. 1 (1977); *U.S. v. Place*, 462 U.S. 696 (1983).
- Sealed shipping container and its contents. *Walter v. United States*, 447 U.S. 649, 657 (1980).
- Mail and Packages, including by private carriers. *United States v. Van Leeuwen*, 397 U.S. 249 (1970), *Walter v. United States*, *Id.*
- Bodily fluid samples such as blood or urine. *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602 (1989).
- Third party conversations in one's home illegally obtained by police. *Alderman v. United States*, 394 U.S. 165 (1969).
- Client files in a law office. *De Massa v. Nunez*, 770 F.2d 1505 (9th Cir. 1985).
- Businesses subject to administrative searches designed to enforce regulatory schemes. *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978).

Additional Wisconsin Cases:

When the state searches mail prior to delivery to a residence, and the addressee is not a resident, resident has a ("minimal") burden of establishing some reasonable expectation of privacy in the package. Defendant must present some reason as to why he would expect that the package, when it came, was intended for him. *State v. Ramirez*, 228 Wis.2d 561 (Ct. App. 1999).

Fourth Amendment applies to business property. *State v. Schwegler*, 170 Wis. 2d 487 (Ct. App. 1992).

Deemed Non-Private:

- Handwriting. *United States v. Mara*, 410 U.S. 19 (1973).
- Voice. *United States v. Dionisio*, 410 U.S. 1(1973).
- Placing private property in another's purse. *Rawlings v. Kentucky*, 448 U.S. 98 (1980).
- Movements of vehicles on highways. *United States v. Knotts*, 460 U.S. 276 (1983).
- Open farm fields notwithstanding "no trespassing" sign posted. *Oliver v. United States*, 466 U.S. 170 (1984).
- Partially covered greenhouse visible from the air. *Florida v. Riley*, 488 U.S. 445 (1989).
- Aerial photography of an industrial complex, *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986).
- Public areas of a business. *Maryland v. Macon*, 472 U.S. 463 (1985).
- Prison cell. *Hudson v. Palmer*, 468 U.S. 517 (1984).
- Bank records. *United States v. Paynor*, 447 U.S. 727 (1980).
- Tax records. *Couch v. United States*, 409 U.S. 322 (1993).
- Negotiable commercial instruments. *United States v. Miller*, 425 U.S. 435 (1976).

- Drug House if one has no connection to premises other than drug dealing. *Minnesota v. Carter*, 525 U.S. 83 (1998).
- Co-conspirator passenger in a searched car. *United States v. Padilla*, 508 U.S. 77 (1993).
- Abandoned property such as trash left in hotel room after checkout. *Abel v. United States*, 362 U.S. 217 (1960).
- Disclosures to third parties. *Hoffa v. United States*, 385 U.S. 293 (1966), including recorded phone conversations where a party is an undercover law enforcement agent, *United States v. White*, 401 U.S. 645 (1971).
- Commercial industry so heavily regulated that no reasonable expectation of privacy exists. *New York v. Burger*, 482 U.S. 691 (1987).

Additional Wisconsin Cases:

No standing to assert a Fourth Amendment violation based on an officer unlocking the door of the public restroom. Although initial use of the restroom was for its intended purpose, defendant continued to have the private use of the locked restroom for at least 25 minutes without responding to knocking and while dozing off. *State v. Neitzel*, 2008 WI App 143.

Police may collect evidence in hospital ER or OR. *State v. Thompson*, 222 Wis.2d 179 (Ct. App. 1998).

Warrantless and unannounced inspections were necessary to further the State's interest in regulating dairy farms and to preserve the public health and safety. *Lundeen v. Wisconsin Dep't of Agric., Trade & Consumer Protection*, 189 Wis. 2d 255 (Ct. App. 1994). Following criteria must be met: (1) The inspection must relate to a regulatory scheme that furthers a substantial government interest; (2) the inspection must be necessary to further the regulatory scheme; and (3) the inspection scheme, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant.

Standing & Overnight Guests

The Fourth Amendment only applies in situations where a person has a reasonable expectation of privacy in a particular location. Overnight guests have standing to challenge the search of a home, *Minnesota v. Olson*, 495 U.S. 91 (1990) for that proposition. However, persons present only for packaging drugs at another's home did not have a reasonable expectation of privacy in that home, *Minnesota v. Carter*, 525 U.S. 83 (1998).

The burden of proving standing is on the defense. The prosecution may not use a client's testimony in its case-in-chief in the subsequent criminal trial. *Simmons v. United States*, 390 U.S. 377, 394 (1968). However, if a client testifies inconsistently at trial, his testimony from the motion hearing can be used on cross examination or in rebuttal.

Additional Wisconsin cases:

State v. Trecoci, 630 N.W.2d 555 (Wisc. App. 2001). Guest who did not stay overnight but was a tenant's fiancée regularly used the property and had a firmly rooted relationship with the tenant of an attic and the property had a reasonable expectation of privacy at that home. In *Trecoci*, the rented attic in question was only used by the tenants for drug packaging and socializing.

State v. McCray, 220 Wis.2d 705 (Ct. App 1998), Guest who exceeded authorized stay by occupying basement while waiting to sell cocaine lacked standing.

Searches by Private Parties

The Fourth Amendment is applicable when searches are conducted by non-law enforcement employees for a governmental purpose. The standard is that the private party must be acting as an instrument or agent of the government. Some examples of what this has been held to include :

- Freight carrier employees. *United States v. Jacobson*, 466 U.S. 109 (1984), *Walter v. United States*, 447 U.S. 649, 657 (1980).
- Hospital officials, *O'Conner v. Ortega*, 480 U.S. 709 (1987); *Ferguson v. City of Charleston*, 532 U.S. 67 (2001).
- Railroads that comply with governmental regulations, *Skinner v. Railway Labor Executives' Asso.*, 489 U.S. 602 (1989).
- Public school officials *New Jersey v. TLO*, 469 U.S. 325 (1985).

Additional Wisconsin Cases:

If a private party is acting as instrument or agent of government, Fourth Amendment applies. *U.S. v. Shahid*, 117 F. 3d 322 (7th Cir. 1997); *State v. Knight*, 232 Wis.2d 305, 310 (Ct. App. 1999).

A security guard's seizure, detention, and search of the defendant was not a government action that permitted the invocation of the exclusionary rule, defendant detained by another citizen has no right to suppress the fruits of the citizen's search, *State v. Butler*, 2009 WI App 52. One does not generally have a reasonable expectation of privacy when delivering property to a private shipping company, particularly when the shipping company posts a sign reserving its right to inspect parcels left with it for shipping. *State v. Sloan*, 2007 WI App 146. Police may collect evidence at hospital ER or operating room. *State v. Thompson*, 222 Wis.2d 179 (Ct. App. 1998). School officials did not need a warrant or probable cause before searching a student who was under their authority. *Interest of Angelina D.B.*, 211 Wis.2d 140 (1997). But, when police initiate search or school officials act at behest of police, probable cause required. *Angelina D. B., Id.*

Requirement of Search Warrant

In general, law enforcement may not enter a home or place of business or search them without a warrant. The provision that a person's home is one's castle, dating back to colonial days, and the corresponding right to privacy was the underlying reason for the Fourth Amendment. Search warrants can only be issued by a judicial officer on a finding of probable cause. The issuing official must be "neutral and detached", *Johnson v. United States*, 333 U.S. 10, 13 (1948); it cannot be by a state official who is also the case investigator or prosecutor, *Coolidge v New Hampshire*, 403 U.S. 443 (1971). Most warrants are issued by magistrates or court commissioners and probable cause is usually shown by a sworn written affidavit, although some courts take sworn oral testimony and issue a warrant.

Additional Wisconsin Cases:

Police officer's stepping into the threshold of an apartment, preventing the occupant from closing the door, amounted to an "entry," thereby triggering the Fourth Amendment warrant requirement. *State v. Johnson*, 177 Wis. 2d 224 (Ct. App 1993); *State v. Larson*, 2003 WI App 150.

Determination of probable cause

Probable cause is defined as "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar v. United States*, 338 U.S. 160, 175 (1949). This is evaluated under the totality of the circumstances test, *Illinois v. Gates*, 462 U.S. 213 (1983). When all the circumstances set forth in the affidavit before a magistrate sets forth a fair probability that contraband or evidence of a crime will be found in a particular place, search warrant to be issued. *Illinois v. Gates*, 462 U.S. 213 (1983).

Additional Wisconsin Case:

Courts must consider whether, when objectively viewed, the information before the magistrate provided sufficient facts to excite an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime, and that they will be found in the place to be searched. *State v. Marquardt*, 2001 WI App 219.

Definition of the Home: Curtilage

The private area of a home for which a search warrant is required includes the curtilage, *Oliver v. United States*, 466 U.S. 170 (1984). Curtilage was defined in *United States v. Dunn*, 480 U.S. 294 (1987) by using a four factor test which looked at the proximity of the area to the home, whether the area is included within an enclosure surrounding the home, the nature of use that the area is put to and the steps taken to protect the area from observation by others. *Id.* at 301.

Additional Wisconsin Cases:

Garage is part of the curtilage of home and subject to the warrant requirement. *State v. Leutenegger*, 2004 WI App 127; *Bies v. State*, 76 Wis.2d 457 (1977). Entry into attached garage unlawful; an exception is possible if that is the least intrusive means of attempting to contact someone in the home. *State v. Davis*, 2011 WI App 74.

Unlawful for police to invade curtilage of home and smell marijuana.; extent of a home's curtilage is determined by factors that bear upon whether a person reasonably believes that the area in question should be treated as the home itself. *State v. Wilson*, 229 Wis.2d 256 (Ct. App. 1999).

Permissible scope of search warrants

A warrant cannot be overbroad and must list with particularity exactly the items to be seized upon their execution, *Marron v. United States*, 275 U.S. 192, 196 (1927); *Stanford v. Texas*, 397 U.S. 476 (1965). The warrant must particularly describe the place to be searched and the persons or things to be seized and the search is to be carefully tailored to its justifications, not an exploratory search, *United States v. Ross*, 456 U.S. 798 (1982). A "warrant to search for a stolen refrigerator would not authorize the opening of desk drawers, *Walter v. United States*, 447 U.S.

649, 657 (1980). Validity of warrant must be judged in light of the information available to the officers at the time they obtained the warrant. When warrant is overbroad but validly obtained and officers' failure to realize overbreadth of the warrant is objectively reasonable, evidence seized is admissible in court. *Maryland v. Garrison*, 480 U.S. 79 (1987).

Additional Wisconsin Cases:

Officers are required to discontinue search once they discover they are not operating within the scope of a search warrant. *State v. Herrmann*, 2000 WI App 38.

Under the "physical proximity" test it is reasonable for officers executing search warrant to search all the items on the premises that could have contained contraband or the evidence sought under the warrant, except those items worn by or in the exclusive possession of persons whose search not authorized, irrespective of the person's status in relation to the premises. *State v. Andrews*, 201 Wis.2d 383 (1996). Items in close proximity to home and within curtilage of home may be searched pursuant to search warrant of the home. *State v. O'Brien*, 223 Wis.2d 303 (1999); see also *State v. LaCount*, 2008 WI 59.

Plain View

When police are in a home or other location pursuant to a valid search warrant and see contraband or obvious evidence of a crime, they may seize the unlawful object if it is in plain view even if the object is not described in the warrant. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). When a warrant is overbroad but validly obtained and the executing police officers' failure to realize the over breadth of the warrant is objectively reasonable, the evidence seized is admissible in court. *Maryland v. Garrison*, 480 U.S. 79 (1987).

Additional Wisconsin Case:

Plain view doctrine applies to seizures conducted pursuant to search warrant. *State v. Schroeder*, 2000 WI App 128.

Good Faith

The Supreme Court created a good faith exception to the exclusionary rule in 1984. Under the exception, evidence seized is admissible when police exercise reasonable, good-faith reliance on a search warrant that was subsequently held to be defective. *U.S. v. Leon*, 468 U.S. 897 (1984). Good faith has also been applied to police administrative searches where officers reasonably relied on a state statute permitting warrantless searches later found to be constitutionally defective, *Illinois v. Krull*, 480 U.S. 340 (1987) or court clerical errors which failed record a quashed warrant, *Arizona v. Evans*, 514 U.S. 1 (1995). The court extended the *Evans* holding to include police clerical errors in *Herring v. United States*, 129 S. Ct. 695 (2009), holding that police must be sufficiently deliberate and culpable in erroneously executing a warrant for the exclusionary rule to apply. The standard a reviewing court is to apply is whether a reasonably trained police officer would be aware that the search is illegal. *Id.* The good faith exception also applies when police rely on current United States Supreme Court precedent and the court later revises its rulings. *Davis v. United States*, 131 S. Ct. 2419 (2010).

Additional Wisconsin Cases:

Good-faith exception recognized in Wisconsin, *State v. Eason*, 2001 WI 98.

Good-faith exception does not extend to a warrant issued on the basis of a statement that totally lacks an oath or affirmation. *State v. Tye*, 2001 WI 124.

The good-faith exception is inapplicable when indicia of probable cause are so lacking as to render official belief in its existence unreasonable. This inquiry is distinct from the question of whether the supporting facts are clearly insufficient. *State v. Marquardt*, 2005 WI 157.

Police action in good faith reliance on supreme court pronouncements insulate that conduct from the exclusionary rule. *State v. Ward*, 2000 WI 3; *State v. Loranger*, 2002 WI App 5.

Knock and Announce

Police are required to knock and announce their presence before executing a search warrant unless the warrant specifies that it is a “no-knock” warrant, there is a threat of physical violence, *Wilson v. Arkansas*, 514 U.S. 927 (1995) or there is reason to believe evidence would be destroyed if police knocked and announced their presence before entry, *Richards v. Wisconsin*, 520 U.S. 385 (1997). However, the exclusionary rule is unavailable as a remedy under the U.S. Constitution for failure to comply with the rule or announcement, *Hudson v. Michigan*, 547 U.S. 586 (2006). Civil remedies still apply but exclusion of evidence only applies if it is required under a state’s constitution. See *United States v. Banks*, 540 U.S. 31(2003).

Challenging Search Warrants

Motions to suppress searches conducted pursuant to warrants on the grounds that the warrant does not contain sufficient probable cause to have been issued have become near to impossible to win since the adoption of the good faith exception. One potential area of challenge however remains: challenging the warrant because it was obtained as a result of a false statement or due to reckless disregard for the truth. *Franks v. Delaware*, 438 U.S. 154 (1978). The defendant has the burden of making a substantial preliminary showing that the affidavit or testimony that supported the issuance of the warrant was false; this claim must establish more than a mere mistake occurred. The false statement must have been made intentionally or with reckless disregard for the truth. If this can be established that absent the false statement the warrant lacks probable cause, the fruits of the resulting search can be suppressed.

Additional Wisconsin cases:

Courts give great deference to a court's determination of probable cause to issue a warrant, and the defendant bears the burden of challenging probable cause. *State v. Multaler*, 2002 WI 35.

Franks v. Delaware applied in Wisconsin, *State v. Mann*, 123 Wis.2d 375 (1985).

Defendant is not entitled to an evidentiary hearing to challenge the credibility of the witness upon whose testimony a court relies on in issuing a warrant, *State v. Stank*, 2005 WI App 236.

Staleness: Passage of time does not alone render probable cause stale; the warrant-issuing court may consider various factors, for example whether there is an ongoing criminal activity such

as drug dealing. *State v. Stank, Id.*. When the type of criminal behavior being investigated is recurring, entrenched, and continuous, warrants may be upheld even after lengthy period of time has passed since crime occurred. *State v. Multaler*, 2002 WI 35; *State v. Gralinski*, 2007 WI App 233.

Overbreadth. In search of a business, when defendant challenged breadth of a warrant and whether search and seizure was supported by probable cause, court considered whether business had a pervasive scheme to defraud and thus it was reasonable to seize all business records, *State v. DeSmidt*, 155 Wis.2d 119 (1990). Search warrants that permit officers to search all persons on the premises not necessarily invalid; the test is not whether innocent persons might be present on the premises, but rather whether the presence of likely guilty persons is demonstrated to a reasonable probability in the warrant, *State v. Hayes*, 196 Wis. 2d 753 (Ct. App. 1995).

Permissible warrantless entries and searches in homes and businesses

The laundry list of exceptions where a search in a home can be lawfully conducted is very lengthy. The first three exceptions below are applicable when police are already lawfully in the home. The remaining exceptions allow police to gain entry into the home when they enter without a warrant or consent. The same exceptions apply to a business as well.

Exception: Search Incident to Arrest

An exception to the warrant requirement is search incident to arrest. Thus when police lawfully enter a home to arrest an individual, the area of the home which is accessible to the arrestee can be search incident to the arrest, *Chimel v. California*, 395 U.S. 752 (1969).

This exception does not justify a search of parts of a home not under the arrestee's immediate control, *Vale v. Louisiana*, 399 U.S. 30 (1970). This exception applies to the search of an arrestee wherever a lawful arrest takes place whether during a traffic stop or on the street, *United States v. Robinson*, 414 U.S. 218 (1973) and *Gustafson v. Florida*, 414 U.S. 260 (1973).

Additional Wisconsin Cases:

Search incident to arrest is limited to area from which arrestee might gain possession of weapons and destructible evidence. *State v. Fry*, 131 Wis.2d 153 (1986). Search cannot be justified as incident to arrest after the defendant had been removed from the home as the defendant could not have gained possession of a weapon or destructible evidence. *State v. Sanders*, 2008 WI 85.

Exception: Protective Sweep

Police may conduct a search known as a protective sweep of a home to ensure their safety from unseen third parties. The scope of the protective sweep is much broader than the area potentially accessible to the arrestee under the search incident to arrest exception; it encompasses the entire home, *Maryland v. Buie*, 494 U.S. 325 (1990). Probable cause is not required for a protective sweep; if police have reasonable suspicion based on specific and articulable facts & rational inferences that a dangerous person may be in the home, they are permitted to conduct the sweep. The sweep is to be a cursory inspection only and isn't to last longer than time needed to make arrest and leave premises.

Additional Wisconsin Cases:

Protective sweep of the closet 32 feet from where defendant arrested held reasonable in that officer could have reasonably believed that an individual was hiding in the closet, the search was narrowly confined to the closet where such an individual could be found, and the sweep was narrowly confined to a brief visual inspection of the closet. Court noted that suspect had just fled from room where closet was located. *State v. Garrett*, 2001 WI App 240.

Search of crawl space in bathroom ceiling upheld as protective sweep when space was only secured by four screws and police heard noise near area of crawl space. *State v. Blanco*, 2000 WI App 119.

Protective sweep not limited to arrest; permitted when police act community caretaker capacity. *State v. Horngren*, 2000 WI App 177.

Purpose of protective sweep is to briefly search for dangerous individuals who could pose threat and cannot justify seizure and examination of a small cannister where drugs were found, *State v. Sanders*, 2008 WI 85.

Exception: Plain View

The plain view doctrine originally developed in the search warrant context permitting police in a location pursuant to a warrant to exceed the warrant's scope and permitting a seizure when they see contraband or obvious evidence of a crime, even if the object is not described in the warrant. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). The doctrine requires that there must be a prior valid intrusion, in other words, the law enforcement official must be entitled to be where they located, the evidentiary value of the item must be immediately apparent to the officer and the sighted object must be in plain view, *Horton v. California*, 496 U.S. 128 (1990).

“Immediately apparent” requires there be probable cause to believe the viewed item is contraband or evidence of a crime, *Texas v. Brown*, 460 U.S. 730 (1983); *Arizona v. Hicks*, 480 U.S. 321 (1987). The plain view doctrine applies anytime an officer is lawfully in the home or business; a search warrant is not required.

Plain view includes items which can be touched; sight is not the only sense implied, *Minnesota v. Dickerson*, 508 U.S. 366 (1993). The United States Supreme Court has not ruled on the applicability of the plain view doctrine to other senses but Wisconsin, along with many federal and state courts have upheld seizures pursuant to “plain smell” and other tactile senses.

Additional Wisconsin Cases:

Evidence admissible under plain view doctrine per *State v. Johnson*, 187 Wis. 2d 237 (Ct. App. 1994) when : (1) evidence must be in plain view of the officer; (2) officer must have lawful right of access to the object; and (3) incriminating character of the object must be immediately apparent, meaning the police must show they had probable cause to believe the object was evidence or contraband.

Plain view includes items which can be smelled, touched, heard or tasted; sight is not only sense implied. *State v. Washington*, 134 Wis.2d 108 (1986); *State v. Hughes*, 233 Wis.2d 280 (2000).

Exception: Exigent Circumstances : The Emergency Doctrine

The emergency doctrine permits law enforcement to enter a home without a warrant when they believe a person is in need of immediate aid. The justification is to preserve life; the need for urgent action precludes taking the time to obtain a warrant. This includes entrance to a homicide scene to see if there are additional victims or if the suspect is still present. *Mincey v. Arizona*, 437 U.S. 385 (1978). The court declined to create a murder scene exception, *Id.* see also *Thompson v. Louisiana*, 469 U.S. 17,21 (1984) (per curiam) and *Flippo v. West Virginia*, 528 U.S. 11 (1999)(per curiam). Serious injury is not required for police to enter under this exception; observing the onset of a physical altercation is sufficient. *Brigham City v. Stuart*, 547 U.S. 398 (2006).

When police are present in the home because of an emergency they may seize any contraband or evidence of a crime that is in plain view. *Id.*, but they may not re-enter without a warrant to conduct a crime scene investigation, *Id.* at 393. Nor may they use the opportunity or search for items not in plain view, *Arizona v. Hicks*, 480 U.S. 321(1987). . Fires are emergencies which justify warrantless entries *Michigan v. Tyler*, 436 U.S. 499 (1978).

The emergency exception permits police to respond to emergencies in the course of criminal investigations. The community caretaker doctrine developed out of the emergency exception; it differs in that police may not be investigating a crime when acting in a community caretaker capacity. See sec.xxx below for additional details on the community caretaker function.

Additional Wisconsin Cases:

Police officers may make warrantless entries and searches when they reasonably believe that a person is in need of aid. *State v. Pires*, 55 Wis.2d 597(1972); *Laasch v. State*, 84 Wis.2d 587 (1982); *State v. Richter*, 235 Wis.2d 524 (2000).

Situation need not necessarily be life threatening to constitute an emergency. Checking on welfare of child permitted. *State v. Rome*, 2000 WI App 243.

Belief there is an emergency not reasonable when premised simply on presence of firearms without

further information. *State v. Kiekhefer*, 212 Wis.2d 460 (Ct. App. 1997). Exigency cannot be created by police. *Id.*

Entry is judged by an objective test: whether a police officer under the circumstances known to the officer at the time of entry reasonably believes that delay in procuring a warrant would gravely endanger life. A court may not consider the subjective beliefs of police officers. *State v. Larsen*, 2007 WI App. 147. In kidnapping cases, the emergency doctrine permits a search not only for the kidnap victim, but also for evidence that might lead to the victim's location. *Id.* Reasonable expectation of privacy is forfeited when authorities respond to an emergency and find property known or believed to be dangerous to investigators. *State v. Milashoski*, 159 Wis.2d 99 (1990).

Court held that the defendant, not the police, created the exigency in this case that resulted in a warrantless search when, after seeing the police outside his residence, he retreated into the residence and shut the door after the police ordered him to stop, creating the exigency of the risk that evidence would be destroyed. *State v. Phillips*, 2009 WI App 179.

The test for exigent circumstances justifying a warrantless seizure is an objective one: whether a police officer under the circumstances known to the officer at the time reasonably believes that delay in procuring a warrant would gravely endanger life or risk destruction of evidence or

greatly enhance the likelihood of the suspect's escape. An arrest was lawful when the urgency reasonably perceived by the officers was compelling and the danger they reasonably perceived for themselves and others if they did not move quickly was substantial. *State v. Ayala*, 2011 WI App 6.

Warrantless entry permitted when officers reasonably believed that a burglary was in progress. *State v.*

Harwood, 2003 WI App 215.

When suspected drug users/dealers who were at home didn't respond to police knock, emergency doctrine justified warrantless entry to check on welfare of heroin using occupants, *State v. Pinkard*, 2010 WI 81.

Exception: Exigent Circumstances: Hot Pursuit

Police may pursue a fleeing felon into a home without a warrant in order to effectuate an arrest. *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294 (1967). The hot pursuit doctrine specifically holds that a person may not retreat from a public place into a private home to avoid arrest. *U.S. v. Santana*, 427 U.S. 38 (1976). Hot pursuit applies only when a police officer is in immediate or continuous pursuit of a suspect from scene of crime. The hot pursuit exception applies only to felonies and does not justify a warrantless home entry for a misdemeanor, *Welsh v. Wisconsin*, 466 U.S. 740 (1984).

Evidentiary searches under the hot pursuit doctrine are limited to searches for weapons and preventing the imminent destruction of evidence. While searches incident to arrest cannot occur until after the arrest and in the area immediately accessible to the arrestee, searches justified by hot pursuit can take place before the arrest and in areas the arrestee could have access to. *Warden, Maryland Penitentiary, Id.*

Additional Wisconsin Cases:

Must be immediate or continuous pursuit of suspect from scene of crime, continuous pursuit may be by citizen witness who transmits information to police. *State v. Richter*, 235 Wis.2d 524 (2000). When police approached defendant in an alley, and he fled into his mother's house, no probable cause and police may not chase into home. *State v. Rodriguez*, 2001 WI App 206. Applies only to felonies and does not justify entry for a misdemeanor. *State v. Mikkelsen*, 2002 WI App 152.

Exception: Imminent Destruction of Evidence

When police conduct knock and talk and suspects take actions to lead police they are destroying evidence, police may enter due to exigent circumstance, *Kentucky v. King*, 131 S. Ct. 1349 (2011).

Additional Wisconsin Cases

When officers fear imminent destruction of evidence, test is whether the facts at the moment of entry would lead a reasonable experienced officer to believe the evidence would be destroyed before a warrant could be obtained. *State v. Kiekhefer*, 212 Wis.2d 460 (Ct. App. 1997).

When police had information that defendant was selling drugs, and defendant's response to knock and talk was to run, exigent circumstances justified forcible police entry into home. *State v. Robinson*, 2010 WI 80.

Warrantless searches without entry

In order for a person to claim their Fourth Amendment rights to privacy have been violated, they must take precautions to prevent casual observers from noticing their conduct; the law permits police to use the same types of devices that are accessible to any member of the public. *California v. Ciraolo*, 476 U.S. 207 (1986). Courts have upheld findings of probable cause when police investigated unlawful conduct by using devices such as telephoto lenses pointed through open windows or even helicopters to fly over a yard to gather evidence without a warrant. But police tools for these investigations must be available to the general public, *Florida v. Riley*, 488 U.S. 445 (1989), *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986). The court drew the line at use of an imaging device to penetrate the areas of the home which would be unobservable without physical intrusion and held the use of that device constituted an impermissible warrantless search. *Kyollo v. United States*, 533 U.S. 21 (2007).

There is no privacy interest in garbage put out for collection and police may conduct garbage searches without a warrant, *California v. Greenwood*, 486 U.S. 35 (1988).

Consent Searches

When a person validly consents to enter a home or business or search a person or a place is given, police do not need probable cause or warrants for searches and seizures. Consent must be given freely and voluntarily by a person with the lawful right to do so.

Needless to say, police constantly ask for consent to enter and search and many people accede to their requests at their own detriment. Frequently your clients will tell you that they didn't want to consent to a search but they were unaware of their right to refuse, intimidated by police and feared worse consequences to themselves if they declined. Not surprisingly the police version will be that the consent was freely and voluntarily given without any intimidation or pressure on their part.

The prosecution has the burden of show by clear and convincing evidence that consent was freely and voluntarily given. *U.S. v. Mendenhall*, 446 U.S. 544 (1980). The voluntariness of consent is determined by the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). When a person is unlawfully detained, evidence can be suppressed notwithstanding their consent to search. *Florida v. Royer*, 460 U.S. 491 (1983).

Additional Wisconsin Cases:

The state has the burden to show that consent is free & voluntary. *State v. Johnston*, 184 Wis.2d 806 (1994).

Consent to search need not be given verbally; it may take the form of gestures, actions or conduct. *State v. Phillips*, 218 Wis.2d 180 (1998); *State v. Tomlinson*, 2002 WI 91. Consent

found voluntary when police did not use deception or trickery; threaten or intimidate suspect, circumstances were non-threatening, cooperative conditions, and suspect didn't object to police presence in home, and there was no record of any particular vulnerabilities of suspect, *Phillips, Id.*

Law enforcement must ask for permission to search in order for consent to be given. *State v. Kiekhefer*, 212 Wis.2d 460 (Ct. App. 1997). Law enforcement may not threaten to obtain search warrant where valid grounds do not exist to obtain warrant; but when expressed intention to obtain warrant is genuine and not a pretest to induce submission, it does not vitiate consent. *Id.* Mere acquiescence to stated intent to search is insufficient. *State v. Johnson*, 2007 WI 32.

“Orderly submission to law enforcement officers who, in effect, incorrectly represent that they have the authority to search and seize property, is not knowing, intelligent and voluntary consent under the Fourth Amendment.” *State v. Giebel*, 2006 WI App 239.

Police do not have to disclose secondary reasons for search when they truthfully disclose primary reason for search and there is no deception or false pretext. *State v. Kelley*, 2005 WI App 199.

When arresting officer correctly states the truth about consequences for refusal to submit to OWI breath or blood test, consent is voluntary. *Village of Little Chute v. Walitalo*, 2002 WI App 211.

A "knock and talk" interview at a private residence can lose its consensual nature and effectively become an in-home seizure or constructive entry, triggering Fourth Amendment scrutiny. When the situation is such that a person would not wish to leave his or her location, such as his or her home, the appropriate inquiry is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter. *City of Sheboygan v. Cesar*, 2010 WI App 170.

Consent to search found voluntary despite police forcible entry to home exterior and interior doors with guns drawn, *State v. Arctic*, 2010 WI 83.

Some Wisconsin cases where consent found involuntary: Acquiescence under false pretenses, to police entry of motel room vitiated any consent for their subsequent search of that room. *State v. Munroe*, 2001 WI App 104; police made misrepresentation as to existence of warrant, *Hadley v. Williams*, 368 F.3d 747 (7th Cir. 2004); owner's consent to search his apartment, given in response to police threat to obtain a search warrant even though no probable cause existed, consent was involuntary. *State v. Trecroci*, 2001 WI App 126; routine traffic stop prolonged to seek consent. *State v. Luebeck*, 2006 WI App 87.

Who may consent to entry and searches of the home

Any lawful occupant of a property has the authority to give consent to enter and search that property. *Schneckloth, Id.* They have the right to refuse to consent to an entry and search but unlike the Fifth Amendment, there is no requirement that police must inform someone of their Fourth Amendment rights to refuse. *Schneckcloth, Id., Ohio v. Robinette*, 519 U.S. 33 (1996).

A person's authority to consent to enter and search a home may not extend to all areas of a home that are shared by others. If a co-occupant has taken steps to protect their own private area of a home, others lack the authority to consent to a search. However, the search may still be deemed valid notwithstanding absence of actual authority to consent if the police reasonably believe that such authority did exist. *Illinois v. Rodriguez*, 497 U.S. 177 (1990).

When there are multiple occupants of a residence and only one person gives consent to a warrantless search while a co-occupant is present and objects to the search, the search is unlawful unless exigent circumstances, such as an emergency, are present, *Georgia v. Randolph* 547 U.S. 103 (2006).

A hotel proprietor or employee may not give consent to search a guest's hotel room. *Stoner v. California*, 376 U.S. 483 (1964).

Additional Wisconsin Cases:

When two persons have equal rights to the use or occupancy of premises either has common authority and may give consent to search. *Embry v. State*, 46 Wis.2d 151 (1970). When one co-habitant consents to search and the other did not object., search is permissible. *State v. Pirtle*, 2011 WI App 89. It was reasonable for the officers to conclude that the leaseholder of a property had the authority to consent to them proceeding up the property's stairs to look for another tenant who was not present to either consent or refuse consent when: 1) a third non-leaseholder tenant refused to consent; 2) the officers were aware that the tenant granting consent was the leaseholder of the property; and 3) the person refusing consent had not previously lived there and had left the room to wake up the subject of the police inquiry after the officers arrived. *State v. Lathan*, 2011 WI App 104.

Both co-occupants must be present at the "threshold colloquy" for consent in order for *GA v. Randolph* to apply; when one party was under arrest in police van and denied consent, search still valid. *State v. St. Martin*, 2011 WI 44.

Children: Five-year-old child found unable to give consent to enter home. *Laasch v. State*, 84 Wis. 2d 587 (1978), but teenager found to have given consent when upon opening door, child walked into home and parent did not say anything. *State v. Tomlinson*, 2002 WI 91.

Apparent Authority: Consent may be valid notwithstanding absence of actual authority to consent if police reasonably believe such authority did exist, *State v. Kieffer*, 207 Wis.2d 462 (Ct. App. 1996).

Scope of consent

A person who consents to search can limit its scope. *Florida v. Jimeno*, 500 U.S. 248 (1991). Consent must be specifically given; permission to search a garage does not implicitly authorize search of adjoining house. *Walter v. U.S.*, 447 U.S. 649 (1980).

Additional Wisconsin Cases:

Consent to look for weapons does not allow officer to look into containers that are too small to hold weapon (film canister in this case). *State v. Johnson*, 187 Wis.2d 237 (Ct. App. 1994). By requesting permission to search for weapons, law enforcement officer limits the scope of the consent. *Id.*

Consent to strip search does not imply consent to body cavity search. *State v. Wallace*, 2002 WI App 61.

Informing officer that the trunk did not open failed to limit the scope of consent to search the trunk when the driver also gave explicit consent to look in trunk. *State v. Stankus*, 220 Wis.2d 232 (Ct. App. 1998).

Hotel room occupant who had apparent authority over the room authorizing her to consent to a search of the room, did not have actual or apparent authority over the inside of the safe when the safe was locked, she could not open the safe, and she did not even know it was in the room. *State v. Pickens*, 2010 WI App 5.

Seizures of Persons: The Terry Doctrine

The Fourth Amendment prevents unlawful seizures of persons and property. A person is seized for Fourth Amendment purposes when subjected to a brief investigatory stop. A detention of an individual for almost any reason is a seizure within the meaning of the Fourth Amendment. *Terry v. Ohio*, 392 U.S. 1 (1968); *Sibron v. New York*, 392 U.S. 40 (1968).

Temporary seizures of a person for investigative purposes are permissible under the Fourth Amendment but they must be reasonable, *Terry v. Ohio*, 392 U.S. 1, 20-22(1968); *Delaware v. Prouse*, 440 U.S. 648 (1979). A law enforcement officer may stop an individual upon “reasonable suspicion” that the person has, is or is about to commit a crime. *Terry v. Ohio*, 392 U.S. 1 (1968). Reasonable suspicion is defined as a level of cause greater than a mere hunch but is less than probable cause. Police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. *Terry, Id.* Stopping a car and detaining the occupants, even only briefly and for a limited purpose, is a seizure within the meaning of Fourth Amendment. *Delaware v. Prouse*, 440 U.S. 648 (1979); *Berkemer v. McCarty*, 468 U.S. 420 (1984); *Whren v. U.S.*, 517 U.S. 806 (1996).

Defining a Seizure

A seizure is determined by whether a reasonable person would have believed that he was not free to leave. *U.S. v. Mendenhall*, 446 U.S. 544 (1980). A belief that one is seized is reasonable when police take actions such as activating sirens, commanding a person to stop, displaying weapons, block travel, or otherwise restrict that person’s movement, *Michigan v. Chesternut*, 486 U.S. 567 (1988). Other indicia include some physical touching of the person of the citizen, or the use of language or a tone of voice indicating that compliance with the officer's request might be compelled, *Id.*

A seizure doesn't occur simply because a police officer approaches an individual, identifies themselves and asks questions concerning criminal activity, *California v. Hodari D.*, 499 U.S. 621 (1991), as long as the person is free to refuse to answer and leave. A police show of authority only constitutes a seizure once a person voluntarily stops or police accompany a show of force by the application of physical force. *Id.* Driving alongside a person who is running in order to conduct further investigation does not constitute a seizure, *Michigan v. Chesternut*, *Id.* The mere fact that the police-citizen encounter takes place in public transportation setting such as on a bus does not turn the encounter into a seizure. *Florida v. Bostick*, 501 U.S. 429 (1991). But if the surrounding conditions are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, then a seizure has occurred, *Florida v. Royer*, 460 U.S. 491 (1983).

Additional Wisconsin Case: *State v. Williams*, 2002 WI 94.

Permissible Length of Temporary Seizures

Seizures during investigative detentions may last "no longer than is necessary to effectuate the purpose of the stop. *Florida v. Royer*, 460 U.S. 491, 500 (1983). What begins as a reasonable seizure is transformed into an unreasonable one if it extends the stop beyond the time necessary to fulfill the purpose of the stop. *United States v. Sharpe*, 470 U.S. 675 (1985). Property can be seized for a brief period for investigative purposes under the *Terry* doctrine; for example dog sniffs during brief traffic stops are permissible, *Illinois v. Caballes*, 543 U.S. 405 (2005). But a weekend long detention of luggage after being sniffed by drug dog was an impermissible seizure, *United States v. Place*, 462 U.S. 696(1983). Questioning can transform a reasonable seizure into an unreasonable one if it extends the stop beyond the time necessary to fulfill the purpose of the stop. *U.S. v. Sharpe*, 470 U.S. 675 (1985). Stopping automobile and detaining occupants, even only briefly and for limited purpose, is a seizure within the meaning of Fourth Amendment. *Delaware v. Prouse*, 440 U.S. 648 (1979);

Additional Wisconsin Cases:

When an officer has fulfilled the purpose of a lawful stop, request for permission to search the vehicle does not, in itself, transform the stop into an unlawful one. *State v. Gaulrapp*, 207 Wis. 2d 600 (Ct. App. 1996). Incremental intrusion that results from questioning vehicle passenger about identity is permissible. *State v. Griffith*, 2000 WI 72. Officers from different law enforcement agencies may both participate in investigatory stop. *State v. Gruen*, 218 Wis.2d 581 (Ct. App. 1998).

Reasonable for the police to detain and transport defendant to the scene of the accident in order to determine if defendant's intoxication contributed to the accident and permissible under sec. 968.24 Wis. Stats. *State v. Quartana*, 213 Wis. 2d 440 (Ct. App. 1997).

Detention was permitted on reasonable suspicion grounds when it lasted one hour and subject was handcuffed because police were awaiting arrival of search warrant. *State v. Vorburger*, 2002 WI 105.

Detaining driver for 30-45 minutes at serious traffic accident before administering field sobriety tests was reasonable. *State v. Colstad*, 2003 WI App 25.

Officer may ask defendant questions outside the scope of the initial traffic stop when officer had become aware of specific and articulable facts giving rise to the reasonable suspicion that a crime had been, was being, or was about to be committed. *State v. Malone*, 2004 WI 108.

Police officer exceeded the permissible scope of routine traffic stop when he continued to detain the vehicle after the driver told him there were no drugs in the vehicle and that he could not search it. *State v. Gammons*, 2001 WI App 36.

A "knock and talk" interview at a private residence can lose its consensual nature and effectively become an in-home seizure or constructive entry, triggering 4th amendment scrutiny. When the situation is such that a person would not wish to leave his or her location, such as his or her home, the appropriate inquiry is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter. *City of Sheboygan v. Cesar*, 2010 WI App 170.

Permissible reasons for a Seizure:

Many cases have taken up the issue of what conduct gives rise to reasonable suspicion and permits a seizure of the person under the Fourth Amendment. The standard is whether the facts amount to reasonable suspicion when viewed from the point of view of an objectively reasonable police officer. *Ornelas v. United States*, 517 U.S. 690 (1996); the court typically gives deference to the opinions of experienced police officers as to what is suspicious conduct. *Id.* A few examples of what has been determined to be reasonably suspicious behavior justifying a stop are:

- Tips given by known informants who have given reliable information in the past. *Adams v. Williams*, 407 U.S. 143 (1972).
- Unprovoked flight from the presence of police officer. *Illinois v. Wardlow*, 528 U.S. 119 (2000).
- Stops for traffic law violations even if the stop is pretextual and officer is actually seeking to accomplish other law enforcement objective. *Whren v. U.S.*, 517 U.S. 806 (1996).
- Investigative detentions during search warrant executions. *Michigan v. Summers*, 452 U.S. 692 (1981).
- Temporary Detention of Luggage to be sniffed by drug dog, *United States v. Place*, 462 U.S. 696(1983).
- Cars believed to be carrying illegal aliens near the border. *United States v. Cortez*, 449 U.S. 411 (1981).
- Wanted posters issued by a different law enforcement agency. *United States v. Hensley*, 469 U.S. 221 (1985).
- Suspect matching a drug courier profile. *United States v. Sokolow*, 490 U.S. 1, 9 (1989).

- Multiple factors which, while standing alone wouldn't justify stop, taken together give rise to reasonable suspicion, for example combination of recent crime report, suspicious appearance or conduct, late night, high crime neighborhood, driving on roads to avoid police contact. *United States v. Arvizu*, 534 U.S. 266 (2002); *United States v. Cortez*, *Id.*

Additional Wisconsin Cases:

State v. Guzy, 139 Wis.2d 663 (1987) Six factor test for reasonableness of investigatory stop (1) the particularity of the description of the offender or the vehicle in which he fled; (2) the size of the area in which the offender might be found, as indicated by such facts as the elapsed time since the crime occurred; (3) the number of persons about in that area; (4) the known or probable direction of the offender's flight; (5) observed activity by the particular person stopped; and (6) knowledge or suspicion that the person or vehicle stopped has been involved in other criminality of the type presently under investigation

Weaving within a single traffic lane does not alone give rise to the reasonable suspicion necessary to conduct an investigative stop of a vehicle. The reasonableness of a stop must be determined based on the totality of the facts and circumstances. *State v. Post*, 2007 WI 60.

There is a difference between police informers, who usually themselves are criminals, and citizen informers that calls for different means of assessing credibility. A citizen informant's reliability is subject to a much less stringent standard. When an informant does not give some indication of how he or she knows about the suspicious or criminal activity reported it bears significantly on the reliability of the information. *State v. Kolk*, 2006 WI App 261.

Unlawful flight from police officer. *State v. Anderson*, 155 Wis. 2d77 (1990).

Cases where stops held lawful: Observation of what officers believe is aborted drug transaction in area known for drug dealing where landlord had requested police presence to stop trespassing and drug activity, *State v. Amos*, 220 Wis.2d 793 (Ct. App. 1998); Observation by police officers at night in a known drug neighborhood of defendant standing around, getting in and out of a car quickly, and walking toward a pay phone, *State v. Allen*, 226 Wis.2d 66 (Ct. App. 1999); Erratic, although not illegal driving, at an early morning hour, combined with driver stopping and pouring a drink onto the road justified officer's suspicion that driver could have been intoxicated. Fact that driver's actions were not unlawful was not determinative, *State v. Waldner*, 206 Wis. 2d 51; Observation of at least seven air fresheners hanging from the vehicle's rear view mirror, combined with inconsistent stories by nervous vehicle occupants as to where they were going, *State v. Mtalone*, 2004 WI 108; Detention of suspected runaway teen sitting alone in high crime area who fled from the police after being told to "stay put", *In the Interest of Kelsey C.R.*, 2001 WI 54; Checking legality of temporary license plate, *State v. Lord*, 2006 WI 12; Unusually nervous behavior, *State v. Bons*, 2007 WI App124.

Cases where stops held unlawful: Vehicle stopped at stop sign a few seconds longer than usual; no evidence to indicate that driver saw, or would be able to see that he was facing a squad car late at night. *State v. Fields*, 2000 WI App 218; Presence in high drug trafficking area and short contact with another person on sidewalk in early afternoon without any observation of actual exchange by officer. *State v. Young*, 212 Wis.2d 417 (Ct. App. 1997); Only specific articulable information police possessed was that defendant's vehicle pulled away from the curb close to

the robbery suspect's address, and that the vehicle contained several black males, *State v. Harris*, 206 Wis. 2d 243 (1996); Observation of picture of a mushroom on defendant's wallet during the course of officer writing him a speeding ticket, *State v. Betow*, 226 Wis. 2d 90 (Ct. App. 1999); Exceeding permissible scope of routine traffic stop when occupants tell officer no drugs and denies permission to search, *State v. Gammons*, 2001 WI App 36; Weaving within a lane of travel, absent more, is not reasonable suspicion. *State v. Post*, 2007 WI 60.

Seizures bases on anonymous tips

The U.S. Supreme Court held in *Alabama v. White*, 529 U.S. 266 (1990) that an anonymous tip containing specific information about an individual's whereabouts and path of travel when corroborated by independent police work is sufficient for a Terry stop. However, an anonymous tip which merely gives a general description of a person in a certain location and claims that this person is carrying a gun, without more, is insufficient to justify a police officer's stop and frisk of that person, *Florida v. J.L.*, 529 U.S. 266 (2000). The crucial difference is that the tipster didn't provide any predictive information about the suspect, thus leaving police without any ability to test the reliability of the informant's knowledge or credibility.

Additional Wisconsin Cases:

Alabama v. White adopted in Wisconsin, *State v. Richardson*, 156 Wis.2d 128 (1990).

When anonymous caller provided predictive information that, if true, demonstrated a special familiarity with the defendant's affairs that the general public would have had no way of knowing and an officer verified this predictive information, reasonable suspicion provided to stop the defendant's vehicle. *State v. Sherry*, 2004 WI App 207.

When an anonymous tip whose indicia of reliability is debatable, is supplemented by behavior observed by the officer at the scene and deemed suspicious reasonable suspicion exists to justify a Terry stop. Suspicious conduct by its very nature is ambiguous, and the principle function of the investigative stop is to quickly resolve that ambiguity. *State v. Patton*, 2006 WI App 235.

Anonymous informant's tip that an individual was selling drugs in an apartment was sufficiently corroborated when police verified occupant's name, address and telephone number. *State v. Robinson*, 2010 WI 80..

Seizures on Public Transportation

Police do not violate the Fourth Amendment when they are board buses and ask passengers for permission to search their person and belongings as long as a reasonable person would understand that they were free to refuse; advisement of the right to refuse is not required. *United States v. Drayton*, 536 U.S. 194 (2002); *Florida v. Bostick*, 501 U.S. 429 (1991).

Many stops at airports and bus stations are based on drug courier profiles, in which law enforcement officer claim that a series of behavioral factors exhibited by a person match that of a drug courier. While any one factor in a drug courier profile standing alone may be insufficient to justify a stop, taken together, the factors can add up to reasonable suspicion. *United States v. Sokolow*, 490 U.S. 1, 9 (1989). When these stops extend into what becomes an arrest, they are unreasonable. *Florida v. Royer*, 460 U.S. 491 (1983). But, information gained during the

investigative interview or Terry stop may then give rise to probable cause to arrest.

Requests for Identification

A police officer is free to ask a suspect to identify himself without implicating the Fourth Amendment. *INS v. Delgado*, 466 U.S. 210, 216 (1984). An officer can ask someone to identify themselves during a Terry stop. *United States v. Hensley*, 469 U.S. 221 (1985); *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177 (2004). However, police cannot arrest someone for refusal to identify themselves if the identification request is not reasonably related to the circumstances justifying the stop. *Hayes v. Florida*, 470 U.S. 811,817 (1985).

Additional Wisconsin Cases:

When police legitimately stop suspect and can't confirm identity through police records, they may conduct an identification search, limited to uncovering wallet or other repository for identifying papers. *State v. Black*, 2000 WI App 175.

Officer may ask passenger for identification during the stop but passenger is free to decline to answer, and refusal to answer does not give rise to any reasonable suspicion of wrongdoing. *State v. Griffith*, 2000 WI 72.

Roadblocks:

Absent special circumstances, the Fourth Amendment forbids police to make stops without individualized suspicion at a checkpoint set up primarily for general "crime control" purposes. *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000). However, there are situations in which roadblock checks are permissible. These are:

- Sobriety checkpoints to curb drunk driving. *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444 (1990).
- Checkpoints for the purpose of asking the vehicle occupants for help in providing information about a crime in all likelihood committed by others. The stop's primary law enforcement purpose must not be to determine whether a vehicle's occupants were committing a crime. *Illinois v. Lidster*, 540 U.S. 419(2004).

Reasonable Suspicion: Frisk of Suspects

The reasonable suspicion doctrine, in addition to allowing temporary detention of a suspect, permits what is known as a *Terry* frisk of a suspect. This frisk is a limited pat down for weapons when an officer is justified in belief that suspect may be armed and dangerous to officer or others. *Terry v. Ohio*, *Id.* at 30-31. A specific and articulable belief on the part of the officer is essential; valid stops do not automatically confer police the right to pat down the suspect. For example, Mere presence in a place where a non-violent crime is occurring, such as drug trafficking, does not give rise to the right to conduct a pat down. *Ybarra v. Illinois*, 444 U.S. 85

(1979).

The *Terry* rule applies identically to encounters on the street and traffic stops; police must have reasonable suspicion that the person subjected to the frisk is armed and dangerous in order in order to conduct a pat down during either situation. *Arizona v. Johnson*, 555 U.S. 323 (2009).

The pat down is limited to feeling the suspect's body over their clothing. When police have reasonable suspicion which permits the frisk and feel an object they believe to be a weapon, they may then go into a pocket or under the clothes to retrieve the weapon. A further search can only take place if the discovery of a weapon gives rise to probable cause for an arrest and a search incident to that arrest.

Additional Wisconsin Cases:

Terry does not authorize officers to conduct a protective frisk as a part of every investigative encounter. Protective frisk limited to situations in which the officer is "justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others". *State v. McGill*, 2000 WI 38. Frisks which are a general precautionary measure, not based on the conduct or attributes of defendant, are not permissible. *State v. Mohr*, 2000 WI App 111

A court may consider an officer's belief whether or not his or others' safety was in danger in determining whether the objective standard of reasonable suspicion was met. *State v. Kyles*, 2004 WI 15.

Suspect behavior. Courts have declined to adopt bright lines rules concerning factors in decision to frisk. Courts examine facts in a case-by-case analysis, looking at totality of circumstances in deciding whether frisk justified. *Kyles, Id.* Some of the factors courts have considered are:

- Individual's failure to obey the direction of an officer to keep hands in the officer's sight. *Kyles, Id.*
- Failure to immediately stop for police in routine traffic stop. *McGill, Id.*
- Nervousness, such as hand twitches, in excess of most traffic suspects *McGill, Id.*
- Apparent alcohol and drug intoxication justified pat down. *McGill, Id.*
- Large fluffy coat in winter *Kyles, Id.*
- High crimes area. *Kyles, Id.*; *State v. Morgan*, 197 Wis.2d 200 (1995).
- Time of stop in high crime area, *Morgan, Id.*; *State v. Mata*, 230 Wis.2d 567 (Ct. App. 1999).
- Area known for gang, drugs and weapon activity combined with odor of marijuana. *Mata, Id.*
- Failure to yield to the police officers' show of authority by running away after being told to "stay put". *In the Interest of Kelsey C.R.*, 2001 WI 54.
- Furtive movements alone in non-criminal traffic stop insufficient. *State v. Johnson*, 2007 WI 32.

Under the totality of the circumstances, the trooper's observation of the defendant's furtive movements and visible nervousness, a record of arrests for violent crimes, and a drug delivery

arrest that had occurred nearby a short time before the stop constituted specific and articulable facts that, taken together with the rational inferences from those facts, created reasonable suspicion and justified a protective search for the officer's safety. *State v. Buchanan*, 2011 WI 49

Scope of Terry Frisk

Terry frisks are not limited to pat downs of persons; police can also conduct a *Terry* “frisk” of a car if reasonable suspicion exists to believe a driver or passenger subjected to a vehicle stop is armed and dangerous. *Michigan v. Long*, 463 U.S. 1032 (1983). When officers are conducting a frisk, whether of a car or other location, if they observe contraband they may seize it under the plain view doctrine. *Id.* However, it must be apparent that the item in plain view is contraband; if a further search of the item is required to determine this, the plain-view doctrine cannot justify a seizure. *Arizona v. Hicks*, 480 U.S. 321 (1987).

Plain view has morphed into “plain touch”, i.e. when a legitimate *Terry* frisk for weapons is conducted and the officer feels an item which is apparently contraband, he may lawfully seize the item. *Minnesota v. Dickerson*, 508 U.S. 366 (1993). But if the incriminating nature of the item is not immediately apparent to the officer, it cannot be examined further to determine if it is contraband. *Id.*

Additional Wisconsin Case:

Manipulation of defendant’s waistband during frisk was permissible when defendant had bulky frame and heavy clothing, thereby impeding effective pat down. It was a minimally intrusive exploration of outer clothing designed to discover whether defendant had a weapon. *State v. Triplett*, 2005 WI App 255; see also *State v. Limon*, 2008 WI App 77.

When officer conducting a *Terry* frisk feels something which is clearly contraband, may seize it; plain view doctrine extends to plain touch or feel. *State v. Guy*, 172 Wis. 2d 86(1992); when officer does not feel anything that resembles weapon or contraband, may not conduct further search. Shining flashlight down defendant’s pants impermissible. *State v. Ford*, 211 Wis.2d 741 (Ct. App. 1997).

Seizures of Property

Seizures subject to a Fourth Amendment analysis include seizures of property as well as of persons. *United States v. Jacobson*, 466 U.S. 109 (1984). The Fourth Amendment proscribes unlawful seizure of one’s property even if there is no expectation of privacy in the property, *Soldal v. Cook County*, 506 U.S. 56 (1992). Property is not seized within the meaning of the Fourth Amendment when it is available for sale to the public, *Maryland v. Macon*, 472 U.S. 463 (1985).

Although not property, fingerprints are commonly seized from a suspect whenever there is an arrest of that person. Reasonable suspicion is sufficient to require a suspect to submit to fingerprinting if the printing will establish or negate the suspect’s connection with a particular crime. *Hayes v. Florida*, 470 U.S. 811, 817 (1985). If fingerprints are obtained as a result of an

unlawful arrest, they are to be suppressed. *Davis v. Mississippi*, 394 U.S. 721 (1969).

Arrest

An individual is “under arrest” when a reasonable person in their position would consider themselves to be in custody given the degree of restraint, the circumstances of the situation and words or actions by police. Put more simply, an arrest occurs when a reasonable person believes that they are not free to leave. *Florida v. Royer*, 460 U.S. 49, 502-505 (1983). This definition, however, has been somewhat disingenuously been applied, as there are many instances in which reasonable people perceive they are not free to leave, which courts have been deemed only to constitute a temporary stop.

Additional Wisconsin Case:

A person is under arrest when a reasonable person in the defendant’s position would consider themselves to be in custody given the degree of restraint, the circumstances of the situation and words or actions by police. *State v. Swanson*, 164 Wis.2d 437 (1991); *overruled on other grounds*. If the police say “you are under arrest” and they also immediately say you will be issued a citation and then be free to go, person is not under arrest. *State v. Marten-Hoye*, 2008 WI App 19. If probable cause exists to arrest for any crime it does not matter that the suspect was arrested for a different crime, *State v. Sykes*, 2005 WI 48.

Probable Cause for Arrest

An arrest of a person, in contrast to a temporary seizure, requires probable cause. *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). The standard is identical for warrants issued by magistrates as it is for warrantless arrests by police. When an officer has a good faith but mistaken belief there is probable cause for arrest, the arrest is still invalid. *Henry v. U.S.*, 361 U.S. 98(1959); *Beck v. Ohio*, 379 U.S. 89 (1964). Probable cause is to be assessed under a totality of the circumstances test. *Illinois v. Gates*, 462 U.S. 213 (1983).

When an individual has given information to the police which provides probable cause to arrest, a court will analyze an informant’s veracity, reliability and the basis for the informant’s knowledge as relevant factors when making a decision under the totality of circumstances test in determining if the arrest is valid. *Illinois v. Gates, Id.* An arrest based on an anonymous tip requires corroborating information. *Alabama v. White*, 496 U.S. 325 (1990).

A great deal of Fourth Amendment litigation centers on whether there was probable cause for an arrest and the subsequent full blown searches, confessions or other fruits of the arrest or whether or not police only had reasonable suspicion justifying a temporary stop and thus could not conduct a full blown search. There is no litmus test or bright line for determining what adds up to full blown probable cause vs. what merely gives rise to reasonable suspicion; courts have determined this on a case-by-case basis. For example, flight from a police officer in a drug-trafficking area may constitute reasonable suspicion to conduct a *Terry* stop but it does not rise to the level of probable cause, *Illinois v. Wardlow*, 528 U.S. 119 (2000). On the other hand, when contraband was found in the vehicle and all the occupants had accessibility and none admitted possession, the court held that they could all be arrest, *Maryland v. Pringle*, 540 U.S. 366 (2003).

When a state statute mandates that a person is to be issued a citation or summons for a minor offense, police do not violate the Fourth Amendment when they instead choose to arrest that individual. *Virginia v. Moore*, 553 U.S. 164 (2008).

Additional Wisconsin Cases:

Police officer must have facts and circumstances within their knowledge to believe that an offense has been committed or is being committed and probably committed by the arrestee. *State v. Richardson*, 156 Wis.2d 128 (1990); Probable cause is information which leads a reasonable officer to believe that guilt is more than a possibility. *State v. Pasek*, 50 Wis.2d 619 (1971). Test for warrantless arrest is whether a warrant could have been obtained based on the information in officer's possession. *Id.* An arrest was lawful when the urgency reasonably perceived by the officers was compelling and the danger they reasonably perceived for themselves and others if they did not move quickly was substantial. *State v. Ayala*, 2011 WI App 6.

An arrest can be lawfully made for non-criminal traffic or ordinance violation. *State v. King*, 142 Wis.2d 207 (1987).

When officer articulates invalid basis for arrest but other objective facts support a correct legal theory for arrest, then arrest is lawful. *State v. Baudhuin*, 141 Wis.2d 642 (1987). When officer was subjectively motivated to arrest defendant for a nonexistent crime, arrest was nonetheless legal because police had probable cause to arrest him for an actual crime. *State v. Repenshek*, 2004 WI App 229. When officer had probable cause to arrest defendant for trespass prior to the search of defendant's wallet, whether the officer intended to arrest defendant for criminal trespass prior to search, or *whether* defendant was actually arrested for and charged with criminal trespass not dispositive of whether the search was lawful. Search held lawful because law enforcement had probable cause to arrest defendant for a crime prior to the search. *State v. Sykes*, 2005 WI 48.

Police officer may rely on collective information in possession of the department. *State v. Cheers*, 102 Wis.2d 367 (1981). However, if the police department does not communicate the police data to the arresting officer, then the collective-knowledge theory cannot apply. *State v. Kueht*, 2003 WI App 1. This doctrine includes information about reliability of informant. *State v. Black*, 2000 WI App 175. The rule extends from one department to another. *Schaffer v. State*, 75 Wis.2d 673 (1977), *overruled on other grounds*.

Ordinary persons who answered questions and provided information in response to a police investigation of a crime are considered reliable as are other citizen informants. *State v. Ritchie*, 2000 WI App 136; police were entitled to rely on information from a known and reliable informant without independently determining the reliability of the informant's source or the source's information, *State v. McAttee*, 2001 WI App 262.

Strong odor of marijuana coming from the direction of the defendant inside an automobile gave rise to probable cause to arrest, *State v. Secrist*, 224 Wis.2d 201(1999); When officer detected odor of raw marijuana, and eliminated two of three vehicle occupants as the possessors of marijuana, probable cause existed to search and arrest defendant. *State v. Mata*, 230 Wis.2d 567 (Ct. App. 1999); When there is no greater basis to believe that a person was the source of the

odor than any of the other individuals present, no probable cause to arrest. *State v. Wilson*, 229 Wis.2d 256 (Ct. App. 1999).

Odor of a controlled substance may provide probable cause to arrest suspect in their home when (1) The odor is unmistakable; (2) it may be linked to a specific person or persons because of the circumstances in which the odor is discovered or because other evidence links the odor to the person or persons and (3) Exigent circumstances also existed based on resident's awareness of police presence and opportunity to destroy evidence. *State v. Hughes*, 233 Wis.2d 280 (2000).

Officer's decision to arrest driver on OWI without performing of field sobriety tests was reasonable when in light of injuries to driver in light of other facts (accident caused by driver, red eyes, odor of intoxicants) supporting probable cause, *State v. Pfaff*, 2004 WI App 31; When driver in accident admitted drinking and smells strongly of alcohol, probable cause to arrest on OWI and perform warrantless blood draw, *State v. Erickson*, 2003 WI App 43; Also see *Waukesha County v. Smith*, 2008 WI 23. Officer lacked probable cause to arrest when he knew only that two tipsters had called dispatch, alleging that the driver of a vehicle was driving while intoxicated and officer had not yet smelled the odor of intoxicants on driver's breath, detected his slurred speech, or even obtained his concession that he had been driving., *State v. Larson*, 2003 WI App 150.

Warrantless Arrests in the Home

A warrantless entry into a home to make an arrest is impermissible without a warrant or exigent circumstances. *Payton v. New York*, 445 U.S. 573 (1980). When a person is at the front door of their home, police are not required to have a warrant because the home is not entered. *United States v. Santana*, 427 U.S. 38 (1976). The warrant rule applies when the arrestee is at the home of another person as well as his own; either consent or exigent circumstances is required to enter. *Steagald v. United States*, 451 U.S. 204 (1981). When police enter a home as a result of exercising their community caretaker function and probable cause for an arrest is found, the subsequent arrest is lawful. *Cady v. Dombrowski*, 413 U.S. 433 (1973).

Additional Wisconsin Cases:

In-home warrantless arrest unlawful absent probable cause and exigent circumstance. *Payton v. New York*, 445 U.S. 573 (1980); *State v. Rodriguez*, 2001 WI App 206.

Warrantless entry into home to arrest for OWI first offense is unlawful. But, *State v. Hughes*, 233 Wis.2d 280, 299-300 (2000), permits entry in first offense possession of marijuana case.

Warrant not required for entry into parolee's home due to diminished expectation of privacy; only apprehension request from parole agent required. *State v. Pittman*, 159 Wis.2d 764 (Ct. App. 1990).

When search of defendant's residence was performed by his probation agent and police officers were present only for protection it is a permissible probation and not a law enforcement search. *State v. Wheat*, 2002 WI App 153.

Exigent Circumstances

Arrests made as the result of warrantless entries into homes are permissible if there are exigent circumstances which justify the entry. The most common exigency is hot pursuit; see sec. xxx.5 this chapter for relevant case law. The emergency doctrine also permits warrantless entries.

Search Incident to Arrest

Police may conduct a full blown search of an arrestee and the surrounding area within his reach in a home, *Chimel v. California*, 395 U.S. 752 (1969), or of the car he is arrested in, *Arizona v. Gant*, 556 U.S. 332 (2009), if the car is “within reach” and the search is related to the arrest offense. Courts have given “within reach” a broad interpretation, upholding searches incident to arrest where there is no way the arrestee could possibly have reached for a weapon while handcuffed, surrounded by officers or otherwise disabled. Police may conduct searches incident to arrest even when they have the option of issuing a ticket instead of making an arrest, *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001). The Fourth Amendment is not violated when a state statute mandates issuance of a ticket or summons instead of an arrest. *Virginia v. Moore*, 553 U.S. 164 (2008).

Remedies for Unlawful Arrest

Criminal charges still stand against an individual when they are unlawfully arrested; dismissal of the case is not a remedy. *Gerstein v. Pugh*, 420 U. S. 103, 119 (1975); *Frisbie v. Collins*, 342 U. S. 519 (1952); *Ker v. Illinois*, 119 U. S. 436 (1886). However, any evidence seized from the person is suppressible under the fruit of the poisonous tree doctrine.

Mirandized confessions obtained after an arrest made without probable cause are suppressible as long as they are not attenuated from the arrest, *Taylor v. Alabama*, 457 U.S. 687, 690 (1982); *Brown v. Illinois*, 422 U.S. 599, 602 (1975); *Dunaway v. New York*, 442 U.S. 200 (1979). However, when police make an in-home warrantless arrest upon probable cause, any later confession is admissible. *New York v. Harris*, 495 U.S. 14 (1990).

An eyewitness’ identification of an arrestee is not suppressible due to an unlawful arrest if the unlawful arrest didn’t play a role in the witness’ identification of the defendant. *United States v. Crews*, 445 US 463 (1980). If an out of court identification procedure such as a live line-up took place as the result of an illegal arrest, that particular procedure can be suppressed; but any in-court identification is admissible if there is an independent basis for the identification.

Special Rules for Moving Vehicles

Another exception to the search warrant rule is known as the automobile exception; though automobile is a misnomer because it applies to all moving vehicles. An automobile may be searched without a warrant if there is probable cause to search the vehicle and the vehicle is readily mobile. *Chambers v. Maroney*, 399 U.S. 42 (1970); *U.S. v. Ross*, 456 U.S. 798 (1982).

One's privacy interest in a moving vehicle is considered to be less than that in a home, *New York v. Class*, 475 U.S. 106 (1986). Car searches are not limited to looking for contraband; police may search for evidence of a crime as well *California v. Carney*, 471 U.S. 386 (1985). This right to search items in a car without a warrant extends to containers located within the passenger compartment or trunk of the care, even when police lack probable cause to search the remainder of the car. *California v. Acevedo*, 500 U.S. 565 (1991). Packages need not be searched immediately. *U.S. v. Johns*, 469 U.S. 478 (1985).

When a person is arrested in a car, police may search the passenger compartment and all containers inside that compartment of a car incident to the arrest of the car's occupant. However, this search is permissible only if the arrestee is within reaching distance of the car or police reasonably believe the car contains evidence related to the offense of arrest. *Arizona v. Gant*, 556 U.S. 332 (2009).

A *Terry* search for weapons is authorized when police stop a vehicle and have reasonable suspicion to believe vehicle may contain weapons potentially dangerous to officer. *Michigan v. Long*, 463 U.S. 1032 (1983).

A dog sniff of car during a lawful traffic stop is permissible as long as it occurs during a reasonable time deemed necessary to conduct the traffic stop, *Illinois v. Caballes*, 543 U.S. 405 (2005). A prolonged detention to conduct the dog sniff is not permissible.

Additional Wisconsin Cases:

Chambers v. Maroney adopted in WI; *Thompson v. State*, 83 Wis.2d 134 (1978); *State v. Marquardt*, 2001 WI App 219.

When vehicle is not within an arrestee's immediate presence, it may not be searched incident to arrest. , 144 Wis. 2d 116 (1988). It matters not that the arrestee is handcuffed, *State v. Littlejohn*, 2008 WI App 45.

Police had probable cause to search the automobile, including a purse in automobile once dog trained in drug detection alerted them to presence of drugs. *State v. Miller*, 2002 WI App 150. BUT- there are other state courts now questioning the reliability of drug dogs. See Stephen Hurley's outline at <http://www.wisspd.org/html/ATPracGuides/Training/ProgMaterials/Conf2011/bitebark.pdf>

Arizona v. Gant adopted in Wisconsin: *State v. Dearborn*, 2010 WI 84; *State v. Bauer*, 2010 WI App 93. *Michigan v. Long* adopted in Wisconsin by *State v. Moretto*, 144 Wis.2d 171 (1988).

Search incident to arrest also applies to vehicle passenger's property when driver is arrested. *State v. Pallone*, 2000 WI 77. Terry frisk of vehicle permitted when police saw drug dealing suspect extend his hand behind the passenger seat. Because police knew dealers to carry guns, they reasonably suspected that the suspect had dropped or hidden a weapon while his hand was concealed. *State v. Williams*, 2001 WI 21.

Terry frisk of vehicle permitted when police saw drug dealing suspect extend his hand behind the passenger seat. Because police knew dealers to carry guns, they reasonably suspected that the suspect had dropped or hidden a weapon while his hand was concealed, *State v. Williams*, 2001 WI 21.

Furtive gesture or suspicious movements do not automatically justify search of car under Terry theory. When the defendant was only suspected of driving a vehicle with a suspended registration for an emissions violation and failing to signal for a turn, violations in no way linked to criminal activity or weapons possession, and when the only purported basis for a protective search was a single, partially obscured movement of the defendant in his vehicle that the officers observed from their squad car, the behavior observed by the officers was not sufficient to justify a protective search of Johnson's person and his car. *State v. Johnson*, 2007 WI 32. But see *State v. Buchanan*, 2011 WI 49, which permitted combination of furtive movements and lengthy and serious criminal history as basis for Terry frisk of car, see also *State v. Alexander*, 2008 WI App 9, where court held that delay in pulling over for minor violation, furtive movements, high crime area, post-stop observation of glove box items on seat held sufficient.

When police have probable cause to believe that a vehicle contains evidence of a crime, warrantless search of the vehicle without a showing of exigent circumstances, includes the trunk, *State v. Stankus*, 220 Wis. 2d 232 (Ct. App. 1998).

Probable cause to search vehicle may arise as result of anonymous tipster provided that corroboration of several details by the police officer demonstrated that a reasonable police officer could believe that the anonymous caller was a person familiar with defendant's activities, *State v. Sherry*, 2004 WI App 207.

Immigration Searches

Immigration searches are not limited to the border and may occur in any location. Law enforcement may briefly stop persons and question them about their citizenship or immigration status without probable cause as long as reasonable suspicion exists for the stop. *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). If the stop occurs without reasonable suspicion or exceeds the permissible scope of a temporary stop, the exclusionary rule applies as it does in all criminal cases but not to deportation proceedings. *Immigration & Naturalization Service v. Lopez-Mendoza*, 468 U.S. 1032 (1984).

Community Caretaker

Stops, searches and seizures that occur as a result of police acting in a community care taker function fall outside the protection of the Fourth Amendment. A bona fide community caretaker function must be totally divorced from the detection, investigation or acquisition of evidence relating to a violation of criminal law. *Cady v. Dombrowski*, 413 U.S. 433 (1973). Community caretaker searches are permitted of both homes and vehicles.

Additional Wisconsin cases:

Three-step test to determine whether a particular activity qualifies under the community caretaker exception, *State v. Ziedonis*, 2005 WI App 249; (1) Whether a search or seizure, within the meaning of the Fourth Amendment, has taken place; (2) If the Fourth Amendment is implicated, whether the police conduct was bona fide community caretaker activity; (3) If the conduct was bona fide community caretaker activity, whether the public need and interest outweigh the intrusion upon the privacy of the individual. In evaluating this, four considerations should be taken into account, see next case below for the four factors.

An officer's exercise of the bona fide community caretaker function must be reasonable as determined by the court by balancing the public interest or need that is furthered by the officers' conduct against the degree and nature of the intrusion on the citizen's constitutional interest. The stronger the public need and the more minimal the intrusion upon an individual's liberty, the more likely the police conduct will be held to be reasonable. Four factors are considered: 1) the extent of the public's interest; 2) the attendant circumstances surrounding the search; 3) whether the search or seizure took place in an automobile; and 4) the alternatives that were available to the action taken. *State v. Ultsch*, 2011 WI App 17.

In a community caretaker context, when under the totality of the circumstances an objectively reasonable basis for the community caretaker function is shown, that determination is not negated by the officer's subjective law enforcement concerns. An officer may have law enforcement concerns even when the officer has an objectively reasonable basis for performing a community caretaker function. *State v. Kramer*, 2009 WI 14.

Community caretaker applies to homes as well as vehicles; when police received anonymous tips that people were sleeping in a home next to drugs and back door was open, police entry permitted based on police claim of concern for health & safety of possible occupants, *State v. Pinkard*, 2010 WI 81.

Inventory Searches

Inventory searches are a police caretaking function and must be a disinterested cataloguing of a car or home's contents; an inventory search cannot be motivated by the desire to search for evidence, *South Dakota v. Opperman*, 428 U.S. 364 (1976). Such searches are frequently conducted on vehicles when police lack reasonable suspicion or probable cause to search a car. There must be standard law enforcement department policies in place to justify an inventory search and the policies must preclude use of the inventory search as a subterfuge to conduct an impermissible search for evidence, *Florida v. Wells*, 495 U.S. 1 (1990). See also *Colorado v. Bertine*, 479 U.S. 367 (1987). Police may search closed containers in inventory search. *Colorado v. Bertine*, 479 U.S. 367 (1987). *Florida v. Wells*, 495 U.S. 1 (1990) permits opening of all closed containers as part of inventory search when consistent with standardized police policy.

The inventory search rule applies to jailhouse inventories of a defendant's possessions. *Illinois v. Lafayette*, 462 U.S. 640 (1983).

Police may search closed containers in inventory search. *Colorado v. Bertine*, 479 U.S. 367 (1987). *Florida v. Wells*, 495 U.S. 1 (1990) permits opening of all closed containers as part of inventory search when consistent with standardized police policy.

Additional Wisconsin Cases:

Inventory search is not motivated by search for evidence but is a disinterested cataloguing of car's contents. Justification does not rest upon probable cause. *Thompson v. State*, 83 Wis.2d 134 (1978); *State v. Weber*, 163 Wis.2d 116 (1991).

Impoundment of a vehicle must be based on something other than suspicion of criminal activity; inventory exception will not apply if it was not police policy to impound vehicles for operating after revocation violations or when operator of vehicle would be in custody for less than a few days. *State v. Gaines*, 197 Wis.2d 102,111-112 (Ct. App. 1995). Can seize notebook on defendant's person and read contents. *Id.* at 110.

Police policy regarding inventory searches needn't be in writing and inventory search rule applies with equal force to containers that come into police custody even though vehicle itself not impounded and defendant not arrested. *State v. Weide*, 155 Wis.2d 537 (1990).

Existence of, and compliance with, a police policy on conducting an inventory search relates only to the reasonableness of the search and not the seizure of the item searched. *State v. Clark*, 2003 WI App 121.

Police may play contents of unmarked cassette tape in order to inventory it. *State v. Weber, Id.*

Mail and Packages

Federal statutes and regulations prohibit opening first class mail without a warrant. 39 USCS§3623(d), 39 CFR§233.3(g). The same protection extends to packages. *United States v. Van Leeuwen*, 397 U.S. 249 (1970); detaining a package overnight to obtain a warrant is permissible. *Id.* Several courts have also permitted delayed delivery on reasonable suspicion in order to conduct a dog sniff of the package, see for example *United States v. Aldaz*, 921 F.2d 227 (9th Cir 1990), cert. den 501 U.S. 1207 (1991). There is no reasonable expectation of privacy on the information on the exterior of a letter or package.

An exception to the mail search rule is ingoing and outgoing mail from correctional institutions and jails, see *Procurier v. Martinez*, 416 U.S. 396 (1974) and *Turner v Safley*, 482 U.S. 78 (1987), *Thornburgh v. Abbot*, 490 U.S. 401 (1989); these searches implicate the First Amendment as well as the Fourth. Searches of international mail are governed by border search law. *United States v. Ramsey*, 431 U.S. 606 (1977).

Private carriers such as Fed Ex or UPS are not subject to the Fourth Amendment and employees of these carriers may search packages and call in law enforcement to view what they've inspected and conduct drug field tests. *United States v. Jacobson*, 466 U.S. 109 (1984).

Luggage Searches

There is a reasonable expectation of privacy in one's luggage or other personal containers such as purses, wallets or backpacks. *United States v. Chadwick*, 433 U.S. 1 (1977). Closed containers in cars can be searched when there is probable cause to do so. *California v. Acevedo*,

500 U.S. 565 (1991). Police may search purses or other containers belonging to a passenger in a car when these items can conceal the object of a search. *Wyoming v. Houghton*, 526 U.S. 295 (1999). Luggage and purses can be subject to inventory searches. *Illinois v. Lafayette*, 462 U.S. 640 (1983). Luggage in airports may be searched, x-rayed or sniffed by a dog without a warrant when traveling on an airplane. Police may not touch or squeeze soft sided luggage stored in overhead bins on public transportation. *Bond v. U.S.*, 529 U.S. 334 (2000).

Abandonment

There is no reasonable expectation in an item that has been abandoned and police are free to seize and search such items. *Hester v. United States*, 265 U.S. 57(1924). But- do not assume there is nothing you can do when you have a “dropsy” case. When an item is dropped because police are engaged in unlawful activity such as making an unlawful arrest, it is not considered to be a voluntary abandonment. *Rios v. United States*, 364 U.S. 253 (1960). Putting a grocery bag down while being questioned by police does not constitute abandonment. *Smith v. Ohio*, 494 U.S. 541 (1990). Trash placed at a curb is considered abandoned for Fourth Amendment purposes because it is open to inspection by anyone. *California v. Greenwood*, 486 U.S. 35 (1988).

Additional Wisconsin cases:

Garbage searches: See *State v. Sigarroat*, 2004 WI App 16; *U.S. v. Redmon*, 138 F.3d 1109 (7th Cir. 1998).

Open Fields

Information gathering in an open field is not a Fourth Amendment violation; there is no reasonable expectation of privacy in an open field even if entry into it constitutes a trespass. *Oliver v. United States*, 466 U.S. 170 (1984). A barn on a property outside of the fenced area surrounding the house is considered part of an open field, not the curtilage of a home. *United States v. Dunn*, 480 U.S. 294 (1987).

Invasive Body Searches, Strip Searches and Body Cavity Searches

Requiring an accused to submit to warrantless blood draws to find in intoxicated driving cases is both routine in all states and legally permissible. *Schmerber v. California*, 384 U.S. 757 (1966). Part of Schmerber’s rationale is that without taking immediate action, the sought after evidence will dissipate, this exigency requires police to act expeditiously without waiting to obtain a warrant. The crux of the determination in searches that involve intrusions beneath the skins is whether the procedure is reasonable under the circumstances and courts determine what is permissible on a case-by-case basis. The factors courts are to consider are whether the defendant’s personal health or safety is threatened by the procedure, the extent to which the procedure is intrusive into one’s privacy and the need for the evidence in determining guilt or innocence. Thus warrantless involuntary surgery to remove a bullet for use as evidence of a crime, was held unconstitutional. *Winston v. Lee*, 470 U.S. 753 (1985).

An invasive body search must be justified by “clear indication” that the evidence will be found. *Schmerber, Id.* at 769-770. The U.S. Supreme Court has not given guidance on exactly what the “clear indication” standard amounts to and courts have differed on its definition. (See Ch. ___,

Sec. __ for further discussion).

Lengthy detention and invasive medical procedures are permitted upon reasonable suspicion in border searches. *United States v. Montoya De Hernandez*, 473 U.S. 531 (1985).

Strip searches and body cavity searches are most often conducted in the context of border searches or searches of prisoners. The U.S. Customs Service has the authority to conduct strip searches upon reasonable suspicion that a person is smuggling contraband into the country. Strip searches must be conducted in a private location, see *Illinois v. Lafayette*, 462 U.S. 640 (1983), permitting such searches during routine jail admissions and noting these would be unreasonable if conducted on the street. Courts have held that strip and body cavity searches of prisoners, including pretrial detainees, are permissible for security reasons. *Bell v. Wolfish*, 441 U.S. 520 (1979).

Additional Wisconsin Cases:

A presumptively valid chemical sample of the defendant's breath does not extinguish the exigent circumstances justifying a warrantless blood draw. The nature of the evidence sought, (the rapid dissipation of alcohol from the bloodstream) not the existence of other evidence, determines the exigency. *State v. Faust*, 2004 WI 99.

Blood may be drawn in a search incident to an arrest for a non-drunk-driving offense if the police reasonably suspect that the defendant's blood contains evidence of a crime. *State v. Repenshek*, 2004 WI App 229. Warrantless administration of laxatives done to assist the police in recovering suspected swallowed heroin was a reasonable search under three factor test: (1) the extent to which the procedure may threaten the safety or health of the individual; (2) the extent of the intrusion upon the individual's dignitary interests in personal privacy and bodily integrity; and (3) the community's interest in fairly and accurately determining guilt or innocence. *State v. Payano-Roman*, 2006 WI 47

Strip search may only be conducted pursuant to requirements of sec. 968.255 Wis. Stats. However, violating the statute does not result in suppression unless court determines there was also a violation of a constitutional right. *State v. Wallace*, 2002 WI App 61.

Prisons, Probationers and Parolees

There is no right to privacy in a prison cell and prison authorities may search an inmate's cell and belongings at any time. *Hudson v. Palmer*, 468 U.S. 517 (1984). Inmate mail can be searched for contraband at any time for security reasons. *Turner v. Safley*, 482 U.S. 78 (1987). Prisons may conduct surveillance of inmate conversations. *Lanza v. New York*, 370 U.S. 139 (1962).

Probation officers are permitted to conduct warrantless searches in the homes of the persons they supervise. *Griffin v. Wisconsin*, 483 U.S. 868 (1987). Parolees can be required to submit to suspicion-less searches of their person by police officers. *Samson v. California*, 547 U.S. 843 (2006). Police may also search a probationer's home for evidence of a crime upon reasonable suspicion when the probationer consents to such searches as a condition of probation. *U.S. v.*

Knights, 543 U.S. 112 (2001).

Additional Wisconsin Cases:

A warrant is not required for entry into parolee's home due to diminished expectation of privacy; only apprehension request from parole agent required. *State v. Pittman*, 159 Wis.2d 764 (Ct. App. 1990).

When search of defendant's residence is performed by his probation agent and police officers are present only for protection, this is a probation, not a law enforcement search. *State v. Wheat*, 2002 WI App 153. But police cannot conduct warrantless searches pursuant to a probation apprehension request. Warrantless searches conducted by police, as opposed to probation agents, are prohibited, *State v. Bauer*, 2010 WI App 93.

Drug Testing

A bodily intrusion to search for use of alcohol or drugs is a search within the meaning of the Fourth Amendment and is permissible to enforce laws against operating a motor vehicle while intoxicated. *Schmerber v. California*, 384 U.S. 757 (1966). In *Skinner v. Railway Labor Executives' Asso.*, 489 U.S. 602 (1989), the court held that the government may require transportation company employees to submit to drug or alcohol tests without individualized suspicion to ensure public safety. Random urinalysis of student athletes is permissible. *Vernonia School Dist. 47J v. Acton*, 515 US 646 (1995).

Hospital may not perform nonconsensual drug testing of pregnant women for drug use when policy developed for law enforcement purposes. *Ferguson v. City of Charleston*, 532 U.S. 67 (2001). States may not pass laws requiring drug tests for candidates for public office. *Chandler v. Miller*, 520 U.S. 305 (1997).

Schools

Public school officials may search without warrant upon reasonable grounds when they believe student has violated the law or school policy. *New Jersey v. TLO*, 469 U.S. 325 (1985). However students retain legitimate interest of privacy in personal non-contraband items such as school supplies and items of personal hygiene. *TLO, Id.* School officials may not search a student's undergarments when they have reasonable suspicion the student unlawfully possesses prescription or over the counter drugs in violation of school policy when there is no reason to believe these drugs are a danger or are concealed in undergarments. *Safford Unified Sch. Dist. #1 v. Redding*, 129 S. Ct. 2633 (2009).

Additional Wisconsin Cases:

Public school officials may search without warrant upon reasonable grounds when they believe student has violated the law or school policy. *New Jersey v. TLO*, 469 U.S. 325 (1985); In balancing the student's legitimate expectation of privacy and the school's need to maintain a safe environment, school officials did not need a warrant or probable cause before searching a student who was under their authority. *Interest of Angelina D.B.*, 211 Wis.2d 140 (1997). When police initiate search or school officials act at behest of police, probable cause required. *Angelina D.*

B., Id. Definition of school includes school parking lot, *State v. Schloegel*, 2009 WI App 85.

Random searches of school lockers by school officials permitted. *In the Interest of Isiah B.*, 176 Wis. 2d 639(1993)

Government Employees

The Fourth Amendment protects government employees against unreasonable searches and seizures. *Skinner v. Railway Labor Executives' Asso.*, 489 U.S. 602 (1989), *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989). Government employee's offices and personal communications may be monitored for work rule violations but the surveillance must be reasonably related to a legitimate employment issue. *O'Conner v. Ortega*, 480 U.S. 709 (1987). A government employer may search an employee's text messages when there is a legitimate work related purpose and the scope of the search is not overbroad in its scope. *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010). The court noted that as technology rapidly changes, the law will continue to evolve on issues concerning employer provided electronic communications devices and employee's reasonable expectation of privacy.

Eavesdropping and Surveillance

Electronic eavesdropping is subject to the protections of the Fourth Amendment. *Alderman v. United States*, 394 U.S. 165 (1969). The use of wiretaps is governed by federal statute, see USCS §§2510-2520, and states have enacted corresponding statutes; the statutes apply to cell phones as well as landlines. Conversations between persons may be recorded with one party's consent. *United States v. Caceres*, 440 U.S. 741 (1979). Suppression is not a remedy for violations of administrative policies when such conversations are recorded by a government agency. *Id.* While a person has a reasonable expectation of privacy in their communications, they do not have such an expectation in the phone numbers they call and use of a device such as a pen register to record dialed numbers is permissible, *Smith v. Maryland*, 442 U.S. 735 (1979). A government employer may search an employee's text messages when there is a legitimate work related purpose and the scope of the search is not overbroad in its scope. *City of Ontario v. Quon*, 130 S. Ct. 2619(2010).

Tracking Devices

The court has permitted the use of some tracking devices to remotely collect data. In *United States v. Knotts*, 460 U.S. 276 (1983), the held the placement of a beeper tracking device into a container purchased by the defendant which permitted law enforcement officers to track the defendant's car to a location where they could observe it was permissible. The court found the beeper surveillance was no different than following the defendant's car on public streets; there is no reasonable expectation of privacy in the movements of a car on public roads or the ultimate location of the container which was in an open field. A similar conclusion was reached in *United States v. Karo*, 468 U.S. 705 (1984). In both *Knotts* and *Karo* the tracking device was placed in a container with the consent of a third party owner before it came into the possession of the defendant.

However, attaching a GPS tracking device to a person's car to monitor their movements is unlawful. *United States v. Jones*, ____ U.S. ____ (2012). One's car is an "effect" protected by

the Fourth Amendment and law enforcement is not permitted to conduct such an intrusion and occupy private property for the purpose of gathering information without a warrant. *Id.* NOTE: This case overrules *State v. Sveum*, 2010 WI 92.

Cell Phones

Cell phones with their call history, voice messages, photographs and other information in their memory are a gold mine for law enforcement and a hotly disputed area of litigation. The United States Supreme Court has not yet ruled on the permissible scope of cell phone searches, other than its ruling in *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010) regarding government employer text message searches. The lower federal courts and state courts have issued numerous decisions regarding cell phones on issues such as when a phone can be seized incident to arrest in a motor vehicle, whether law enforcement may answer an arrestee's ringing phone or text messages, and whether law enforcement can conduct warrantless searches of a phone's call history, voice messages or save photographic images. Courts have analyzed these issues looking to what may be searched as incident to an arrest, under the plain view doctrine or as a result of exigent circumstances. An excellent discussion of these issues can be found in *United States v. Gomez*, 807 F.Supp.2d 1134 (S.D. Fla. 2011).

Additional Wisconsin Cases:

Police officer was legally able to demand subject drop a cell phone when office thought it was a weapon, *State v. Carroll*, 2010 WI 8.

A cell phone is analogous to a container and police may seize and hold a cell phone if there is probable cause to believe that it contains evidence of a crime; and if exigencies of the circumstances demand it. *Id.* An officer who legally viewed an image of the defendant with marijuana in plain view on an open cell phone and who testified that he knew, based on his training and experience, that drug traffickers frequently personalize their cell phones with images of themselves with items acquired through drug activity, had probable cause to believe that the phone contained evidence of illegal drug activity. When an officer had probable cause to seize a cell phone that he reasonably believed was a tool used in drug trafficking, exigent circumstances permitted the officer to answer an incoming call. The fleeting nature of a phone call is apparent; if it is not picked up, the opportunity to gather evidence is likely to be lost, as there is no guarantee or likelihood that the caller would leave a voice mail or otherwise preserve the evidence. *Id.*

Administrative Searches

The Fourth Amendment applies to administrative searches. *Camara v. Municipal Court of San Francisco*, 387 U.S. 523 (1967); *See v. Seattle*, 387 U.S. 541 (1967). The court held that when a valid public interest justifies an administrative search and the person in charge of the premises refuses consent to enter, a warrant may be issued. The standard for issuance of the warrant falls short of traditional probable cause in that specific evidence of a legal violation is not required as long as "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular establishment. *Marshall v. Barlow's, Inc.*, 436 US 307, 320-21(1978), citing *Camara, Id.* at 538.

It is impermissible to conduct searches of homes under this doctrine as a means to search for evidence of a crime where a search warrant would normally require probable cause. *Michigan v. Tyler*, 436 US 499 (1978). Thus, the absence of exigent circumstances, a fire damaged home cannot be searched for evidence without a warrant by fire department officials even when the department's administrative rules allow for an inspection. *Michigan v. Clifford*, 464 US 287 (1984).

The Court determined that certain types of businesses must be "closely regulated" and submit to searches under any circumstances. Owners of these businesses have a lesser expectation of privacy and warrantless inspections are permitted to fulfill a proper regulatory function. Many industries are governed by federal and state laws ranging from nuclear power plants to cosmetologists. Some examples of business the U.S. Supreme has held are subject to such regulations are liquor merchants, *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970); gun dealers, *United States v. Biswell*, 406 U.S. 311 (1972) and mines, *Donovan v. Dewey*, 452 U.S. 594 (1981).

Additional Wisconsin Case: *Lundeen v. Wisconsin Dep't of Agric., Trade & Consumer Protection*, 189 Wis. 2d 255 (Ct. App. 1994).

Special Needs Searches

The courts have determined that persons and property are subject to warrantless searches in certain areas due to the special needs of government to conduct warrantless searches. *New Jersey v. TLO*, 469 U.S. 325 (1985). Special needs areas include previously discussed searches of schools, prisoners, probationers, and administrative searches. Other common areas where special needs searches are conducted are entrance to government buildings, airports, military bases and to large sporting or other entertainment venues.