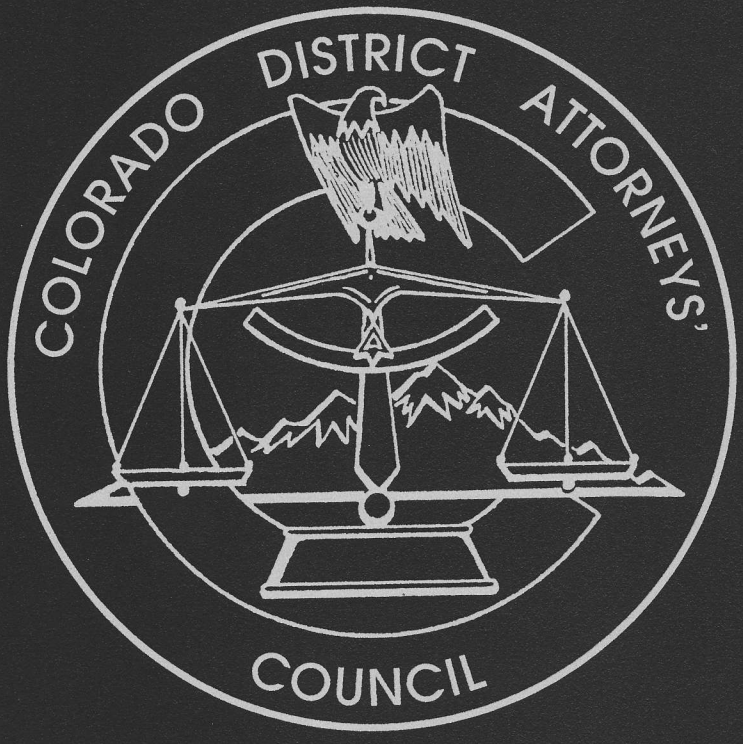
COLORADO PEACE OFFICERS LEGAL SOURCE BOOK



COLORADO DISTRICT ATTORNEYS' COUNCIL
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AN OPEN LETTER TO COLORADO PEACE OFFICERS

The Colorado District Attorneys' Council is proud to present our updated version of the Colorado Peace Officers' Legal Source Book. This valuable reference tool has become essential for legal guidance on matters such as search and seizure, interrogation and evidence. You will find that this update provides answers to officers' questions in an authoritative, concise, and interesting format.

CDAC offers our sincerest thanks and recognition to the many authors and dedicated professionals who worked long, hard hours to assure the Peace Officers' Legal Source Book accurately describes the law. We extend our utmost appreciation to Colorado Attorney General John Suthers and his extremely helpful staff for providing updates to ensure the dependability of this book.

Additionally, CDAC thanks the peace officers of Colorado to whom this volume is dedicated. We greatly appreciate your commitment to the professionalism and your cooperation with our offices to make sure, that in every case, the protection of citizens' rights and public safety comes first. We thank you all for using the Peace Officers' Legal Source Book to assist you in your duties.

Very Truly Yours,

Ted C Tow
Executive Director
October 2009

THE LAW 27
INTRODUCTION 27
Memorizing the Law 27
The Law as a Seamless Web 27
THE PURPOSE OF THIS BOOK 29
Training Text 29
Reference Source 29
Justice Bias 29
Advisory Nature of the Book 29
THE TYPES OF LAWS 30
Constitutional Law 30
The United States Constitution 30
The Colorado Constitution 30
Statutory Law 30
Case Law 31
Precedent 31
New Law 31
The Officer's Role 31
HOW TO USE THIS BOOK 31
The Approach 31
The law 31
Examples 31
Notes 32
Suggested techniques 32
Repetition of the law and cases 32
The Chapters 32
Changes in the Law 32
Tables of Contents and Indexes 33
HOW TO LEARN THE LAW 33
Know the Difference Between the Legal Theories 33
Know the Reasons for the Theory 34
Know the Facts of Cases 35
DISCLAIMERS 36
SEARCH AND SEIZURE - PERSONS 37
INTRODUCTION 37
CHART: SEARCH AND SEIZURE OF PERSONS 37
CONSENSUAL ENCOUNTERS 38
Definition 38
Constitutional Basis for Consensual Encounters 38
Reasonable Person Test 38
Consensual Encounters v. Stops/Detentions 39
Particular Circumstances 40
Approaching a person 40
Street Contacts 40
Residential Contacts 40
Airport Contacts 41
Contact on Public Transportation 42
Identifying Self as Police Officer 42
Request for Identification 43
Retaining Identification 43
Following or Walking Along With a Person 44
Chasing a Suspect 45
Contact with Automobile Passengers 46
A Note on Demeanor 47
Suggested Techniques 48

Table of Contents

STOPS/DETENTIONS **48**
Definitions **48**
Legal Basis of Stops/Detentions **50**
Constitutional Basis 50
Statutory Basis 51
Reasonable Suspicion **51**
The Formula 51
Factors 51
Experience of the Officer 51
Conduct of the Suspect 52
Report of a Crime 52
Report from Third Persons 52
Examples 53
Suspicious Activity or Circumstances 53
Suspect Matches Known Description 54
High Crime Area 55
Proximity to a Crime Scene or Crime Evidence 57
Flight 58
Furtive Gestures 59
Citizen Informants 59
Anonymous Tips 60
Masking Agents 63
Officer's Powers in Conducting a Stop/Detention **63**
Questioning the Detainee 64
Bringing Eyewitnesses to the Scene 64
Investigating the Crimes 64
Stop/Detention v. Arrest/Custody **65**
Indications of Arrest 65
Guns Drawn 66
Moving the Detainee 66
Placing A Detainee in a Patrol Car 69
Handcuffing 70
Formal Arrest 71
Time Limitations 74
Exigencies 76
Suspect has a Weapon 77
Suspect Flees 77
Suspect Committed a Violent Crime 78
Other Exigencies 78
Consent **79**
Investigatory Stop De-Escalating to a Consensual Encounter 80
Detentions After Vehicle Stops **81**
Detention During the Execution of a Search Warrant **82**
***Miranda* Warnings** **83**
Detentions for Identifications **84**
Court Order 85
Reasonable Grounds 85
Other Provisions 85
Impermissible Actions 86
Consent 87
Emergency Circumstances 87
Detention of Witnesses 88
Suggested Techniques 88
SEARCHES DURING DETENTIONS **89**
The Danger Requirement **90**
Violent Crimes 90

Non-Violent Crimes 92
Narcotics-Related Crimes 93
Consent 94
The Area Which May Be Searched 94
Closed Containers 95
Vehicles 96
Other Areas 97
Plain Feel Doctrine 97
Suggested Techniques 97
ARRESTS 98
Probable Cause Requirement 98
Amount of Evidence Necessary to Establish Probable Cause 98
Establishing Probable Cause: Informants 102
Reliability of the Informant 102
Citizen Informants 103
Fellow Officers 103
Personal Knowledge 106
Corroboration 106
Warrant Requirement 108
Arrests in a Public Place 108
Arrests in the Suspect's Home 109
Arrests in a Third Party's Home 109
Exigencies 110
SEARCHES INCIDENT TO ARREST 111
Reason for the Law 111
The Contemporaneous Requirement 112
Scope of the Search: Custodial v. Non-Custodial Arrest 113
The Areas Which May be Searched 116
Premises 116
Vehicles 116
Closed Containers 117
Suggestions for Officers 117
BODY SEARCHES 118
Minor Bodily Intrusions 118
Major Body Intrusions 120
Cavity Searches 120
Surgical Searches 121
Medical Emergency Exception 121
Suggested Techniques 122
PLAIN VIEW 122
Plain View 122
Plain Smell 124
Plain Feel 124
Plain Hearing 125
Suggested Techniques 126
CONSENT SEACHES AND/OR SEIZURE 126
Seizures 126
Detentions 126
Movement 127
Searches 127
Frisk 127
Searches Incident to Arrest 127
Body Searches 128
Legality of Consent 128
Voluntariness 128
Factors Bearing on Whether Consent is Voluntary 128

Factors Tending to Show Involuntariness 128
Scope 129
Withdrawal 129
Suggested Techniques 129
SEARCH AND SEIZURE - PREMISES 131
INTRODUCTION 131
REASONABLE EXPECTATION OF PRIVACY 131
Reasonable Expectation of Privacy Defined 132
Fourth Amendment Protects Against Unreasonable Intrusions 132
The House 133
The Garage or Carport 134
Other Structures on the Premises 135
The Back Yard 136
Windows 137
Lawful Presence 138
Observing v. Peeking 138
Observing – No Search 138
Peeking - A Search 139
Fences and Walls 140
Lawful Presence 140
Extraordinary Means 140
The Porch 140
Observations Made While On Porch 142
The Front Yard 142
The Driveway 143
Sidewalks 144
Open Fields 144
Curtilage 145
Views from Neighboring Premises 145
Use of Binoculars 146
Aerial Views 146
Business Premises 148
Suggested Techniques 148
LEGAL THEORIES FOR SEARCHES OR SEIZUES IN HOMES 149
Warrants 149
Searches for Persons 149
The Suspect's Home 149
Third Party's Home 150
Searches for Evidence 150
Exigencies and Emergencies 151
Searches for Persons 151
Pursuit of a Fleeing Felon 151
Protective Sweeps 155
Lives or safety at risk 158
Injured, Ill, In Danger, Etc. – The Emergency Doctrine 158
Crime Scenes 163
Searches for Evidence 165
Impoundment 168
Detention of Persons Present – Time Limitations 171
Crime Scenes 172
Entering Other Rooms 173
Suggested Techniques 173
Searches Incident to Arrest 174
Reason for the Law 174
Contemporaneous Requirement 174
Custodial Arrest Requirement 174

Requires Lawful Arrest 176
Where the Officer May Search 176
Searches of Closed Containers 177
Plain View Seizures 177
Movable Areas of Control 178
Body Searches 178
Arrests Outside the Home 178
Suggested Techniques 179
Plain View Seizures 179
Lawful Presence 179
Lawful Entry 179
Lawful Presence in a Particular Area 181
Apparently Crime-Related 185
Probable Cause 185
Reasonable Suspicion 188
Inadvertence 188
Suggested Techniques 188
Consent 189
Purpose of the Search 189
Entries to Search for Persons 189
Entries to Search for Evidence 190
Legality of Consent 190
Voluntariness 190
Authority to Consent 198
Spouses 198
Parents-Children 199
Roommates 200
Host-Guest 201
Landlord-Tenant 202
Motel Manager-Boarder 203
Employer-Employee 204
Babysitter 204
Joint Property Owners 205
Fifth Amendment Warnings 205
Where the Officer May Search 206
Withdrawal of Consent 207
Suggested Techniques 207
Standing 208
Standing In Another Person's Home 208
Abandonment 209
Trash 210
Trespassers 211
Searches by Private Citizens 211
Private Searches 212
Agency Relationships 212
Cooperative Searches 213
Suggested Techniques 213
FORCIBLE ENTRY OF PREMISES 213
Forcible - Definition 214
Requirements for Forcible Entry 214
Purpose of the Requirements 215
Exceptions to the Requirements 215
Exceptions to the Knock and Announce Requirement 215
Exceptions to the Wait Requirement 216
Suggested Techniques 216
SEARCH AND SEIZURE – VEHICLES 217

INTRODUCTION 217
REASONABLE EXPECTATION OF PRIVACY 219
Probable Cause Searches – Exigent Circumstances 219
Plain View Seizures v. Open View Observations 220
CONTACTS/CONSENSUAL ENCOUNTERS 220
Permissible Conduct 221
Incidental Detentions 222
Indication of Seizures 223
Suggested Techniques 224
STOPS OF VEHICLES 224
Traffic Stops 225
Seizures of Persons 227
Officer's Powers 227
Time Limitations 229
Searches of Persons 230
Searches Incident to Detentions 230
Searches Incident to Arrest 230
Search of Vehicles 231
Searches on Probable Cause 231
Searches Incident to Detention 232
Searches Incident to Arrest 233
Stops on Reasonable Suspicion 233
Examples – Reasonable Suspicion Found to Exist 233
Examples – Reasonable Suspicion Found Not to Exist 235
Reasonable Suspicion v. Probable Cause 237
Seizures of Persons 238
Officer's Powers During Detentions 238
Time Limitations 239
Emergencies 240
Searches Incident to Detentions 241
Searches of Persons (Frisk) 241
Searches of Vehicles 241
Miranda Warnings 244
Traffic Offenses 244
Reasonable Suspicion Stops 245
Searches and Seizures of Passengers 246
Searches of Passengers 247
SEARCHES AND SEIZURES ON PROBABLE CAUSE 248
Probable Cause – Evidentiary Issues 249
Amount of Evidence Necessary to Establish Probable Cause 249
Probable Cause Based on Informants 250
Reliability of the Informant 250
Staleness 251
When an Officer May Search 252
Vehicles Removed to the Impound Lot 252
Emergencies 252
Where An Officer May Search 253
SEARCHES INCIDENT TO ARREST 254
Reason for the Law 255
Contemporaneous Requirement 255
Where an Officer May Search 257
The Passenger Compartment 257
Closed Containers 257
Glove Compartments 257
Trunks 257
Open Bed of a Truck 258

The Arrestee 258
Suggested Techniques 258
PLAIN VIEW SEIZURES 258
Lawful Presence 258
Officer Standing Outside the Vehicle 258
The Vehicle is on Premises 259
Officer Inside the Vehicle (Prior Lawful Entry) 261
Apparently Crime-Related 262
The Probable Cause Test 262
Reasonable Suspicion 263
Inadvertence 263
Plain View Doctrine v. Open View Doctrine 263
Suggested Techniques 264
CONSENT SEARCHES 264
Always Ask 264
Voluntariness 265
Factors Which Tend to Show Voluntariness 266
Officer's Courtesy 266
Fourth Amendment Warnings and Waiver 266
Signed Written Consent 266
Fifth Amendment Warnings and Waiver 266
Consenter Admits Guilt Before Consent Given 267
Consenting Party Aids in the Search 267
Consenting Party is Intelligent or Sophisticated 267
Factors Which Tend to Show Involuntariness 268
Force, Threats, Weapons 268
Custody 268
Promises, Deception 268
Initial Refusal to Consent 269
Refusal to Sign Written Consent Form 269
Suspect Hampers the Search 269
Consenting Party's Condition 269
Asking the Suspect to Perform the Act 269
Authority to Consent 270
Where the Officer May Search – Limitations Upon Consent 270
Withdrawal of Consent 271
Consent – D.U.I. 271
Roadside Sobriety Tests 271
Chemical Testing 272
Suggested Techniques 272
SEARCHES AND SEIZURES BY PRIVATE PERSONS 272
Encouragement by Law Enforcement 273
Cooperative Searches 273
Suggested Techniques 273
INVENTORY SEARCHES 273
Purposes of an Inventory Search 273
Protection of an Owner's or Occupant's Property 274
Protection of the Public from Liability Based on Claims of Missing or Damaged Property 274
Protection of the Police From Dangerous Instrumentalities 274
Requirements For an Inventory Search 274
Lawful Custody 274
Reasonable Alternatives 275
Departmental Rules 276
Where the Officer May Search 277
The Vehicle 277
Closed Containers 278

Federal Constitutional Rule 278
Possible Colorado Rule 279
Exceptions to the Possible Colorado Rule 279
Property on the Arrestee 280
Suggested Techniques 280
THE VEHICLE AS EVIDENCE 28
STANDING 282
Abandonment 282
Stolen Vehicles 283
No Possessory Interest In Articles 283
Passengers 284
Suggested Techniques 284
SEARCH AND SEIZURE – CLOSED CONTAINERS 287
INTRODUCTION 287
DEFINITIONS – CLOSED CONTAINERS 287
Containers 287
Closed 287
REASONABLE EXPECTATION OF PRIVACY 288
The Area Inside a Closed Container 288
Seeing Inside 288
Feeling Inside 288
Search Incident to Detention (Frisk) 288
Search Incident to Arrest 289
Under Authority of a Warrant 289
With the Consent of an Owner or Possessor 289
Under Emergency Circumstances 289
Smelling Inside 290
The Area Surrounding a Closed Container 290
Suggested Techniques 290
LEGAL THEORIES FOR SEARCHES 290
Probable Cause and the Warrant Requirement 291
Searches of Closed Containers on Persons 291
Searches of Closed Containers in Premises 291
Searches of Closed Containers in Vehicles 292
Suggested Techniques 293
Emergencies – Exigencies 294
Emergency 294
Exigency 294
Suggested Techniques 295
Searches Incident to Arrest 295
Containers Which May Be Searched Incident to Arrest 295
Containers on Premises 295
Containers on the Arrestee's Person 296
Containers in Vehicles 296
Reason for the Rule 296
The Contemporaneous Requirement 297
Locked or Sealed Containers 297
Suggested Techniques 297
Plain View, Feel, Smell 297
Contents Apparent From Container 298
Feeling the Container 29
Smelling 298
Apparently Crime-Related 299
Suggested Techniques 299
Consent 299
Always Ask 300

Voluntariness 300
Factors Which Tend to Show Voluntariness 300
Factors Which Tend to Show Involuntariness 300
Authority to Consent 301
Limitations Upon Consent 301
Suggested Techniques 302
Standing – Abandonment 302
Asserting Another's Fourth Amendment Rights 303
Abandonment 303
Types of Abandonment 303
Possessing Another Person's Closed Container 304
Suggested Techniques 304
Searches by Private Persons 305
Agency Relationships 305
Cooperative Searches 305
Reopening Closed Containers 305
Suggested Techniques 306
Inventory Searches 306
Closed Containers in Vehicles 306
Closed Containers Closely Associated with an Arestee 307
Civil Detentions 307
LEGAL THEORIES WHICH JUSTIFY SEIZURES OF CLOSED CONTAINERS 308
Probable Cause But No Emergency 308
Reasonable Suspicion 308
Suggested Techniques 309
SEARCH AND SEIZURE – MISCELLANEOUS 311
INTRODUCTION 311
ADMINISTRATIVE SEARCHES AND SEIZURES 311
Types of Administrative Searches and Seizures 311
Reasons for the Searches or Seizures 312
Administrative Warrants 314
Suggested Techniques 314
AIRPORTS 314
Reasons for the Searches and Seizures 314
Types of Searches 315
Magnetometer 315
X-Rays 315
Legal Theories for Searches 315
Emergency Theory 315
Consent Theory 316
Administrative Searches 316
Legal Theories for Seizures 317
Profiles 317
Reasonable Suspicion Developed Because of X-Ray or Magnetometer 317
Suggested Techniques 317
BEEPERS 318
Federal Constitutional Standard 318
State Constitutional Standard 319
Suggested Techniques 319
BINOCULARS 319
The General Rule 319
Suggested Techniques 320
BOOKING SEARCHES 320
Legal Theories for the Search 320
Theft and Claims of Theft 321
Injury 321

Administrative Search ... 321
Scope of the Search – Closed Containers ... 321
Identification ... 321
Suggested Techniques ... 322
Probable Cause ... 322
Consent ... 322
Inventory Procedure ... 322
Departmental Policies ... 322
Locked Containers ... 322
Searches of Persons ... 322
BUSINESSES ... 323
Reasonable Expectation of Privacy ... 323
Records ... 324
Administrative Searches ... 324
Suggested Techniques ... 324
CONSENT ... 324
When to Seek Consent ... 324
The Reason ... 324
Alternative Legal Theories ... 325
Search Warrant ... 325
Warrantless Searches ... 325
Warrantless Seizures ... 325
Voluntariness ... 326
Totality of the Circumstances ... 326
The Officer's Conduct ... 326
Factors Tending to Show Involuntariness ... 327
Factors Tending to Show Voluntariness ... 330
The Consenting Party's Condition, Status or Conduct ... 331
Factors Tending to Show Involuntariness ... 331
Factors Tending to Show Voluntariness ... 334
Authority to Consent ... 335
Where and How the Officer May Search ... 336
Withdrawal of Consent ... 337
Burden of Proof ... 337
Suggested Techniques ... 337
CONVERSATIONS ... 338
Electronic Eavesdropping ... 338
Other Penalties ... 338
Consent of One Party ... 339
Prisoners ... 339
Eavesdropping ... 340
Suggested Techniques ... 341
DOGS ... 342
Federal Constitutional Standard ... 342
Colorado Constitutional Standard ... 342
Suggested Techniques ... 344
FLASHLIGHTS ... 344
Lawful Presence ... 344
Particular Places ... 345
Premises ... 345
Vehicles ... 345
Persons ... 346
Suggested Techniques ... 346
HI-TECH METHODS AND USE OF OTHER AIDS ... 346
The Trend ... 346
Suggested Techniques ... 347

JAIL AND PRISON SEARCHES 347
Reason for the Law 347
Types of Searches 347
Searches of Cells 347
Searches of the Person 348
Searches of Mail 348
Incoming Mail 348
Outgoing Mail 348
Notes Between Inmates 348
Searches of Jail Property 348
Suggested Techniques 349
MAIL 349
Mail Covers 349
Reading Mail 349
First Class Mail 349
Parcels Mailed Via Private Courier Service 350
Non First Class Mail 350
International Mail 350
Prisoner Mail 350
Contraband 350
Censorship – Reading Mail 351
Suggested Techniques 351
PEN REGISTERS 351
Federal Constitutional Standard 351
Colorado Constitutional Standard 351
Suggested Techniques 352
PROBATIONERS AND PAROLEES 352
Legal Theories for the Searches 352
Colorado's Parole Statute 352
The Officer's Role 353
Biological Samples 354
Suggested Techniques 354
RECORDS – PERSONAL AND BUSINESS 354
Personal Records 354
Business Records 354
Federal Constitutional Standard v. Colorado Constitution 354
Exceptions the Warrant Requirement 355
Public Records 355
Business is the Victim 355
Third Party Consent 356
Subpoena Duces Tecum 356
Reasonable Expectation of Privacy 356
Suggested Techniques 357
ROADBLOCKS 358
International Borders 358
State Borders 358
Emergencies 358
Sobriety Checkpoints 358
Wildlife Checkpoints 359
Suggested Techniques 359
SCHOOL SEARCHES 359
Governmental Nature of Searches 359
Drug Testing 360
Consent from a School Official to an Officer 361
Officer's Involvement in School Official's Search 361
Suggested Techniques 361

SECURITY GUARDS 362
SURVEILLANCE 362
Surveillance Techniques 362
Hi-Tech Devices 362
Tape Recordings and Photographs 362
Harassment 363
Suggested Techniques 363
PROBABLE CAUSE 365
INTRODUCTION 365
Definition 365
Probable Cause Based Upon Hearsay 366
Documenting Probable Cause 366
GENERAL 367
Probable Cause to Search/Arrest 367
When Assessed 367
Promptness Requirement 368
Warrant v. Warrantless Searches/Seizures 368
Evidence Sufficient to Establish Probable Cause 368
Probable Cause Based Upon Hearsay 369
Warrantless Search or Arrest Based on Hearsay 370
Search or Arrest With Warrant Based On Hearsay 370
THE ESTABLISHMENT OF PROBABLE CAUSE 370
Probable Cause Established 370
Probable Cause to Arrest 370
Probable Cause to Search 373
Probable Cause for Search Warrant 374
Probable Cause Not Established 375
No Probable Cause to Arrest 375
Warrantless Arrest 375
Arrest With Warrant 377
No Probable Cause to Search 377
Warrantless Search 377
Search Based on a Warrant 378
Reasonable Suspicion 379
Reasonable Suspicion to Seize Persons 379
Reasonable Suspicion to Seize Property 379
PROBABLE CAUSE BASED ON HEARSAY 381
Reliability of the Informant 382
Reliable Informants 382
Citizen-Informants 382
Victim of a Crime 383
Fellow Officer 384
Unreliable Informants 385
Examples of Unreliable Informants 386
Circumstances Which Make an Unreliable Informant Believable 387
Proving Reliability 392
Mere Conclusion of Reliability 393
Information Not Specific Enough 394
Information Sufficient to Show Reliability 395
Personal Knowledge of the Informant 395
Establishing Personal Knowledge 395
Stating Personal Knowledge 396
Obtaining a Warrant 396
Warrantless Searches or Seizures 396
Protecting the Identity of the Informant 397
Reasonable Suspicion 397

Unreliable Informants 398
Reliable Informants 398
TIMELINESS 399
Staleness 399
When the Informants Obtained Their Information 399
Type of Evidence 399
Warrants 401
When the Officers Conducted Their Search 402
Anticipatory Search Warrants 403
CORROBORATION 403
The Totality of the Circumstances Test 403
Crime-Related Corroboration 406
Corroboration of Innocent Details 407
Corroboration with a Different Informant 407
Detailed Information 408
SEARCH AND SEIZURE – WARRANTS 409
INTRODUCTION 409
THE ROLE OF THE JUDGE 409
THE ROLE OF LEGAL COUNSEL 410
DEFINITIONS 410
Search Warrant 410
Affidavit 410
Affiant 410
STATUTORY GROUNDS FOR A WARRANT 410
ADVANTAGES OF A SEARCH WARRANT 411
Alternative Legal Theories 411
Presumption of Legality 412
Common Sense Interpretation 412
Close Cases Go to the Officer 413
Applicability of the Good Faith Exception 414
The Statute 414
Application of the Statute 415
Limitations to the Good Faith Exception 417
DRAFTING THE WARRANT 418
DRAFTING THE AFFIDAVIT 419
The Particular Place 420
The Particular Property 421
Informants 421
Reliability of the Informant 422
Types of Informants 422
Stating Reliability in the Affidavit 423
Personal Knowledge 426
Protecting the Identity of Informants 427
Experience 427
Staleness 428
Types of Evidence 428
Continuous Course of Conduct 430
Corroboration 431
Misstatements and Omissions 432
Misstatements 432
Misstatements by Informants 432
Misstatements by Officers 433
Omissions 435
Other Information 437
DESCRIBING THE PLACE TO BE SEARCHED 437
Multi-Unit Premises 437

Other Areas 438
Other Structures on the Premises 439
Vehicles on the Premises 439
Closed Containers 441
Use 442
Proofreading 442
DESCRIBING THE PROPERTY TO BE SEIZED 442
Describing Types of Property 442
Overbreadth 442
Overbroad Descriptions 443
Not Overbroad 443
Indications of Ownership 444
Premises 444
Vehicles 444
Proofreading 444
PRESENTING THE WARRANT AND AFFIDAVIT TO THE COURT 445
The Oath 445
Questioning by the Judge 445
Preservation of the Warrant and Affidavit 446
SERVICE AND EXECUTION OF THE WARRANT 446
Time Limitations 446
Forcible Entry 446
Displaying the Warrant 447
Searches and Seizures 447
Searches and Seizures of Persons 448
Seizures of Persons 448
Searches of Persons 448
Searches for and Seizures of Evidence 449
Premises 449
Closed Containers 450
Business Records 450
Plain View Seizures 451
RETURN AND INVENTORY 451
SUGGESTED TECHNIQUES 451
Drafting the Affidavit 451
Proofreading 451
Execution of the Warrant 452
Forcible Entry 452
Detention of Persons Present 452
Searches of Persons 452
Searches for Evidence 452
STATEMENTS 453
INTRODUCTION 453
IMPORTANCE OF GETTING A STATEMENT FROM A SUSPECT 453
Admissions and Lies 453
Admissions 453
Lies 454
Tying the Suspect to the Crime 454
Predictability 455
Effectiveness of an Early Statement 455
Defenses Available 456
Disproving the Defense 456
Juror Predisposition 457
Suppression of Other Evidence 458
Leaving the Questioning for Detectives 458
Officer's Ignorance of the Facts 458

Details **459**
Obtaining More Than One Statement **460**
Determination of Innocence **460**
Taped, Written, Oral Statements **460**
Practical Problems **461**
Getting the Suspect to Talk 461
Getting the Suspect to Talk About the Crime 461
Keeping the Suspect Talking 461
Documenting 462
Suggested Techniques **462**
THE EXCLUSIONARY RULE **462**
Searches **463**
Seizures **464**
Statements **464**
Suggested Techniques **467**
VOLUNTARINESS **467**
Conduct of the Officers **468**
Physical Abuse 468
Threats 468
Mental Coercion 471
Promises 474
Clearing Paper 475
The Initiator 476
Promise Not to Prosecute 477
Promise to Obtain Counseling 478
Promise to Relate Cooperation to Powers That Be 479
Promise to Treat Fairly 480
Deceit, Dirty Tricks, Etc 480
Length of Interrogation 481
***Miranda* Warnings** 481
Coercion Under Emergency Circumstances 482
Condition of the Suspect **482**
Injury 482
Intoxication or Withdrawal 483
Intoxication 483
Withdrawal 484
Emotional Problems 484
Juveniles 486
Jail Conditions 486
Suggested Techniques **487**
Find Out About Emotional Problems 487
Threats 487
Promises 487
MIRANDA WARNINGS **488**
Custody **488**
What Objective Indications of Custody Were Present 489
What Information the Officer Has – Focus, Probable Cause 492
How Accusatory the Questioning Was 493
How Long the Questioning Lasted 494
Where the Questioning Occurred 494
Jail or Prison 494
Patrol Car 496
Interrogation Room 497
Public Places 499
The Suspect's Home 501
The Workplace 502

When the Questioning Occurred 503
How Many Officers Were Present 503
How Many of the Suspect's Friends/Relatives Were Present 504
What Happened After the Interview 504
What the Officer Reports and Testifies 505
Reports 505
Testimony 505
Suggested Techniques 505
Interrogation 506
Interrogative Statements by the Officer 506
Volunteered Statements by the Suspect 509
Non-Testimonial Questions and Answers 512
Questions Not Intended to Elicit a Communication 512
Statements and Actions Which Are Non-Testimonial 513
Suggested Techniques 514
Detention Questioning 514
Stops on Reasonable Suspicion 514
Pedestrians 515
Vehicles 515
Traffic Stops 517
On the Scene Questioning 519
Indications of Custody 519
Suggested Techniques 520
The Warning 520
Use Your Card 522
Repeating the Warnings After a Waiver 523
Conversation – Warnings – Waiver - Interrogation 524
Suggested Techniques 524
Waiver of Rights 525
Voluntariness of the Waiver 525
Informing the Suspect of the Charges 528
Knowing and Intelligent Understanding 529
Active Waiver 532
Waiver by Conduct 533
Waiver by Silence 533
Suggested Techniques 534
Assertion of Rights 534
Complete Assertion 534
Limited Assertion 536
Equivocal Assertion 537
Non-Assertions 539
Suggested Techniques 540
Change of Mind After Assertion of Rights 541
Assertion of Right to Silence 541
Reasonable Time 541
Returning to Questioning 542
Initiation by the Suspect 542
Assertion of Right to An Attorney 544
Suggested Techniques 547
Warnings After Charges Have Been Filed 547
No Custody – Must Warn 548
Informant (Agent of the State) – Must Warn 548
Suggested Techniques 549
Emergency – Rescue Questions 549
Juveniles 550
SIXTH AMENDMENT CONFRONTATION RIGHTS 552

STATEMENTS TO PRIVATE PERSONS 552
Before the Crime 552
During the Crime 553
After the Crime 553
Voluntariness 553
Miranda 554
Threats to Witnesses or Victims 554
Admissions Made to Friends, Neighbors, Etc 554
Suggested Techniques 554
STATEMENTS FROM WITNESSES 554
Witnesses Generally 555
Hostile Witnesses 555
The Witness Who Refuses to Cooperate 555
The Witness Who Claims Ignorance 557
The Cooperative-But-Hostile Witness 557
Statements That Tie the Suspect to the Crime 557
Lies and Mistakes That Can Be Proven False at Trial 558
Statements That Contradict the Suspect's Story 558
Oral/Written/Taped Statements 559
Friendly Witnesses 560
Voluntariness and *Miranda* 560
Suggested Techniques 560
Narrative v. Specific Questions 561
Friendly Witnesses 561
Hostile Witnesses 561
ANTICIPATING DEFENSES 561
Self Defense 562
The Condition of the Victim 562
The Condition of the Suspect 562
The Suspect's Fear 563
History of Combatants 563
Accident 564
The Suspect 564
Witnesses 564
Pathologist 564
Motive 564
Intoxication 564
Preparation 565
Perpetration 565
Post-Crime Conduct 565
Alibi 566
Insanity 566
The Test 566
Opinion by Officers 567
Entrapment 569
Fraud – White Collar 569
Suggested Techniques 574
VOLUNTARINESS HEARINGS 574
Motion to Suppress 574
Document and Paperwork Review 574
Your Report(s) 575
Other Officer's Report 575
The Motion to Suppress 575
The Burden of Proof 575
The Hearing 575
Suggested Techniques 575

IDENTIFICATIONS 577
INTRODUCTION 577
SUGGESTIVITY 577
Suggestivity Before the Identification 577
Suggestivity During the Identification 578
Lineups (Physical or Photographic) 578
Composition 579
Officer Conduct 582
Number of Participants 583
Showups (One-on-One Confrontations) 584
Suggestivity After the Identification 585
Showing a Witness More Than One Lineup 586
RELIABILITY 586
Independent Basis 586
Reliability Factors 587
SEARCHES AND SEIZURES 588
Detentions 588
Showups 588
Handcuffs or Physical Restraint 589
Movement 589
Rule 41.1 Orders 589
Requirements 589
Other Issues Relating to the Petition and Order 590
Searches 591
Arrests 591
Movements for Showups 591
Physical Lineups 591
RIGHT TO AN ATTORNEY 591
Lineups 591
After Formal Proceedings Have Begun 591
Before 591
Showups 592
NON-TESTIMONIAL EVIDENCE 592
SUPPRESSION HEARINGS 592
IDENTIFICATIONS AT TRIAL 593
The Witness' Testimony 593
The Officer's Testimony 593
SUGGESTIONS FOR OFFICERS 593
General 593
Physical Lineups 594
Photographic Lineups 595
Showups 596
Ensuring Reliability 597
EVIDENCE 599
INTRODUCTION 599
DEFINITION OF EVIDENCE 599
Purpose of the Rules of Evidence 599
Purpose For Which Evidence is Offered 599
KINDS OF EVIDENCE 600
Direct – Circumstantial – Substitute Evidence 600
Direct Evidence 600
Circumstantial Evidence 600
Substitute Evidence 601
Judicial Notice 601
Presumptions 601

Inferences 602
Testimonial – Real – Demonstrative – Documentary Evidence 602
Testimonial Evidence 602
Factual Testimony 602
Opinion Testimony 603
Real Evidence 606
Demonstrative Evidence 607
Documentary Evidence 607
THE TRIAL 607
Pretrial 607
Constitutional Violations 608
Other Motions 608
Discovery 608
Jury Selection 608
Opening Statements 608
The State's Case 609
Direct Examination 609
Leading Questions 609
Objections 609
Cross-Examination 609
Eliciting Facts Which Support the Defendant's Theory 610
The Defense Case 612
Jury Instructions 612
Defense Theory 612
Flight 613
Recent Possession 613
Self Defense 613
Accomplice Testimony 613
Closing Arguments 613
Techniques For Officers 614
ADMISSIBILITY OF EVIDENCE AGAINST A DEFENDANT 615
Relevance 615
Motive 616
Negative Evidence 616
Weapons, Disguises 616
Aliases 617
Informants 617
Officer's Prior Misconduct 619
Reliability 619
Hearsay 620
Admissions 620
Statements Against Penal Interest 621
Excited Utterances 622
Dying Declarations 623
Written Records 624
Statements of a Child Victim of Unlawful Sexual Offenses 625
State of Mind 626
Prior Inconsistent Statements 626
Arresting Officer Statements 627
Prior Consistent Statements 627
Competency 628
Unsound Mind 628
Children 628
Witnesses Who Have Been Hypnotized 629
Scientific Evidence 629
Physical Characteristics 629

Polygraph Results 630
Experiments 631
Undue Prejudice 632
Convictions 633
Impeachment 633
Misdemeanors 633
Other Bad Acts 633
Motive 634
Complete Story Doctrine 634
Modus Operandi – Common Scheme or Plan 637
Intent 642
Malice or Ill-Will 642
Disprove Accident 643
Consciousness of Guilt 643
Photographs 643
Mug shots 644
Gruesome Pictures 644
Foundation 644
General Rules 644
Collection of Evidence 644
Documentation of Evidence 645
Labeling the Evidence 645
Documenting the Evidence 645
Preservation of Evidence 646
Writings 646
Photographs 646
Chain of Custody 647
Lost or Destroyed Evidence 649
Constitutional Violations 656
The Exclusionary Rule 656
The Good Faith Exception to the Exclusionary Rule 656
Colorado's Statute 657
Reliance Upon Case Law 657
Reliance on Statute or Ordinance 658
Mistakes in the Drafting of Warrants 658
Limitations to the Good Faith Exception 660
Independent Source Exception 661
The Inevitable Discovery Exception 663
Impeachment 665
Privileges 665
Testimonial Privilege: Spouses 666
Communication Privilege 666
The Informer Privilege 666
Burdens of Proof 667
Trials 668
Hearings 668
Suggested Techniques 668
Relevance 668
Reliability 669
Foundation 669
Constitutional Violations 670
Privileges 670
Burdens of Proof 670
CRIMINAL PROCESS 673
INTRODUCTION 673
FIRST APPEARANCES 673

Purpose of the First Appearance 673
Unnecessary Delay 674
Necessary Delays 674
Prejudice 674
Suggested Techniques 675
Pre-Arrest Statements 675
Post-Arrest Statements 675
The First Appearance 675
Statements After First Appearances 675
PRELIMINARY HEARING, GRAND JURY 675
Difference Between a Preliminary Hearing and Grand Jury 676
Hearsay 676
Suggested Techniques 676
ARRAINGMENT 677
PRETRIAL HEARINGS AND PROCEDURE 677
Discovery 677
Disclosure to the Defendant 678
Disclosure to the Prosecutor 679
Impeding Defense Investigations 679
Failure to Disclose 679
Pleas 679
Motions 680
TRIALS 680
Jury Selection 680
Examination of Jurors 680
Challenges 681
Challenges for Cause 681
Peremptory Challenges 681
Opening Statements 681
The State's Case 681
Cross-Examination 682
Motion for Judgment of Acquittal 682
The Defense Case 682
Jury Instructions 683
Closing Arguments 683
SENTENCING 683
POST-CONVICTION PROCEEDINGS 683
Probation/Parole Revocation Hearings 683
Post-Conviction Relief 684
REPORT WRITING 685
INTRODUCTION 685
IMPORTANCE 685
Intra-Agency Review 685
District Attorney Review 685
Defense Attorney Review 685
Discovery 686
Defense Preparation 686
PRINCIPLES OF CLARITY 687
Dictating 687
Words 688
Sentences 688
The Active Tense 688
Paragraphs 689
OCUMENTATION 689
Personal Knowledge 689
Contact Information 689

Hearsay **689**
Statements **690**
Suspects 690
Admissibility in Court 691
Approach 691
Hostile Witnesses 692
Property Descriptions and Values **693**
Times **694**
Apparently Insignificant Facts **694**
Information Tending to Disprove or Minimize the Suspect's Guilt **695**
Some Things Which Should Not Be Documented **695**
Opinions 696
Theories 696
Factual Theories 696
Assumptions 696
Conclusions 697
Writing with Preservation of Memory in Mind **697**
SUGGESTED TECHNIQUES **697**
Overview **698**
The Elements **698**
The Facts **698**
Suppression (Constitutional Issues) **698**
Searches and Seizures 698
Statements from Suspects 698
Witness Statements **699**
Rebutting Defenses **699**
TESTIMONY **701**
INTRODUCTION **701**
You Are a Witness, Not an Advocate **701**
You Must Testify From Personal Knowledge **701**
PRE-TRIAL PREPARATION **702**
At the Scene **702**
Explaining Actions 702
Failure to Act 702
Your Report **703**
Writing Your Report 703
Reviewing Reports 703
Evidence **703**
The Scene of the Crime **704**
Interview With the Prosecutor **704**
Weaknesses 704
Testimonial Experience 704
Anticipated 704
Limitations on Testimony 705
Sitting In On The Trial 705
APPEARANCE **705**
DEMEANOR **705**
The Oath **706**
The Witness Stand **706**
Positioning 706
Microphone 706
Looking At The Jurors 706
Answering Questions 707
Helping the Prosecutor 707
Hurting the Defense 707
Dealing with the Defense Attorney 707

Surprise Questions 708
Hostile/Offensive Questions 709
Conversations Off The Stand 709
Around Jurors 709
Talking to Jurors 709
Talking to the Prosecutor 710
Other Witnesses 710
With Defense Attorneys 711
TESTIMONY 711
General Rules 711
The Court Reporter 711
Speak Clearly 712
Describing in words in what cannot be seen 712
Style Tips 712
Police Jargon 712
Direct Quotes 713
Volunteering Information 713
Objections 714
Direct Examination 714
Open Ended vs. Leading Questions 714
Refreshing Recollection 715
Admitting Physical Evidence 715
Distinguishing Features 716
Chain of Custody 717
Photographs 718
Diagrams, Charts, Maps, Etc. 719
Cross-Examination 720
Building Defenses 720
Alternative Suspect 720
Affirmative Defenses 721
The witness is lying 722
Leading Questions 722
Purposes 722
Bolstering the Defendant's Story 723
Impeachment 723
Essential Testifying Skills 723
Listen to the Question 723
Be Fair 723
Understand What is Being Asked and Why 724
Unclear Questions 724
Hostile or Offensive Questions 724
Friendly Questions 724
Compound Questions 725
Rapid-Fire Questions 725
Know How to Answer 725
Certainty 725
Cleverness 727
Lies 727
Correcting Mistakes 728
Looking to the Prosecutor for Help 728
Explaining Your Answer 728
Mistrial Bait 731
Other Bad Acts 731
Assertion of Fifth Amendment Rights 731
PRETRIAL HEARINGS 732
Preparation 732

Knowledge of the Law 732
Standard Procedure or Departmental Rules 732
Legal Conclusions 733
Reports 733
Testimony 733
Credibility 734
SUGGESTED TECHNIQUES 734
CIVIL DISPUTES 735
INTRODUCTION 735
GENERAL RULES 735
Professional Attitude 735
The Law 735
Keeping the Peace 736
Legal Advice 736
Legal Questions and Action 736
DOMESTIC DISPUTES 736
Protection 736
No Court Order 737
Crime Committed 737
No Crime Committed 737
Violence Imminent 737
Shelter House 737
Emergency Protective Order 737
Court Order 739
Officer's Duty 739
Divorce Actions 739
Child Custody Disputes 740
No Court Order 740
Court Order 740
Emergency Protective Orders 740
Suggested Techniques 741
LANDLORD – TENANT DISPUTES 741
Tenant Lockout 742
Court Order Requirement 742
Eviction Procedure 742
Landlord Liens 742
Personal Effects 742
Peaceable 743
Value of the Property 743
Interference with Tenant's Enjoyment 743
Abandoned Property 743
Suggested Techniques 743
Lockouts 743
Landlord Liens 744
CREDITOR REPOSSISSIONS 744
Self-Help 744
Self Help Powers 744
Breach of Peace 745
The Officer's Role in Repossession 745
State Action 745
Passive Assistance 745
Responding to the Scene 746
Court Order 746
Particular Property 746
Vehicles 746
Self Help 747

Court Order 747
Personal Property in Vehicles 747
Household Property 747
Consent to Enter 747
Consent to Repossess 747
Complaints from Residents 747
Suggested Techniques 748
CIVIL LIABILITY 749
INTRODUCTION 749
Causes of Action 749
Governmental Immunity 749
Amount of Awards 750
Payment of Damages 750
Punitive Damages 750
Governmental Immunity Act 750
GENERAL – TORTS 750
Torts v. Crimes 750
Crime 751
Tort 751
Types of Torts 751
Negligent Torts 751
Duty to Plaintiff 752
Breach of Duty 752
Proximate Cause 753
Damages 753
Lack of Good Faith 753
Intentional Torts 754
Constitutional Torts 755
Civil Procedure 755
Initiating a Complaint 755
Discovery 756
Interrogatories 756
Depositions 756
Production of Documents 757
Settlements 758
Trials 758
Burdens of Proof 758
Self-Incrimination 759
Witnesses 759
Who Can Sue 759
Who Can Be Sued 760
The Officer 760
Superior Officers 760
Governmental Entity Employers/Agencies 761
Other Defendants 761
In What Court Will the Suit Be Brought 762
Small Claims Court 762
State County or District Court 762
United States District Court 762
Scope of Employment 762
Factors 763
Off-Duty Work 763
Color of Law 764
NEGLIGENCE 765
Vehicle and Traffic Related Negligence 765
Non-Emergency Situations 765

Emergency Situations 766
Statutory Authority 766
Police Chases 768
Road Hazards 769
Drunken Drivers 769
Weapons Negligence 770
Failure to Protect 770
False Arrest 771
Arrest Warrant 771
Warrantless Arrests 772
Effect of Departmental Rules and Regulations/Policies and Procedures 773
Presumption of Negligence 773
Immunity 774
INTENTIONAL TORTS 774
Excessive Force 775
Dismissals and Acquittals 775
Reasonable and Necessary Force 775
Flashlights 776
Batons 776
Mace 776
Handcuffs 776
Chokeholds 776
False Imprisonment 776
Imprisonment 777
Malice 777
Malicious Prosecution 778
Abuse of Process 778
CIVIL RIGHTS VIOLATIONS 778
Civil Remedies 778
Negligence 779
Excessive Force 780
Other Types of Claims 781
Attorneys Fees 781
Conspiracies 782
Criminal Remedies 783
Double Jeopardy Issues 784
Indemnification 784
Good Faith Defense 784
Punitive Damages 785
SUPERVISOR LIABILITY 785
Elements 785
Foreseeability 785
SUITS AND COUNTERCLAIMS BY OFFICERS AND GOVERNMENTAL EMPLOYERS 787
Suit and Countersuits by Governmental Employers 787
Attorney Fees 787
Direct Suits 788
Suits by Officers 788
SUGGESTED TECHNIQUES 788
Situations Where a Complaint May Be Filed 789
Situations Where a Complaint Has Been Filed 789
DEFINITIONS 791

Chapter 1

THE LAW

I. INTRODUCTION

The laws relating to law enforcement have become so confusing and complex that many officers are complaining in frustration, "You gotta' be a lawyer to be a cop these days." This statement is both accurate and absurd. It is accurate because it is your sworn duty to enforce the law by lawful means; it is absurd because you need not know the law as well as lawyers. You must know it better!

If you think about it for a moment, the reason is obvious. Often you must decide in seconds what to do in a given situation. Lawyers, then, may research and debate the law relating to the circumstances of your conduct for months. After that, the trial, appellate and supreme courts may research and reflect for months, or even years, before deciding (often by split decision) whether your conduct was lawful or unlawful.

A. Memorizing the Law

Prosecutors and citizens sympathize with your plight. Prosecutors do not, however sympathize with the common notion among officers that the law can be learned by memorization. It cannot. "Hard and fast" rules in the law are rare. The sooner you realize this, the better and more professional officer you will be. As a final emphasis of this point, read what a Chief Justice stated in response to the argument that officers "need rules" relating to constitutional issues: "We are construing the Constitution, not writing . . . a manual for law enforcement officers." *Arkansas v. Sanders,* 442 U.S. 753 (1979).

You should not be offended by the Chief Justice's seemingly callous remark. It is simply a fact of law and (your) life that you must "think" rather than memorize.

B. The Law as a Seamless Web

The law has often been described as a "seamless web." Nowhere is this description more appropriate than in the areas of law related to law enforcement. Often officer conduct which appears to relate only to one specific legal question becomes a "web" of issues including many interrelated laws.

Example:

An officer stops a vehicle and discovers evidence related to a crime. Later, the officer may be required to prove many "legal facts" about the discovery of that evidence.

1. **The legality of the stop**

   The officer may have to prove in court that the stop of the vehicle was lawful

2. **The legality of any search or seizure of evidence**

   The officer may have to prove the legality of the search of the vehicle and/or the occupant(s).

3. **Other legal issues**

   Besides the rather obvious legal issues listed above, the officer will often have to contend with other legal issues.

   a. **Statements**

      Rarely should there be a case where the officer does not take, or at least attempt to take, a statement from a suspect. A statement is not admissible unless the officer can prove that it was lawfully obtained.

   b. **Identifications**

      Sometimes officers must tie a particular suspect to a particular crime. The officers must prove that the identification procedure used was lawful.

   c. **Proper collection, documentation and preservation of evidence**

      Before crime-related evidence is admissible in court, the officer must be able to "lay a foundation" for the evidence. This foundation can be established only if the officer properly collected, documented and preserved the evidence.

   d. **Report writing and testimony**

      When an officer writes a report poorly or makes mistakes during testimony, the officer is easily discredited by the defense attorney.

e. Civil liability

When suspects claim that their rights were violated the officers may have to prove that their own conduct was lawful and reasonable.

II. THE PURPOSE OF THIS BOOK

The purpose of this book is to inform officers of the laws and techniques that are necessary to obtain convictions of criminals.

A. Training Text

The primary purpose of this book is educational. If you study this book you will be much better able to handle the legal issues relating to the performance of your duties.

B. Reference Source

The second purpose of this book is to provide a reference source for officers in the field. In most circumstances, officers will be able to look up a legal question in the book before taking action.

C. Justice Bias

This book has a "justice bias." The vast majority of officers want their investigations to be professional and their arrests to "stick." If the purpose of your investigations is to produce arrests, confiscate property, harass suspects, and the like, this book is not for you. On the other hand, if you want to increase your professionalism through knowledge of the law and techniques which will result in convictions of guilty criminals, you will find this book very helpful.

D. Advisory Nature of the Book

The issues in this book have been extensively researched and reviewed. No legal sourcebook, however can possibly cover every situation you may encounter in your job. Although this book should give you enough information to exercise your professional judgment in the vast majority of situations, it is very important that, if there is time, you contact your local district attorney's office for advice relating to your particular situation.

III. THE TYPES OF LAWS

There are three primary sources of law that officers must understand:

- Constitutional law
- Statutory law
- Case law

A. Constitutional Law

Most officers think constitutional law is very complicated. It can be, but it is not beyond the understanding of every officer who really wants to learn it.

1. The United States Constitution

The United States Constitution is the supreme law of the land. No statute or judicial ruling can stand which is in conflict with the Constitution.

The Constitution has about 17,000 words. Less than 100, however, are of practical importance to officers in their law enforcement duties. These words are embodied in the Fourth and Fifth Amendments to the Constitution and are discussed extensively in this book.

2. The Colorado Constitution

The Colorado Constitution, as it relates to "civil rights" and the job of a law enforcement officer, is very similar to the United States Constitution. A fact that officers should be aware of, though, is that the Colorado Supreme Court may interpret the Colorado Constitution more strictly against officers than the United States Supreme Court interprets the Federal Constitution. In other words, just because the United States Supreme Court rules that an officer's conduct was proper in a particular case does not mean that the Colorado Supreme Court will rule the same way.

B. Statutory Law

A second source of law is statutory law. This is law which comes from state and federal legislatures, and is seemingly self-explanatory. If, however, there is any question in your mind as to the meaning of any of the words or phrases in the statutes you should talk to your district attorney.

C. Case Law

The third source is case law. These are rulings by the courts which interpret the meaning of the constitutions, statutes, and previous case law.

1. Precedent

Every officer must understand that courts make their rulings based upon previous court decisions. These previous decisions are called "precedents." Courts rely upon precedent so that legal rulings are consistent over time. This helps assure society (including law enforcement officers) that the law is fair and orderly.

2. New Law

Sometimes courts change the law because the judges change their mind as to what the law should be. More often, however, the courts simply rule that the facts of the case which they are presently deciding are different from the prior *factual situations* reflected in the previously decided case.

3. The Officer's Role

Ultimately, officers create "good" and "bad" case law. An officer, who understands the law, uses good judgment and good faith normally "creates" good law for other officers. On the other hand, when officers do not understand the law, use bad judgment or bad faith, they not only lose individual cases, but they also create bad law for other officers.

IV. HOW TO USE THIS BOOK

A. The Approach

The following is the typical approach of this book to the problems encountered by officers. You will find that this book is somewhat different than most law texts which you have seen.

1. The law

The legal proposition related to the particular issue is stated first.

2. Examples

A specific example or examples stating the facts of particular cases relating to the legal issue is provided after the legal proposition.

3. Notes

If there is an important issue closely related to the law or example(s) which officers should be aware of, this issue is stated after the law or example.

4. Suggested techniques

Suggested techniques in dealing with the issues are offered at the end of each section.

Note: These techniques can be somewhat misleading if read in isolation rather than in conjunction with the rest of the book.

5. Repetition of the law and cases

There is some repetition in this book because the same legal principle may apply in many different situations. This repetition is used not only to reinforce the rules in your mind but also to avoid cross references.

B. The Chapters

This book contains a number of chapters which discuss separate and distinct topics. It is very important to remember, however, that all of these topics are overlapping and interrelated. Therefore, learn the book as a "whole" rather than chapter by chapter.

C. Changes in the Law

The law is not written "in stone" and neither is this book. A court may determine that it made a mistake in a previous ruling and change an entire area of the law by a ruling in a case before it. Far more commonly, however, courts "create" new law because of the new facts which are presented to the court. Even lawyers who study the criminal law often have trouble keeping up with the recent changes in the law. For officers, this task is nearly impossible.

For these reasons, it is the intention of the Colorado District Attorneys' Council and the Attorney General's Office to publish and distribute revisions in the law as often as is necessary. When you receive these revisions be sure to read them in light of your previous knowledge of related legal principles and not in isolation.

Note: For logistical reasons, it is impossible to get changes in the law to you "hot off the presses." Therefore, it is very important that you have close contact with your district attorney in order to keep up with the law.

D. Tables of Contents and Indexes

Detailed tables of contents are included at the beginning of this book. If, for example, you encounter a problem situation, you can use the table of contents as a quick reference to find the issues.

V. HOW TO LEARN THE LAW

Officers often state the law in conclusory terms.

Example: "Any time I arrest the driver out of a car I can search the car."

Such statements may be incomplete, inaccurate, and dangerous without a complete understanding of:

- the legal theory (rule) which justifies the conduct;
- the reason(s) for the legal theory;
- the facts of the case or cases which support the law.

A. Know the Difference Between the Legal Theories

Courts deal in legal theories. It is very important that officers know and understand the difference between the various legal theories.

Using the above example, consider the following rule: an officer may or may not search a vehicle depending upon how the facts fit the legal theory relied upon by the officer. These theories are discussed extensively later in this book.

The following are examples of some of the theories which may justify the warrantless search of the vehicle:

1. The "Automobile Exception":

The courts have ruled that an officer may search a vehicle if the officer has "probable cause" to believe the vehicle contains crime-related evidence and the vehicle is mobile.

Note: This theory has absolutely nothing to do which whether anyone is arrested out of the vehicle or not.

2. Search incident to arrest

An officer may search the *passenger compartment* of a vehicle incident to a valid custodial arrest.

3. Inventory searches

An officer may search a vehicle under the inventory theory if the officer has lawful "custody" of the vehicle and there are no reasonable alternatives to the inventory.

B. Know the Reasons for the Theory

All legal theories have a reason or reasons An officer who knows the reason for the theory will be able to understand when the theory applies or does not apply. Using the above example, consider the following reason(s) for the legal theories:

1. The "Automobile exception"

The reason an officer may normally search a mobile vehicle without a warrant is because by the time the officer gets a warrant the car and/or the evidence might be gone.

Note: Also, a person has a lower expectation of privacy in a car than other areas, such as a home.

2. Search incident to arrest

An officer may search the passenger compartment of a vehicle incident to arrest because, long before the Constitution was written, officers were allowed to search areas within reach of an arrestee at the time of the arrest. Later, the United States Supreme Court ruled that these areas could be searched in order to locate a weapon which could harm the officer or evidence which the arrestee could destroy. The Supreme Court has ruled that the passenger compartment is a place which officers can search incident to arrest. *Thornton v. U.S.*, 541 U.S. 615 (2004).

3. Inventory searches

Officers may inventory vehicles in their custody to protect the owner's property and to protect themselves from false claims of theft by the

owner. If the officers do not have lawful custody of the vehicle, they may not search it.

C. Know the Facts of Cases

It is crucial that officers understand that usually a simple statement of law is rather meaningless without a firm understanding of the facts which the law is based on. In other words, a very small change in the facts will often change the law that applies. Notice how the following factual situations change the law related above.

1. The "Automobile Exception"

An officer knows exactly which container holds crime-related evidence in the car. The officer cannot search the container without a warrant.

a. Reason For the "Rule Change"

The officer can easily seize the container and get a warrant. Therefore, there is no danger of losing the evidence.

b. "New" Legal Theory

An officer must obtain a warrant unless there are "exigent" circumstances justifying the warrantless search.

2. Searches Incident to Arrest

An officer places the arrestee in jail and then searches a locked suitcase "incident to arrest." It would be very difficult to justify the search under these circumstances.

a. Reason or the "Rule Change"

It is difficult to justify the search of a locked container when there is no possibility that the arrestee could get to it.

b. "New" Legal Theory

The search incident to arrest must be conducted contemporaneously with the arrest (i.e., at about the same time and place as the arrest) and must include only those areas which the arrestee could possibly get to at the time of the arrest.

3. Inventory Searches

There is a passenger present who is licensed, sober and capable of driving the vehicle. The officer may not inventory the vehicle.

a. Reason for the "Rule Change"

There is no need for an officer to protect property of an arrestee if there is someone in the car who is able to take care of it.

b. "New" Legal Theory

In order to inventory a vehicle officers must be able to prove that there was no reasonable alternative to the inventory.

VI. DISCLAIMERS

This book is advisory only. Absolutely no warranties, **EITHER EXPRESS OR IMPLIED** are made with respect to any of the materials reflected in this book. The best way to use this book is to discuss its principles with your district attorney and develop a close working relationship with your legal advisor.

Chapter 2

SEARCH AND SEIZURE - PERSONS

CONSTITUTION OF THE UNITED STATES
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."

I. INTRODUCTION

All "persons" are protected by the Fourth Amendment against "unreasonable searches and seizures." This chapter discusses what is, and what is not, an unreasonable seizure or search of pedestrians.

Note: The search and seizure of persons in vehicles is discussed in detail in Chapter 4, **SEARCH AND SEIZURE – VEHICLES.**

CHART: SEARCH AND SEIZURE OF PERSONS

The following is a chart which lays out the evidence required that is required for a search and/or seizure of a person, the officer's powers, and a suspect's rights during the encounter.

	Evidence Required	Officer's Powers	Suspect's Rights
Consensual Encounter	None	None	Free to leave
Stop/ Investigative Detention	Reasonable, explainable suspicion	May "freeze" the situation; may "frisk" if fearful	Free to leave after reasonable time if no probable cause
Arrest/Custody	Probable cause	Handcuff and book; search incident to arrest	Remain silent, contact attorney

II. CONSENSUAL ENCOUNTERS

The protections afforded by the Fourth Amendment protect citizens against "unreasonable searches and seizures." Many forms of interactions between police and citizens do not trigger the Fourth Amendment protections because the interaction is consensual in nature and does not constitute a "seizure" of the citizen. However, during such encounters the officer has no power to require the citizen to do anything.

A. Definition

A consensual encounter is a brief discussion between an officer and a private person where that person voluntarily cooperates with the police and is free to walk away or ignore the officer's questions. It is not a "seizure" (stop/detention/arrest) under the Fourth Amendment, and the officer does not have to possess any kind of suspicion or explainable reason in order to contact the person.

B. Constitutional Basis for Consensual Encounters

The United States Supreme Court, in the landmark case of *Terry v. Ohio,* 392 U.S. 1 (1968), discussed the difference between a seizure (stop/ detention or arrest) and a consensual encounter, stating:

> "Obviously, not all personal intercourse between policemen and citizens involve 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."

In a concurring opinion, one Justice stated, "there is nothing in the constitution which prevents a policeman from addressing questions to anyone on the streets."

Similarly, the Colorado Supreme Court has recognized that "when a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person in a constitutional sense . . . . It does not follow, however, that every confrontation between a police officer and citizen, which results in some form of interrogation directed to the citizen, necessarily involves a 'seizure' of the person." *People v. Pancoast,* 659 P.2d 1348 (Colo. 1983).

C. Reasonable Person Test

An officer may have a difficult time convincing a court that a person was "contacted" rather than "stopped and detained." The test is whether a reasonable person under the circumstances would believe that he or she was

free to leave and/or disregard the officer's request for information. The courts recognize that inherent social pressure to cooperate with the police does not necessarily convert a consensual encounter into a stop or arrest. Rather, the courts look to all of the circumstances to determine whether the conduct of the police communicated to a reasonable person that the person was not free to decline the officer's request or otherwise end the encounter. *People v. Marujo,* 192 P.3d 1003 (Colo. 2008).

D. Consensual Encounters v. Stops/Detentions

When a citizen's freedom is restricted by means of an officer's physical force or show of authority, the person is stopped, or "seized," under the constitution. *People v. Heilman,* 52 P.3d 224 (Colo. 2002). An officer must have at least "reasonable suspicion" to believe that a suspect has or is about to commit a crime in order to "seize" that person. Otherwise, evidence obtained by the officer during the encounter will be inadmissible in court.

The is no "bright line" established by the courts to delineate under what circumstances a police/citizen encounter is consensual and when that encounter escalates into a stop or detention. The rules in this respect are established on a case-by-case basis. However, the Colorado Supreme Court has established certain factors or guidelines to help determine whether a seizure has occurred or not. Those factors include:

1. whether there is a display of authority or control over the suspect, such as activating a siren or any patrol car overhead lights;
2. the number of officers present;
3. whether the officer approaches in a non-threatening manner;
4. whether the officer displays a weapon;
5. whether the officer requests or demands information;
6. whether the officer's tone of voice is conversational or whether it indicates that compliance with the request for information might be compelled;
7. whether the officer physically touches the citizen;
8. whether an officer's show of authority or exercise of control over an individual impedes that individual's ability to terminate the encounter;
9. the duration of the encounter
10. whether the officer retains the citizen's identification or travel documents.

People v. Marujo, 192 P.3d 1003 (Colo. 2008). It is important to understand that no one of the factors listed above will necessarily determine whether an encounter is deemed consensual or as a stop by the courts. Rather, the courts will examine "the totality of the circumstances" to decide how the encounter is legally characterized.

E. Particular Circumstances

1. Approaching a person

Normally, the fact that an officer approaches a person is not a stop unless the officer makes some indication that the person is not to move as the officer approaches.

a. Street Contacts

Officers were informed that an individual named "J" or "Johnny" lived at a particular address and had a large quantity of methamphetamine. Within minutes, they went to that address and saw a man standing in the front yard. An officer approached Melton and asked him if his name was "J" or "Johnny." The Colorado Supreme Court held that the initial encounter was not a seizure or an investigatory stop but a consensual encounter, and thus reasonable suspicion was not needed. *People v. Melton,* 910 P.2d 672 (Colo. 1996).

As officers approached a car parked in a parking lot occupied by three men, one of the men made a rapid motion as if to conceal something. When asked what he had put underneath the driver's seat, the man replied, "Nothing." The Colorado Supreme Court concluded that this initial encounter was a consensual interview and not a seizure. *People v. Hill,* 934 P.2d 821 (Colo. 1996).

Officers approached the defendant outside a store after his friend had been arrested, searched, and questioned inside the store. The Colorado Supreme Court held that the encounter was consensual because only a single patrol car was involved, the patrol car did not have its lights or sirens activated, a single officer was present with defendant, the officer did not draw a weapon, nothing indicated that the officer used a threatening tone of voice, and the defendant was not separated from his identification or personal belongings. *People v. Marujo*, 192 P.3d 1003 (Colo. 2008).

b. Residential Contacts

Three uniformed police officers knocked on the door to the defendant's motel room. When the defendant opened the door, the lead officer asked permission to come into the room. The officer advised the defendant that the police were there because of a concern that illegal drugs might be in the room. The defendant then gave permission for the officers to come into the room. Once inside, the officers split up among the three occupants of the room.

The lead officer stood about three to four feet from the defendant and asked for his identification. Before or immediately after asking for the identification, the officer sought permission to search the room. The defendant provided his identification to the officer and gave permission to search the room. The court of appeals concluded that this contact between the police and defendant was consensual in nature. *People v. Tweedy*, 126 P.3d 303 (Colo. App. 2005).

Officers entered a home pursuant to the owner's consent. They located the defendant in the bathroom, directed him to come out of the bathroom, and then directed him into a separate room. An officer then ran a clearance check to determine if he had any active arrest warrants. The Colorado Supreme Court held that this encounter was a seizure. *People v. Martinez*, 200 P.3d 1053 (Colo. 2009).

c. Airport Contacts

Undercover DEA agents who approached Royer in an airport terminal, identified themselves, and asked to see his identification and travel documents did not "seize" Royer in a way implicating the Fourth Amendment. However, when the agents retained Royer's driver's license and airline ticket and requested that he accompany them to the "police" room, the encounter no longer was consensual and reasonable suspicion was required. *Florida v. Royer,* 460 U.S. 491 (1983).

Officers approached Johnson after observing him running through the airport. As he was standing in line at an airport boarding gate, the officers asked for identification and questioned him about whether he was a ticketed passenger, and if there were drugs or large sums of money in his carry-on baggage. Johnson consented to a search of the carry-on baggage he was carrying, and cocaine was found inside. The Colorado Supreme Court held that that this type of questioning did not result in a "seizure" of the person, because it was not so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded. *People v. Johnson,* 865 P.2d 836 (Colo. 1994).

Note: The Court stressed that if Johnson had refused to answer the officer's questions and the police took additional steps to obtain an answer, then a seizure would occur.

d. Contact on Public Transportation

Bostick boarded an Atlanta-bound bus in Miami. When his bus stopped in Ft. Lauderdale, officers boarded and made routine requests of all passengers, including Bostick, to search baggage as part of Florida's drug interdiction program. Because Bostick was seated on a bus and had no desire to leave, the Supreme Court shifted the inquiry from whether he felt "free to leave" to whether he felt free to decline the officers' request or otherwise terminate the encounter. By treating police-civilian encounters on a bus no differently than police-citizen encounters on a city street or in an airport lobby, the Court concluded that no seizure of Bostick's person occurred if all the circumstances surrounding the encounter would have communicated to a reasonable person that he was free to decline the officers' request. *Florida v. Bostick,* 501 U.S. 429 (1991).

Officers removed a suitcase from the luggage compartment of a bus and subjected it to sniff test by a trained narcotics dog. The bag was then carried onto the bus by an officer dressed as a bus driver, who then asked the owner of the suitcase to come forward. Once the officer identified Ortega as the owner of the suitcase, the officer asked her to come with him so that "a new tag" could be attached to the case. The officer, accompanied by Ortega, was taken to the garage and questioned by the officers. The Colorado Supreme Court held that, while the initial sniff of the suitcase by the narcotics dog did not constitute a seizure, the subsequent conduct of the officers caused a "meaningful interference" with Ortega's possessory interest in the suitcase, and therefore constituted a seizure of the suitcase. However, since the detention lasted only twenty to thirty minutes and did not delay the departure of the bus, the officer's conduct amounted to an investigative detention requiring only reasonable suspicion. *People v. Ortega,* 34 P.3d 986 (Colo. 2001).

2. Identifying Self as Police Officer

An officer approached two men sitting in a car in a parking lot who appeared bent over something in the front seat. Upon shining his flashlight into the car, he saw both men with cash in their hands and a small plastic bag containing a white powdery substance. The Colorado Supreme Court held that the officer did not restrain the liberty of occupants of the car by merely approaching them, and the mere fact that the officer identified himself as a police officer, without more, did not convert the encounter into a seizure. *People v. Dickinson,* 928 P.2d 1309 (Colo. 1996).

Officers knocked on the front door of a shed that defendant was using as living quarters, announced their presence, and told the defendant to open the front door. The Colorado Supreme Court held that the defendant was not seized, as the officers did not make any threats or other statements that would have caused a reasonable person in defendant's situation to believe that he was required to open front door. *People v. Terrazas-Urquidi*, 172 P.3d 453 (Colo. 2007).

3. Request for Identification

An officer observed two people in a legally parked car near a private residence. The officer parked his police car behind the car, turned on his side spotlight to provide some illumination, but did not activate his siren or any other lights. He then approached the car and "asked" the driver and passenger for identification. The officer then told the occupants to "wait a minute," and returned to his police car to check on the names provided by the identifications. The officer learned through the dispatcher that the passenger had an outstanding warrant. The passenger was arrested and a search incident to that arrest revealed a cigarette packet containing marijuana. The Colorado Supreme Court held that the officer's request for identification, without more, did not convert a consensual encounter into a seizure requiring Fourth Amendment protection. *People v. Paynter,* 955 P.2d 68 (Colo. 1998).

Retaining Identification

As the Courts in *Royer* and *Paynter* have made clear, while a police officer's request for identification does not constitute a seizure of the person, the act of retaining that identification to conduct further investigation is likely to convert the consensual encounter into a stop requiring reasonable suspicion.

Example:

During a lawful traffic stop an officer requested identification from both the driver and his passenger. The officer then retained both drivers' licenses, told the occupants to "hang tight in the car, "I'll be back with you in a minute," and went with the licenses to his police car to check for outstanding warrants. Although the Colorado Supreme Court found the initial request of the passenger for identification to be consensual, the encounter escalated to an investigatory stop when the officer ordered him to remain in the car while returning to his police car with the identification. The Court reasoned that, under such circumstances, a reasonable person in the passenger's shoes would no longer have felt free to leave or

otherwise terminate the encounter. *People v. Jackson,* 39 P.3d 1174 (Colo. 2002).

4. Following or Walking Along With a Person

Walking or driving along with and talking with a person may or may not constitute a seizure, depending upon whether the actions of the officer would lead a reasonable person to believe that his or her freedom is being restrained or that they are required to submit to the officer's authority.

For example, in *People v. Morales,* 935 P.2d 936 (Colo. 1997), plain clothes officers noticed Morales in the airport terminal after he asked directions and then attempted to leave by a "restricted access" exit. The officers identified themselves as police officers, showed Morales their identification, and offered to help him return to the main terminal. The officers asked to see Morales' ticket and identification, looked at those documents, and engaged in casual conversation as they walked to the baggage carousel. In these circumstances, the court concluded that the encounter between Morales and the officers was a consensual interview.

Similarly, in *Michigan v. Chesternut,* 486 U.S. 567 (1988), the defendant ran at the approach of a patrol car. The officers caught up to him and drove alongside him for a short distance. During this time, the officers saw the defendant throw away several packets which were later found to contain narcotics. The court ruled that it was not a stop (seizure) to follow and drive alongside the defendant, since a reasonable person would not have felt his liberty was restrained so that he was not free to go about his business.

However, in *Outlaw v. People,* 17 P.3d 150 (Colo. 2001), officers observed four individuals on a street corner. They did not recognize any of them, did not know how long they had been there and did not see the individuals exchange anything. When the individuals saw the police car, they began to walk away. The officers turned their car around, drove it onto the sidewalk, and followed five feet behind the individuals for a distance of twenty or thirty feet. Observing that Outlaw's right hand was open but his left hand was closed, the officers drove the police car back onto the street, drove slowly eastbound in the westbound lane of traffic, and followed alongside Outlaw for another ten to fifteen feet as he walked down the sidewalk. The officer then stopped the car and summoned Outlaw, saying either "Can you come over to the vehicle" or "Come over to the vehicle." Outlaw complied, but was observed to drop baggies of suspected crack cocaine as he approached the police car. In these circumstances, the court concluded that the "officers' close pursuit of a pedestrian while in an automobile on a sidewalk is a 'show of

authority' . . . A reasonable person in Outlaw's position would not feel free to proceed on; rather; he would view the police conduct as a command to stop."

5. Chasing a Suspect

Officers on routine patrol in a high-crime neighborhood observed a group of youths, including Hodari D., huddled around a small red car. The youths ran upon seeing the officers. As Hodari rounded a block in one direction, one of the officers rounded it in the other in an attempt to intercept him. Hodari did not see the officer until he was almost upon him, but was able to toss away a rock of crack cocaine just before being tackled. He later moved to exclude the cocaine on the ground that it was the fruit of an unlawful seizure. The United States Supreme Court found that the jettisoning of the cocaine was not the fruit of an illegal arrest because Hodari had not been "seized" within the contemplation of the Fourth Amendment. Prior law had indicated that Hodari might have been "seized" when the police made some type of "show of authority" leading a reasonable person to believe he was not free to leave the presence of the police. However, the Supreme Court refined the "seizure" principle to apply only when either (a) an application of a physical force actually achieves a restraining effect or (b) "an officer's show of authority results in actual submission. *California v. Hodari D.,* 499 U.S. 621 (1991).

The Colorado Supreme Court has similarly overruled prior cases holding that an officer's act of chasing a suspect constitutes a "seizure" requiring at least reasonable suspicion. In *People v. T.H.,* 892 P.2d 301 (Colo. 1995), officers responded to a business owner's request to control loitering. Upon approaching T.H. and asking him for identification, the youth fled and, while fleeing, tossed a plastic baggie of cocaine into the street. When the officers caught up with T.H., they arrested and searched him. Although the district court ruled that the contact with T.H. constituted an investigatory stop and the officers did not have reasonable to approach him, the Colorado Supreme Court reversed, holding that the contact was merely an encounter no seizure occurred until after officers recovered the cocaine.

Similarly, in *People v. Archuleta,* 980 P.2d 509 (Colo. 1999), an officer observed three men "huddled together" in a dark alley in an area known for illicit drug activity. As the officer approached the men, Archuleta ran away and the officer chased him down an alley and to the door of a bar. As Archuleta entered the bar he knocked down a bicyclist who was in the entryway. He was apprehended at gunpoint after the officer found him hiding under some tables in the bar. A search incident to arrest revealed illegal drugs. The Colorado Supreme Court concluded in these

circumstances the officer did not need to have reasonable suspicion in order to chase Archuleta because that pursuit was not a seizure and did not trigger the Fourth Amendment.

6. Contact with Automobile Passengers

As will be discussed in detail in Chapter 4, contacting the driver of an automobile in the course of a traffic stop invariably constitutes a seizure necessitating reasonable suspicion. In a "full blown" traffic stop, the driver is yielding to the officer's show of authority, and the officer must therefore have reasonable suspicion that the driver is violating the law.

In 2007, the United States Supreme Court held that when an officer makes a traffic stop, the passenger of the car is also seized "from the moment the car comes to a halt on the side of the road." *Brendlin v. California*, 551 U.S. 249 (2007). Therefore, if the reasonable suspicion for the stop does not extend to the passenger's conduct, officers should have little or no contact with the passenger unless such reasonable suspicion arises.

In 2009, the Court reiterated that, "[f]or the duration of a traffic stop ... a police officer effectively seizes everyone in the vehicle [including] the driver and all passengers." *Arizona v. Johnson*, 129 S.Ct. 781 (2009). However, the court also held that, in a traffic-stop setting, it is lawful for police to detain an automobile and its occupants pending inquiry into a vehicular violation. "The police need not have, in addition, cause to believe any occupant of the vehicle is involved in criminal activity." However, the court went on to clarify that "[t]o justify a pat down of the driver or a passenger during a traffic stop ... the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous."

In *People v. H.J.*, 931 P.2d 1177 (Colo. 1997), the defendant was a passenger in a vehicle stopped for a traffic violation. The driver could not produce valid registration or proof of insurance, and neither of the passengers claimed ownership of the car. Suspecting that the car was stolen, the officers asked both passengers for their names and dates of birth. When the defendant provided confusing information regarding his name, the officers requested that all three occupants of the car exit and sit on the curb. The defendant was then handcuffed to investigate a possible false information charge. In this situation, the Colorado Supreme Court concluded that the officers had reasonable suspicion that the car was stolen, independent of the traffic infraction committed by the driver, and it was therefore permissible for the officers to detain and question the passengers.

Compare, however, *People v. Fines,* 127 P.3d 79 (Colo. 2006). There, the defendant was a passenger in a vehicle which was stopped for a traffic infraction. After the driver consented to a search of the car, an officer asked the defendant to step out, and he escorted her away from the stopped car to a particular location behind the stopped vehicle and in front of two police cars which had their overhead lights on. One of the officers then questioned her about drug activity, and requested consent to search her purse, which remained inside the car. Only after being told that the driver had already given consent to search the car did she reply, "Go ahead." The Colorado Supreme Court that under these circumstances, a reasonable person in the defendant's position would not have felt free to simply walk away or ignore the officer.

F. A Note on Demeanor

The officer's conduct and demeanor is crucial if the officer wishes to contend later in court that he was contacting rather than stopping a suspect. The officer who is courteous and conversational has a much better chance of a positive ruling from the court than one who is curt, businesslike and official. While the courts do not require an officer to inform a suspect that he or she is free to leave before determining that a contact was consensual, it is nevertheless advisable, if at all possible, to explain to the suspect that he or she is free to leave. It is very difficult for a court to rule that a stop or "seizure" occurred when the suspect has been informed that he or she is not being detained.

Example:

An officer observed a van parked in a pull-off area bordering a lake. Two men were sitting inside the van and one man was standing just outside of it. As the officer approached the car, the driver looked up, his eyes widened, and he appeared to throw something to the floor of the van. The officer parked approximately ten feet from the van in a T-formation, jumped out of the car, hurried to the van on foot, and said that "he wanted to see everybody's hands." He then asked the driver what he was doing and whether he needed assistance. When the driver stated that no assistance was needed, the officer asked him what he threw down, and then inquired whether there were any weapons or contraband in the vehicle. When the driver informed the officer that he could "sniff around," the officer ordered all the persons out of the van, ordered them to put their hands behind their heads with fingers interlocked, called for backup, conducted a pat down search of each of them and, when back-up arrived, began searching the vehicle. The officer's tone of voice during the encounter was described as unfriendly and his questioning was "rapid fire." Taking into account all of the circumstances, the court concluded that the officer's conduct demonstrated that his contact

constituted a **seizure**, and not a consensual encounter. *People v. Heilman,* 52 P.3d 224 (Colo. 2002).

G. Suggested Techniques

If an officer wants to talk to a suspect and there is any question as to whether reasonable suspicion exists to stop the suspect, the officer should strongly consider the following suggestions.

1. If you tell a suspect to "stop," "freeze," "halt," etc., and the suspect complies, you have seized (stopped) the suspect.

2. Talk to the suspect in a friendly, non-accusatory manner unless you are sure that you have reasonable suspicion.

3. You do not have to tell a suspect that he or she is free to leave. However the officer who tells the suspect his status is much more likely to have the court rule that the questioning was a consensual contact. If at all possible under the circumstances, tell the suspect:

   a. "you are free to leave"
   b. "you are not being detained"
   c. "you don't have to talk to me"

4. In order to talk to a suspect who is walking, simply walk along side him. Do not to anything to alter his or her path of travel.

5. If you did not stop the suspect be sure to document in your reports the specific facts reflecting that the encounter was a consensual contact.

III. STOPS/DETENTIONS

An officer may conduct an investigatory "stop" or "seizure" of a suspect if the officer has "reasonable suspicion" that the suspect is engaged in illegal activity. The officer may stop and detain the suspect for a short period of time in order to investigate the crime or suspicious activity.

A. Definitions

An officer "stops" a citizen "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of the citizen." *Terry v. Ohio,* 392 U.S. 1 (1968). This means that a stop is any conduct by an officer which would have communicated to a reasonable person that the person was not free to walk away, decline the officer's requests, or otherwise terminate the encounter.

Example:

An officer saw the suspect walking across a street and said, "hold it there, Bill." The court ruled that the officer's statement was a "stop." The court further ruled that "in order lawfully to [stop and] detain an individual for questioning . . . the officer must have a reasonable suspicion that the individual has committed or is about to commit, a crime." *Stone v. People,* 485 P.2d 495 (Colo. 1971).

An investigatory "detention" is the "freezing" of the suspect after a stop for a reasonable time while the officer investigates whether probable cause exists to make an arrest. Such a detention is not an arrest which must be supported by probable cause, even though the detainee is not "free to leave." An officer "detains" a suspect from the time the officer stops the suspect until the time the suspect is released or arrested.

The courts recognize the investigatory detention as an "intermediate form of police response that may be employed under narrowly defined circumstances upon less than probable cause." An officer may stop and detain a suspect without probable cause to arrest as long as three conditions are satisfied:

1. there is a specific and articulable basis in fact for suspecting that criminal activity has taken place, is in progress, or is about to occur ("reasonable suspicion");

2. the purpose of the intrusion is reasonable;

3. the scope and character of the intrusion are reasonable related to its purpose.

In reviewing an officer's conduct in making an investigatory stop, the court will base its decision on an **objective analysis** of whether reasonable suspicion exists to justify the stop and not upon the **subjective intent** of the officer.

Examples:

An officer observed a van weave across the continuous white line on the right shoulder of I-70 by approximately half the width of the van, and then cross over and touch the white-dashed line on the other side of its lane. The officer followed the van approximately a mile and a half, and then stopped the van to determine whether the driver was intoxicated. Upon making contact with the driver it was obvious to the officer that the driver had not been drinking, and the officer decided that he would not issue a traffic citation for

failure to drive within a single lane. However, the officer requested the driver's operator's license and vehicle registration. Subsequent investigation led to a search of the van, and drugs were discovered. The Colorado Supreme Court ruled that the officer's subjective decision not to ticket the driver for weaving did not strip him of his authority to inquire further concerning the traffic offense of weaving. "[T]he trooper possessed an objectively reasonable and articulable suspicion that Rodriguez had engaged in criminal activity, namely, the traffic offense of weaving, and thus the trooper was authorized to request identifying information from Rodriguez." *People v. Rodriguez,* 945 P.2d 1351 (Colo. 1997).

An officer observed a car parked in the driving lane of a side street, about 3-4 feet from the curb, with two males standing beside the passenger side window. When the officer approached the vehicle, the two men walked away. Upon contact, the officer observed marijuana in the vehicle and a later search of the driver uncovered cocaine on her person. The Colorado Supreme Court reiterated that the subjective intent of the officer in contacting the driver was not relevant, thus any subjective intentions in making the stop would not otherwise invalidate the legality of the stop for the traffic violations. *People v. Cherry,* 119 P.3d 1081 (Colo. 2005).

Officers observed the defendant's car parked illegally, and then drive away with only one operating headlight. The Court of Appeals held that any subjective intent of the officer to investigate drug activity did not invalidate the otherwise valid stop based on the traffic violations. *People v. Grenier,* 200 P.3d 1062 (Colo. App. 2008).

However, once the purpose for which the investigatory stop was instituted has been accomplished and no other reasonable suspicion exists to support further investigation, the justification for the stop ends and the detention must be terminated.

B. Legal Basis of Stops/Detentions

1. Constitutional Basis

While generally discussing investigative stops, the United States Supreme Court explained, "the Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary . . . it may be the essence of good police work to [stop the suspect]." *Adams v. Williams,* 407 U.S. 143 (1972).

2. Statutory Basis

The Colorado legislature has "codified" (written into the Criminal Code) a law relating to the stops of suspects on less than probable cause. The statute provides that "a peace officer may stop any person who he reasonable suspects is committing, has committed, or is about to commit a crime and may require him to give his name, address, identification if available, and explanation of his actions. The stopping shall not constitute an arrest. Section 16-3-103(1), C.R.S. (2008).

C. Reasonable Suspicion

Reasonable suspicion is information known to the officer which amounts to more than a mere hunch or generalized suspicion, but less than probable cause to arrest

1. The Formula

The Colorado Supreme Court has stated that what is required is "a particularized and objective basis for suspecting that a person or persons are engaged in criminal activity . . . The officer's assessment must center on whether there is an articulable suspicion that a person is engaged in wrongdoing." *People v. Hayhurst,* 571 P.2d 721 (Colo. 1977).

Stating the formula the courts use for reasonable suspicion is easy. But defining the term is not very helpful without referring to specific sets of facts. The following are specific factors and examples which will give the officer an idea of what information is necessary to make a stop.

2. Factors

A court will consider only **facts** (not hunches) which an officer can specifically state or explain, as in a report or under oath on the witness stand. These explainable facts must have been known to the officer **before** the stop was made. What follows is an examination of some of the factors which the courts have ruled contribute to an officer's reasonable suspicion. It is important to note, however, that one factor alone is rarely enough to establish reasonable suspicion.

a. Experience of the Officer

The courts will often give weight to the knowledge an officer has gained through training and experience. A fact which appears innocent enough to the average citizen may, when combined with other information the officer knows from experience, create

reasonable suspicion and justify a stop. Some examples of the type of information are:

(1) high crime area;
(2) suspect does not "fit" in neighborhood;
(3) suspect is a known addict, burglar, etc.;
(4) manner of packaging (especially drugs);
(5) smells (e.g. marijuana)
(6) association with known criminals.

The officer must be able to specifically state his or her knowledge in **factual terms**. For example, in (4) above it would be of little help to say, "to me the package looked like drugs." However, by saying "I suspected the package contained drugs because in the past I have found that tied-off balloons contain illegal drugs almost without exception," the officer stands a better likelihood of establishing reasonable suspicion.

b. Conduct of the Suspect

What a suspect does, both before and after he sees the officer, may be a strong indication of criminal activity that justifies a stop. Examples include:

(1) concealment;
(2) flight;
(3) unusual movements;
(4) abandonment of property;
(5) "casing" a location;
(6) looking back and forth ("look out" man);
(7) disguises
(8) presence at, or proximity to, the scene of a crime.

c. Report of a Crime

A stop of someone acting suspiciously is much more likely to be approved if the officer has already received information that a crime has just occurred. Since the officer already knows there has been a crime, the suspect's actions need only be enough to create reasonable suspicion that he is involved.

d. Report from Third Persons

When an officer receives information from another person which indicates that the suspect may be involved in crime-related activity,

this information may help to establish reasonable suspicion to stop a suspect. Examples include:

(1) Unreliable informants (e.g. anonymous calls);
(2) citizen informants;
(3) information from fellow officers or the police dispatcher.

3. Examples

It is difficult for an officer to understand what information is required to conduct a stop without specific examples. The following are specific examples of factual situations where the officer either did or did not have enough evidence to stop a suspect. Keep in mind, however, that courts will invariably look to the "totality of the circumstances" surrounding an encounter to determine whether reasonable suspicion exists to stop and detain a suspect.

a. Suspicious Activity or Circumstances

An officer saw Johnson and another man running in a hunched-over position from a fast food restaurant. It was past midnight and the restaurant was closed. The officer followed the suspects. When the suspects got into a car the officer stopped the car by parking in front of it. One suspect threw some evidence away. Soon thereafter, the officer heard over his radio that the restaurant had been robbed. The court ruled that these facts established reasonable suspicion, and that the evidence discovered after the lawful stop was admissible. *People v. Johnson,* 691 P.2d 751 (Colo. App. 1984).

An officer observed Davis approach a woman in front of a convenience store and the woman quickly walk way. The officer concluded that Davis was panhandling, and he was informed by the dispatcher that there was a report of a transient attempting to sell marijuana at the same location. The officer approached Davis and asked to see identification. Davis showed a Colorado identification card and denied panhandling or selling drugs. The Colorado Supreme Court concluded that the officer had reasonable suspicion to stop Davis. *People v. Davis,* 903 P.2d 1 (Colo. 1995).

Officers knew that Morales, an airline passenger, had purchased a ticket from Los Angeles with cash and had attempted to leave the airport through a "restricted access" door, and that there was confusion surrounding his baggage claim ticket. Morales also wore loose fitting clothing which could conceal drugs. The Colorado Supreme Court concluded that the officers had reasonable

suspicion for an investigatory stop which constituted of asking Morales three questions related to criminal activity and drug use, and requesting consent for a pat-down search. *People v Morales,* 935 P.2d 936 (Colo. 1997).

Officers observed the defendant and a companion at 3:30 a.m. in a dark area behind a store in a shopping center where there had been recent burglaries. The two men were digging in a dumpster and, upon seeing the police car, they pulled away from the dumpster and began walking towards a parked car. The Colorado Court of Appeals held that these factors established reasonable suspicion to conduct an investigatory detention of the defendant. *People v. Rushdoony*, 97 P.3d 338 (Colo. App. 2004).

An officer observed a vehicle parked behind a building in an area where vehicles do not normally park. The door to a business was adjacent to the vehicle's location, the area was not well lit, it was approximately 1:00 in the morning, and the business was closed. In addition, there were no lights on in the building, and the vehicle appeared to have been turned off. The Colorado Supreme Court held that these facts provided the officer with reasonable suspicion that the vehicle's occupants may have been engaged in a burglary or vandalism. *People v. Pacheco,* 182 P.3d 1180 (Colo. 2008).

Compare with:

While making a routine check of a bar, an officer stopped and frisked Montoya based on the observation of a bulge in Montoya's front pocket which the officer thought resembled a gun. The Colorado Supreme Court found that there was no reasonable suspicion to stop and frisk Montoya based on the simple bulge in a person's pocket which was consistent with innocent activity. *People v. Montoya,* 828 P.2d 251 (Colo. 1992).

b. Suspect Matches Known Description

Two men were robbed and assaulted late at night by a person wearing dark clothes, a mask, and a hood. About 3 hours later, an officer responding to a robbery call saw Jackson dressed in a black Ninja costume, complete with hood, mask, shirt, long coat and pants. When Jackson saw the police car he ran. Police caught Jackson and found items linking him to the robbery and assaults. The court held that "even though defendant was in fact not connected with the crime scene (which the officer) was approaching, (Jackson's) evasive actions taken while he was in close proximity to the location, coupled with his masked costume

and the late hour, supported (the officer's) reasonable suspicion that (Jackson) might be connected to the reported criminal activity and should be investigated." *People v. Jackson,* 627 P.2d 741 (Colo. 1981).

Acting upon information by a reliable informant, officers obtained and executed a search warrant for narcotics at Spaccamonti's apartment. Hughes, who was present in the apartment, matched the informant's description of Spaccamonti's supplier, so the officers frisked him and discovered a canister containing cocaine. Although the trial court suppressed the cocaine based on the finding that the police had indiscriminately searched people on the premises without adequate cause, the Colorado Supreme Court reversed. The court held that the officer's experience, coupled with the fact that Hughes matched the description given by the informant, provided a specific articulable basis in fact to suspect that Hughes was an armed narcotics supplier. *People v. Hughes,* 767 P.2d 1201 (Colo. 1989).

Two police officers stopped defendant and another person after recognizing their car from a previously received bulletin that depicted three people and a car connected to the use of the victim's credit cards. Other officers were called to the scene with copies of the bulletin, and the two men and their car were matched up with the photographs in the bulletin. A search of the car uncovered a fanny pack, containing the victim's credit cards and Social Security card, under the driver's seat. The Colorado Court of Appeals held that the requisite articulable reasonable suspicion existed to stop defendant's car as a result of the officer's observations that (a) the car was the same color and make, and it had the same peculiar tire feature, as the car used by suspects in a homicide; and (b) the car had a cracked windshield and an item dangling from the rearview mirror. *People v. Huynh*, 98 P.3d 907 (Colo. App. 2004).

c. High Crime Area

An officer on day-time patrol in downtown Denver observed four individuals standing outside a bar. The officers had made drug arrests in the area in the past and considered it to be a high crime area. However, they did not recognize any of the individuals, they did not know how long the individuals had been standing outside the bar, and they did not see the individuals exchange anything. As the officers approached, the individuals began to walk away. The officers followed them for a short distance, and then ordered Outlaw to approach the police car. Outlaw had his left hand closed

in a fist, and as he approached the car the officer driving the patrol car saw a piece of clear plastic protruding from Outlaw's closed hand. Under these circumstances, the Colorado Supreme Court held that a history of past criminal activity in an area is not itself sufficient to create a reasonable suspicion that a crime is being, has been, or will be committed. The Court also stated that the gathering of individuals on a public sidewalk, and the fact that they walked away when the police approached, did not establish reasonable suspicion for a stop, and the fact that Outlaw's hand was closed in a fist was "too ambiguous to constitute the basis for an investigatory stop." *Outlaw v. People,* 17 P.3d 150 (Colo. 2001).

From a distance, an officer observed the arrival of two cars and a meeting of four people in a dark parking lot of a bar known for its drug activity. The officer could only see elbows of one person bent upward, and another person turn and leave and put a bill in his pocket. All four people then left the parking lot. The Colorado Supreme Court held that the officer's obstructed observations were insufficient to establish reasonable suspicion to believe that a drug deal had occurred, where the officer did not in fact see any exchange take place and did not recognize any person known as a drug dealer. *People v. Greer,* 860 P.2d 528 (Colo. 1993).

An officer observed three youths, one of whom appeared to be dressed in Crips gang attire, leave an apartment building where rival gang leaders lived. Upon spotting the patrol car, two of the youths fled but soon rejoined the defendant. The three youths next went to a car and drove to a 7-11 where the officer activated his overhead lights. Following a protective search of the defendant and a consent search of his companions and the trunk of the car, the officer learned the car was involved in a burglary and that the items discovered in the searches were stolen. The Colorado Supreme Court ruled the defendant's attire, the behavior of his companions in avoiding contact with the officer and their mere presence in an area of gang related crime were insufficient to establish a reasonable suspicion that criminal activity was afoot and that a drive-by shooting was about to occur. *People v. Rahming,* 795 P.2d 1338 (Colo. 1990).

Compare with:

Officers were engaged in an undercover operation near a bar in an area that had a history of high drug activity. As an officer drove slowly past the bar in an unmarked vehicle, he saw Walker, whom he knew as a user and seller of cocaine and for whom there was an

outstanding arrest warrant, standing in the area outside the bar. The officer observed Ratcliff come out of the lounge and make contact with Walker by extending one hand out to him. Ratcliff then put his hand out and Walker took something from him and Ratcliff, in turn, took something from Walker. As this apparent exchange took place, Ratcliff and Walker remained close to the side of the building, as if they were attempting to shield their conduct from view. Although the officer was unable to see what objects actually had been exchanged between the two men, he believed that they had engaged in a drug transaction. Ratcliff was stopped and a protective frisk or weapons revealed a small container containing cocaine. Under these facts, the Colorado Supreme Court held that, although mere presence in an area of criminal activity or association with a known narcotics trafficker are alone insufficient to establish reasonable suspicion, the officer here could reasonably suspect that criminal activity was afoot based on his specific observations and in light of his special training and experience as a narcotics officer. *People v. Ratcliff,* 778 P.2d 1371 (Colo. 1989).

d. Proximity to a Crime Scene or Crime Evidence

Officers responded to a silent burglar alarm at 12:15 a.m. at Skaggs Drugstore. Upon arrival, they saw McCombs loading clothes into his car. The officers asked McCombs for some identification and shined a flashlight into his car and saw Skaggs price tags on the clothes. Here, the court found that the stop was based on reasonable suspicion to contact McCombs and that the evidence discovered was admissible. *People v. McCombs,* 629 P.2d 1088 (Colo. App. 1981).

A woman told her boyfriend that she had just been raped. The boyfriend set out for the alleged rapist's home with a gun. When police heard about this from an informant's phone call they went toward the alleged rapist's home. Near the home they saw a man and woman, who ran when they saw the officers. The officers apprehended the two suspects and, as a result of the stop, obtained evidence of an unrelated nearby burglary. The court ruled that, under these circumstances, the officers had reasonable suspicion to stop the suspects, and the evidence was admissible. *People v. Perez,* 690 P.2d 853 (Colo. 1984).

Lingo went to visit a friend in prison. Immediately after she left the lobby of the prison's waiting room a guard found a drug-filled balloon on the lobby floor. She was then detained and a pat-down search was conducted. The Colorado Supreme Court held that a

reasonable basis for the stop existed due to the discovery of the balloon on the lobby floor. *People v. Lingo,* 806 P.2d 949 (Colo. 1991).

Compare with:

Carillo-Montes was a passenger in the rear seat of a car parked in front of a house for which police had a warrant to search. When officers arrived, the driver of the vehicle was talking to a person inside the house. The police detained the driver and Carillo-Montes until an INS agent arrived and arrested them. The Colorado Supreme Court ruled that the officers had no basis for a reasonable suspicion that either Carillo-Montes or the driver was involved in criminal activity. The fact that cocaine is kept at a residence is simply insufficient to raise a reasonable suspicion that everyone who approaches that residence is involved in the criminal activity occurring therein. *People v. Carillo-Montes,* 796 P.2d 970 (Colo. 1990).

e. Flight

An officer observed three men "huddled together" late at night in a dark alley by the back door of a bar in an area known for illegal drug activity. The officer circled around, saw the men again, and as he approached them Archuleta ran away. The officer chased Archuleta up the alley and then back down the street to the front door of the bar. As Archuleta ran into the bar, he knocked over a bicyclist who was in the entryway. The officer found Archuleta in the bar hiding under some tables in the dining area. He was detained and during the course of the detention the officer obtained incriminating statements and located controlled substances lying on the floor where Archuleta had been hiding. In upholding the lawfulness of the stop, the Colorado Supreme Court held that the fact that a suspect flees from an officer, standing alone, does not support a reasonable suspicion of criminal activity. Similarly, the fact that an area is known for drug trafficking, standing alone, does not comprise reasonable suspicion. "However, the notion that such circumstances individually cannot constitute reasonable suspicion does not prevent both of them from combining with other developments to form a sufficient basis for reasonable suspicion." The court concluded that Archuleta's presence in the high crime area and his flight, combined with his behavior during flight (knocking over the bicyclist) and continued evasive action (i.e. hiding in the bar) amounted to reasonable suspicion for the stop. *People v. Archuleta,* 980 P.2d 509 (Colo. 1999).

Note: *Archuleta* signals a departure from previous law which held that chasing a suspect constitutes a "seizure," and that reasonable suspicion must therefore exist at the time the chase is initiated. Under *Archuleta,* a chase by police does not constitute a stop or "seizure," and the grounds for a stop (i.e. reasonable suspicion) may be developed in the course of the chase.

f. Furtive Gestures

A state trooper was on patrol on a county road by a lake when he observed a plumbing van parked in a pull-off area that bordered the lake. Two men were sitting inside the van and one man was standing just outside of it. Wondering if the occupants of the van needed assistance, the officer turned the patrol car around in a U-turn and drove back toward the van. Heilman, who was sitting in the driver's seat, looked up and saw the approaching patrol car. The officer saw Heilman's eyes widen. Heilman appeared to throw something to the floor of the van. The officer parked approximately ten feet from the van in a T-formation, jumped out of the car, hurried to the van on foot, and said that "he wanted to see everybody's hands." The occupants were removed from the truck and a subsequent search disclosed illegal drugs. In finding no reasonable suspicion for the stop, the Colorado Supreme Court stated "in this case, the officer testified that he had observed a furtive gesture by Heilman. He based his suspicion of illegal activity solely on that observation. We have held that a "furtive gesture" is too ambiguous, standing alone, to constitute the basis for an investigatory stop." *People v. Heilman,* 52 P.3d. 224 (Colo. 2002).

g. Citizen Informants

After receiving information from several sources (including an identified citizen informant and a confidential informant) about Boylan's involvement in trafficking narcotics through package delivery services, officers alerted the delivery service to be on the lookout for any packages sent to Boylan. When the delivery service received such a package, officers used a police sniffer dog to examine several packages. The Colorado Supreme Court held that information from a citizen informant about what another had told him plus generally corroborating information of the confidential informant was sufficient to establish reasonable suspicion for detention of the package and the dog sniff. *People v. Boylan,* 854 P.2d 807 (Colo. 1993).

Police received a call from an unnamed Burger King employee reporting that a white, service-type van and a small white vehicle had been parked in the same area of the parking lot for about 30 minutes, and that an employee had observed the occupants passing a marijuana pipe back and forth. Officers arrived at the Burger King within minutes and they observed a white service van and a smaller vehicle parked in the lot within inches of the van's passenger side. An officer approached the service van and could see that no one was in the driver's seat, but several people were communicating and engaging in some activity in the back of the van. The defendant was summoned from the car, frisked, and illegal drugs were discovered. The Colorado Supreme Court concluded that, unlike the truly anonymous tipster, the caller in this case was akin to a citizen informant whose reliability is accepted because the caller provided significant information about both his or her veracity and basis of knowledge (i.e. personal observation) and the officer's personal observations, "cursory as they may have been, not only corroborated portions of the caller's information but aroused suspicions in themselves." *People v. Polander,* 41 P.3d 698 (Colo. 2001).

h. Anonymous Tips

An anonymous caller reported to the Miami-Dade police that a young black man standing at a particular bus stop and wearing a plaid shirt was carrying a gun. Nothing was known about the informant. Two officers responded to the location and saw three black males, one of whom was wearing a plaid shirt. The men were doing nothing suspicious, the officers saw no weapons, and they made no threatening or unusual movements. One of the officers approached J.L., stopped and frisked him, and seized a gun from his pocket. The United States Supreme Court held that, while there are situations in which a corroborated anonymous tip is sufficiently reliable to warrant an investigatory stop, the anonymous call here provided no predictive information and lacked all means to test the informant's knowledge or credibility. As such it was not sufficiently reliable and the stop lacked reasonable suspicion. *Florida v. J.L.,* 529 U.S. 266 (2000).

An undercover Officer was conducting surveillance on a house suspected as being the site of illegal narcotics sales, based upon an anonymous tip. After watching the house for approximately twenty minutes and not seeing anyone enter or exit, he observed a car pull up in front of the house and park. The undercover officer saw Dixon get out of the car, enter the house for about one minute, and then return to the car. Dixon got in the back seat of the car and

the vehicle pulled away. The undercover officer followed the car and saw the driver exceed the posted speed limit by fifteen miles per hour and make several lane changes without using a turn signal. The undercover officer radioed this information to a patrol unit and asked the patrol officer to stop the vehicle. The undercover officer described Dixon and indicated that he was a suspect in a narcotics transaction. A patrol officer located the car described by the undercover officer parked on the street. The officers activated the overhead lights of their patrol car as they approached. The driver got out of the car and Dixon, who matched the description provided by the undercover officer, got out of the car on the passenger side and began to walk towards a nearby house. The patrol officer ordered Dixon to return to the vehicle. In finding no reasonable suspicion to stop and detain Dixon, the Colorado Court of Appeals held that an anonymous tip, by itself, lacks sufficient indicia of reliability to establish reasonable suspicion. Information supplied by an anonymous source may warrant an investigatory stop only if it is verified by sufficient independent corroborating evidence of criminal activity. *People v. Dixon,* 21 P.3d 440 (Colo. App. 2000).

An officer was dispatched based on an anonymous telephone call reporting that an individual was selling cocaine at a bar. The anonymous caller provided a description and stated that the individual stored the cocaine in his right shoe. The caller did not provide the basis for this information. Upon entering the bar, the officer observed an individual who matched the description provided by the caller sitting at a table against the back wall of the establishment. The officer approached the individual, who later identified himself as Salazar, and asked him to go outside. Salazar said nothing, but stood up and started walking toward the exit. A subsequent search disclosed illegal drugs. The Colorado Supreme Court held that, under these facts, the officer lacked reasonable suspicion to stop Salazar. The anonymous tip did not supply detailed knowledge or predictions of the person's future behavior that were corroborated by the officer's observations; the only corroborated facts (Salazar's presence in the bar and physical appearance) were known or knowable by everyone; and the officer knew of no suspicious circumstances surrounding the bar or suspicious conduct on the part of Salazar. *People v. Salazar,* 964 P.2d 502 (Colo. 1998).

Compare with:

An officer was dispatched to a bar based on an anonymous telephone call to police dispatch reporting that a large group of

males were congregated outside the bar and were possibly involved in drug trafficking. The officer arrived at the bar and observed approximately 10 to 15 males gathered in the front parking lot. With the exception of Canton, all of the males scattered when the officer approached. Unlike the others who were gathered, Canton apparently did not see the officer approach. As the officer got out of his car and drew nearer, he observed a roll of bills in Canton's right hand. Because the officer had investigated drug activity at the bar on previous occasions, he knew of its reputation as a site for drug dealing. As a result of his observations and his previous experiences at the bar, the officer suspected that Canton was involved in trafficking drugs. He therefore stopped and detained Canton, and ultimately discovered illegal drugs. Under these facts, the Colorado Supreme Court concluded that the officer's specific observations sufficiently corroborated the anonymous tip and provided reasonable suspicion to believe that Canton was involved in illegal activity. *People v. Canton,* 951 P.2d 907 (Colo. 1998).

An anonymous caller told officers that individuals were stripping a red car and placing its parts in a nearby purple car. Responding to the scene, an officer saw a purple car with four occupants in it and a nearby red car with wheels and "T-tops" missing. The officer stopped the defendant when he exited the purple car and walked in the officer's direction. The defendant was eventually arrested after he admitted owning the purple car and a closer inspection of the red car revealed that numerous items were either broken or missing. An inventory search of the purple car uncovered the red car's missing parts. The Colorado Supreme Court upheld the stop because the anonymous tip, corroborated by the observations at the scene, provided a specific and articulable basis in fact to suspect that the defendant had committed a crime. *People v. Contreas,* 780 P.2d 552 (Colo. 1989).

Police received an anonymous tip that one of three young men walking southbound at a certain location was carrying a concealed weapon. Officers located three young males, and observed that one was walking stiff-legged. One of the officers ordered the young men to stop and put their hands in the air. D.F. stopped and put his hands in the air, and one of the officers observed a shotgun protruding from his waistband. The Colorado Supreme Court held that the investigatory stop was justified by reasonable and articulable suspicion that one of the youths could be carrying a concealed weapon. *People v. D.F.,* 933 P.2d 9 (Colo. 1997).

i. Masking Agents

An officer stopped a vehicle for traffic violations, and during his contact with the driver he noticed two air fresheners and spray cans of engine degreaser among the trash strewn on the rear floor of Cervantes' car. The officer immediately noticed that the engine degreaser had a very strong odor, and he thought that the air freshener and engine degreaser might be "masking agents" used to disguise the odor of drugs. The Colorado Supreme Court stated that the scent of a masking agent alone is insufficient to establish reasonable suspicion. However, the presence of a scent-masking agent, coupled with other indicia of criminal activity, can provide reasonable suspicion for further investigation. "Officers must look not only to the presence of a potential masking agent, but also to the overall situation and the potential innocent uses of such agents. The presence of known masking-agents in unusual locations may give rise to reasonable suspicion of criminal activity." *People v. Cervantes-Arredondo,* 17 P.3d 141 (Colo. 2001).

D. Officer's Powers in Conducting a Stop/Detention

An officer may use reasonable force to stop a suspect on reasonable suspicion. Normally, a verbal command such as "wait a second," "stop," "halt," "freeze," etc. will suffice. If the suspect refuses to stop upon command, the officer may take more forceful actions, such as grabbing the suspect's arm and repeating the command. In addition, there may be situations where an officer may take actions typically associated with an arrest, such as drawing weapons or handcuffing a suspect, without converting the investigatory "stop" into a formal "arrest." These situations will be discussed below.

Once the stop has been made, the officer's powers in conducting the detention are quite limited. Normally an officer may only "freeze" a suspect for a reasonable time in order to determine whether probable cause to arrest exists. In discussing investigatory detentions the Colorado Supreme Court has stated, "the character of the detention must be reasonable when considered in light of the purpose." *Stone v. People,* 485 P.2d 495 (Colo. 1971). What this means is that an officer's powers will vary depending upon the reasons for the detention. In certain situations, for example, an officer may only need to question the suspect briefly. In other situations, the officer may need to prolong the detention in order to bring witnesses to the scene or conduct independent investigation of the crime. In determining whether the parameters of an investigatory stop have been exceeded, the court will examine four circumstances: (1) the length of the detention; (2) whether the officer diligently pursued the investigation during the detention; (3) whether the suspect was required to move from one location to another; and (4) whether there were alternative, less intrusive means available and whether the

police acted unreasonably in failing to recognize or to pursue them. *People v. Rodriguez,* 45 P.2d 1351 (Colo. 1997).

1. Questioning the Detainee

An officer may always ask a lawfully stopped detainee for identification and briefly question him about the crime(s) being investigated. Section 16-3-103(1), C.R.S. (2008); *People v. Archuleta,* 616 P.2d 977 (Colo. 1980).

2. Bringing Eyewitnesses to the Scene

If the suspect is caught near the scene of and soon after the crime, and there is a witness to the crime, the officer may prolong the detention for a reasonable time in order to bring the witness(es) to the suspect for an immediate confrontation.

Example:

An officer stopped York because he matched the description of a prowler who was trying to break into a house. After stopping York, the officer received a radio report that the Osuna's residence had been burglarized and Mrs. Osuna assaulted. Because York matched the description of the burglar, he was held until Mrs. Osuna could arrive to make an identification. The California court ruled that the detention for the purpose of having the victim identify the suspect was reasonable, and the identification was therefore admissible in court. *People v. York,* 166 Cal. Rptr. 717 (Cal. App. 1980) .

3. Investigating the Crimes

In detaining a person a police officer is not restricted to mere questioning but may also conduct limited investigation.

Examples:

a. Bring in a dog to sniff a detainee's luggage. *United States v. Place,* 462 U.S. 696 (1983); *People v. Unruh,* 713 P.2d 370 (Colo. 1986).

b. Bring eyewitnesses to identify the detainee. *People v. York,* 166 Cal. Rptr. 717 (Cal. App. 1980).

c. Check homes in the neighborhood to determine whether they were burglarized when the detainee is suspected of burglary. *People v. Quintero,* 657 P.2d 948 (Colo. 1983).

d. Checking for outstanding warrants or checking identifying information provided by the detainee. *People v. Ramos,* 13 P.3d 295 (Colo. 2000).

Time is "of the essence" when conducting such investigations. In other words, an officer has only a limited amount of time to conduct the independent investigation. If during this time an officer cannot obtain probable cause to arrest, the officer must then let the suspect go.

E. Stop/Detention v. Arrest/Custody

The difference between a "stop" and an "arrest" is in the amount of restraint or power exercised by the officer. When an officer "significantly restrains" a suspect's liberty, he or she has made an arrest, whether or not that is what was intended (or stated). An officer who "significantly restrains" (arrests) a suspect with only reasonable suspicion that the suspect committed a crime usually causes evidence gathered to be suppressed in court.

When a suspect has only been stopped, that suspect is "detained. When the suspect is arrested, he or she is in "custody." It is very easy to turn a lawful stop/detention into an illegal arrest/custody. An officer's statement in court that the suspect was "not under arrest," or was "only being detained," or was "free to leave" is not good enough. The determinative issue for the court is whether a reasonable person in the suspect's position would have felt that he or she was in "custody" or "restrained in a significant way."

Rule of Thumb:

"Whenever detention and questioning by a police officer are more than brief and cursory, there is an arrest which must be supported by probable cause." *People v. Schreyer,* 640 P.2d 1147 (Colo. 1982).

1. Indications of Arrest

There are a number of actions which strongly indicate an arrest, and which must be avoided during stops unless there are exigent circumstances (see below).

a. Guns Drawn

Drawing a gun usually indicates an arrest. Officers should not draw their guns to make an investigatory stop unless they reasonably believe the suspect has just committed a violent crime or that the suspect poses a significant safety risk.

Examples:

Officers located a marijuana garden in an isolated canyon and developed information suggesting that Gulick and King were involved. After viewing video surveillance of the garden officers initiated live surveillance and ultimately observed two men, who roughly matched the descriptions Gulick and King, emerge from the general area of the garden. One of the men had a backpack that looked full. As the suspects left the canyon they were stopped by officers, who drew their guns, ordered both men to exit the car, directed the men to lie face down on the ground, and handcuffed both suspects. Although the Colorado Supreme Court held that the police possessed reasonable suspicion to conduct an investigatory stop, the court found that the testimony of the officers failed to establish any specific facts or circumstances indicating that the two men posed a danger that could cause a reasonable police officer to resort to the force used in conducting the stop. The court concluded that the force used in effecting the stop amounted to an arrest without probable cause. *People v. King,* 16 P.2d 807 (Colo. 2001).

Officers had information (creating reasonable suspicion but less than probable cause to arrest) that Baird might be flying to Colorado transporting contraband. They watched Baird after he arrived in Colorado. As he was getting into a taxi, an officer approached Baird, drew his gun, identified himself, told Baird that he was suspected of transporting contraband, and proceeded to talk to him. Under these facts, the court ruled that the officer's action constituted an arrest and not a stop, and since there was no probable cause to believe Baird had committed a crime, the arrest was unlawful and the marijuana found in Baird's suitcase was suppressed. *People v. Baird,* 628 P.2d 161 (Colo. App. 1981).

b. Moving the Detainee

When an officer moves a detainee or orders a detainee to move it often appears to a court that the suspect is no longer being detained

but is in custody. Therefore, the officer who moves a detainee risks the loss of all evidence gathered as a result of the movement.

Examples:

A state trooper stopped a van for a traffic infraction, and upon examining the driver's license and vehicle documentation discovered discrepancies on the vehicle's license and registration. The trooper then attempted to compare the VIN from the dashboard and registration with the VIN on the "Nader Label," which had a sticker glued to the doorjamb on the driver's side of an automobile. The trooper discovered that the van had no Nader Label. He was aware that automobile manufacturers often place the VIN in other inconspicuous locations on a vehicle, and he decided to compare the VIN on the dashboard and registration with the other VIN. However, the trooper did not know the location of the hidden VIN so he decided to conduct further investigation at the state patrol headquarters which was located 10 miles away in the opposite direction in which the van had been traveling. When the driver indicated he did not wish to follow the trooper to headquarters, the trooper advised him that he would disable and impound the van unless the driver complied with his request. The driver complied, followed the trooper to headquarters, and ultimately consented to a search of the van which disclosed illegal drugs. Under these circumstances, the Colorado Supreme Court held that the traffic stop escalated into an arrest when the trooper forced the driver to drive to the state patrol office. Since there was no probable cause to arrest the driver at the time the trooper moved the driver, the drugs found in the search were suppressed. *People v. Rodriguez,* 945 P.2d 1351 (Colo. 1997).

A jail inmate, deemed an unreliable informant, told officers that Dunaway had committed a brutal murder. The officers picked Dunaway up, took him to the station and obtained a confession within one-half of an hour. The United States Supreme Court ruled that the officer arrested Dunaway (without probable cause) when they took him to the station for questioning. Therefore, the confession was not admissible in court. *Dunaway v. New York,* 442 U.S. 200 (1979).

In a homicide investigation officers learned from the victim's family that the victim had planned to go out with a man

named Terry. The victim's sister then took the officer to Terry Marioneaux's house. Marioneaux and three other men at the house were questioned for a half an hour and the four admitted being with the victim but denied knowledge of the victim's death. Due to inconsistencies among the four stories, the officer requested the four men to accompany the officers to the police station. At the station, officers advised Marioneaux of his *Miranda* rights, placed him in an interrogation room, denied him permission to contact "his people," subjected him to a trace metal detector and denied him the use of a telephone. The court subsequently ruled that Marioineaux was illegally arrested when he was taken from his home and transported to the police station even though he was not "formally" placed under arrest. *People v. Marioneaux,* 618 P.2d 678 (Colo. App. 1980).

Officers obtained reasonable suspicion to believe Royer was a drug courier based on the facts that he purchased his airline ticket under a fictitious name in large bills and appeared pale and nervous. Officers approached Royer, asked him some questions, and then obtained his driver's license and ticket. The officers then asked Royer to come with them to a nearby "interrogation room" where, pursuant to a consent search of his luggage, they found marijuana. The United States Supreme Court ruled that, by retaining Royer's license and ticket and moving him to a room outside of public view, what had began as a consensual encounter became an arrest without probable cause. Therefore, the evidence was suppressed. *Florida v. Royer,* 460 U.S. 491 (1983).

Officers on foot patrol saw an elderly man chasing Cobbin. They radioed ahead that a robbery might be in progress. When officers caught Cobbin, they searched and handcuffed him. In the search, the officers discovered a wad of bills stolen from the elderly man's cash register The officers then transported Cobbin back to the victim's barber shop where the victim identified Cobbin as the perpetrator of the theft. The Colorado Supreme Court ruled that, while it was proper to stop Cobbin and conduct a cursory frisk for weapons, it was illegal to conduct a full search because the officers lacked probable cause. Furthermore, moving Cobbin for the identification amounted to an arrest without probable cause. *People v. Cobbin,* 692 P.2d 1069 (Colo. 1984).

Officers wanted Hayes's fingerprints. Without probable cause, the officers took Hayes to the police for printing,

where they also obtained a statement. The United States Supreme Court suppressed the fingerprints and the statement because Hayes had been "significantly restrained" without probable cause. *Hayes v. Florida,* 470 U.S. 811 (1985).

After stopping Trujillo and two others in a car, sheriff's deputies, without having probable cause, transported Trujillo to headquarters for questioning. The court ruled this was an arrest because it went beyond the brief detention and cursory questioning necessary to determine the suspect's identification and an explanation of his behavior. *People v. Trujillo,* 710 P.2d 1169 (Colo. App. 1985).

Suggested Techniques

1. If you want to move a suspect more than a short distance from the site of the detention and there is no probable cause for an arrest, obtain the suspect's consent and/or let him or her walk or drive to the location on their own. Advise them that they are not being placed under arrest.

2. If you wish to obtain an identification of the suspect by the victim, bring the witness to the suspect if at all possible, and avoid moving the suspect any significant distance.

c. Placing A Detainee in a Patrol Car

Often, when an officer places a detainee in the officer's patrol car the courts find that the detainee has been placed in custody and was "arrested." If, however, the officer can convince the court that this procedure was reasonable and not a "significant restraint" of the suspect, or that the restraint was necessary for officer safety, a court may rule that the suspect was not in custody.

Examples:

Officers responded to a domestic disturbance and found a heavily intoxicated man yelling and knocking on the door where the disturbance had been reported. The officers placed the intoxicated man in one of the police cars and then knocked on the door to inquire about the reported disturbance. Garcia stepped approximately ten feet outside the residence and, upon questioning, denied any disturbance. While speaking to Garcia, the officers observed a crack pipe

laying on the ground near him. The officer's placed Garcia in the back seat of a different police car from where the intoxicated man was sitting due to officer safety because they "didn't know what was happening inside . . . ." Garcia was not handcuffed but he could not open the car doors from the inside. Thee officers then conducted a 15-minute investigation inside the house, where they found illegal drugs. The Colorado Supreme Court held that Garcia's detention in the police car occurred for officer safety purposes in the course of an investigatory stop, as officers diligently investigated a nighttime domestic disturbance involving drugs. The detention, which was brief in duration, did not constitute an arrest. *People v. Garcia,* 11 P.3d 449 (Colo. 2000).

The victim met Bookman and Body at a dance and left the dance with them. Seven days later the victim's body was discovered. Two days later officers went to see Bookman at the restaurant where he worked. They took Bookman to an unmarked patrol car, where he sat on the passenger side with the door unlocked. After 45 minutes of questioning Bookman gave written consent to search his car and after 4 hours Bookman began to incriminate himself. Later he confessed. While the trial court found that Bookman was not under arrest, the court of appeals reversed and ruled that Bookman "had been arrested without probable cause at the time the detectives had escorted [him] from the restaurant to the police car." The Colorado Supreme Court then sent the case back to the trial court in order for that court to determine whether a "reasonable person" would have felt under the circumstances that he was in custody during the questioning. *People v. Bookman,* 646 P.2d 924 (Colo. 1982).

d. Handcuffing

An officer who handcuffs a detainee frequently takes the detainee into "custody." While the courts recognize that the use of physical restraint, such as the use of handcuffs, the drawing of weapons, and other demonstrations of force do not necessarily convert an investigatory stop into an arrest, "such show of force does heighten our concern as to whether the action taken exceeds what is reasonably necessary. *People v. Smith,* 13 P.3d 300 (Colo. 2000). The use of such physical restraints in the course of an investigatory stop is only justified when the circumstances indicate that such force constitutes a reasonable precaution for the protection and safety of the investigating officers.

Example:

A witness called the police at 3:15 a.m. to report that a truck had driven by with its lights out and parked in a certain location. A passenger got out and disappeared into a warehouse. Officers arrived within three minutes and saw a truck at the location described. When the driver slouched down an officer ordered him out of the truck, handcuffed him, and looked in the cab of the truck where property taken from the warehouse was located. The court held that the driver was arrested at the time he was handcuffed, even though the officers did not so state to him at the time. The court stated, "there is no doubt that the objective facts known to the officer at the time he subjected the defendant to an arrest did not amount to probable cause." The evidence was therefore suppressed. *People v. Tooker,* 601 P.2d 1388 (Colo. 1979).

Compare with:

An officer stopped a car for a traffic violation at 2:50 a.m. After obtaining the driver's license and registration, the officer returned to his car, ran a computer check on the license and registration, and then ran a computer check on the VIN which revealed that the car had been reported stolen. As the officer was conducting the computer check he saw the driver make a call from her car on a cellular phone, and shortly thereafter a car with tinted windows pulled up behind the officer's patrol car. The officer could not see into the car behind him and, fearing an ambush, called for backup. A second officer responded within two minutes. Both officers then approached the second vehicle with guns drawn and ordered the driver out of the car. The driver was ordered to lay face down, where he was handcuffed. A search of his car then revealed a handgun and illegal drugs. The Colorado Supreme Court held that, while the degree of force used by the officers was significant, it was not disproportionate to the circumstances in which they found themselves, and did not escalate the investigatory stop into an arrest. *People v. Smith,* 13 P.3d 300 (Colo. 2000).

e. Formal Arrest

Normally when an officer "formally" arrests a suspect (i.e. tells him or her that they are under arrest) there must be probable cause. However, an officer's words alone will not necessarily determine

whether an arrest has or has not taken place. Whether a person has been subjected to a limited seizure or an arrest is determined by the court taking into account the "totality of circumstances" and applying an objective "reasonable person" standard.

Example:

As the result of a one-car collision Turtura was hospitalized for injuries. A state trooper arrived at the hospital and determined that Turtura might have been driving under the influence of alcohol. A second trooper arrived at the hospital to obtain blood samples, and in the course of his conversation advised Turtura that he was being placed under arrest for driving under the influence of alcohol. After the blood samples were collected, the trooper told Turtura that he was free to go but that charges might be brought against him. The Colorado Supreme Court held that, although the trooper had used the term "arrest," Turtura was in fact subjected to only a limited seizure for the purpose of taking the blood samples and not actually placed under arrest. *People v. Turtura,* 921 P.2d 40 (Colo. 1996).

Actions that typically suggest that an "arrest" has taken place include some form of physical restraint, transporting the suspect to police headquarters, formal booking, etc. When an officer has stopped a suspect on reasonable suspicion and there is a question whether or not to effect a formal arrest, the officer should inquire whether any more information can be gathered in a short period that will provide additional justification for an arrest. If so, the officer should get the evidence or information **before** "arresting" the suspect, because evidence obtained after the arrest cannot support probable cause.

Example:

A witness saw Quintero walk up to a neighbor's front door and then stand in front of a window for 20 seconds peering in. Quintero then appeared to peer into another window. He then walked to another house and went up to the door. About an hour later, the witness saw Quintero with a television set. The police were summoned. When the officer asked for identification Quintero had none. When asked about the television, Quintero said he had bought it from someone who lived in the neighborhood. When the witness arrived and positively identified Quintero as the person who was looking in the windows the officer arrested him. The Colorado

Supreme Court later found that, while the officer had reasonable suspicion to detain Quintero, the arrest was made without probable cause since there had been no report of a burglary prior to the arrest. *People v. Quintero,* 657 P.2d 948 (Colo. 1983).

Note: In order to prevail under circumstances such as this, the officer needs to obtain as much evidence as he or she can through detention procedures rather than through post-arrest investigation. The following are some examples:

a. If possible, request fellow officers to conduct a brief neighborhood survey to determine whether any theft or burglary had occurred.

b. Seek consent to check the serial number and/or any other identifying characteristics of the stolen property.

c. Seek the detainee's consent to conduct a search. (In this case, the police found $140.00, five rings and jewelry in the search incident to arrest).

d. Seek the detainee's consent to hold the property at the station for one day. Tell him you will deliver it to him the next day if no one claims it to be missing, and keep the promise if no one reports it stolen. (In this case, the victims called to report the burglary later in the day).

e. Seek consent to take measures to confirm the detainee's identity, such as taking him to his residence.

f. Seek to elicit information from the detainee in a non-custodial setting. The more times a detainee lies or is evasive, the closer you get toward developing information establishing grounds to further detain and/or arrest him.

An officer heard over his radio that a burglary had occurred and that the burglar had apparently returned to the scene.

When the officer arrived at the scene he saw Bates talking to the owner's son-in-law. When Bates saw the police he fled. The officer apprehended and arrested Bates and took him to the station, where he obtained a statement. The court ruled that the information known by the officer, while sufficient to detain Bates, was not sufficient to arrest him. Although soon after the arrest the officer learned that Bates had been peering into the front and back windows of the residence just before the burglary, this information was meaningless in supplying probable cause, because it was obtained after the arrest. *People v. Bates,* 546 P.2d 491 (Colo. 1976).

2. Time Limitations

During the course of an investigatory stop an officer may "freeze" a detainee for a reasonable period of time to investigate the circumstances. The detainee must be released if probable cause is not established within a reasonable time. There are no "hard and fast" rules in which to determine the reasonableness of the period of time elapsing during a detention. What is "reasonable" is determined based upon the "totality of the circumstances." If, however, an officer detains a suspect for longer than 20 to 30 minutes, he or she should be prepared to provide the court with a good explanation.

A corollary to the requirement of a "brief" detention is the requirement that officers act diligently when conducting an investigatory stop. If the officers "drag their feet" trying to buy time until something turns up, they are acting unreasonably and the evidence they gain will usually be suppressed.

Examples:

A state trooper made a traffic stop on I-70 near Wolcott. Due to discrepancies in the vehicle's registration and license plate, and the trooper's inability to compare the VIN on the dashboard to the VIN on the "Nader Label" on the driver-side door, the trooper required the driver to follow him to the state patrol headquarters 10 miles in the opposite direction so the trooper could more conveniently locate another VIN on the vehicle. At this point the driver had been detained 42 minutes, and he arrived at headquarters 14 minutes later. Although the trooper allowed the driver's wife and children to go to a nearby restaurant, he required the driver to remain in the car. The hidden VIN was then quickly located, 71 minutes after the initial traffic stop, but the detention continued for an additional 15 minutes, under the supervision of another trooper, while the first trooper returned to the office.

When the first trooper returned, he instructed the driver to step out of the vehicle and led him to the rear of the car where he was surrounded by three other troopers in a semi-circle. The driver was told he was then "free to go now," but the troopers then obtained consent to search the vehicle. In suppressing the illegal drugs discovered during the search, the Colorado Supreme Court held that, although the trooper possessed a reasonable purpose in temporarily detaining the driver to verify the VIN, he did not diligently pursue the investigation during the 90-minute detention. *People v. Rodriguez,* 945 P.2d 1351 (Colo. 1997).

Without probable cause, officers questioned Mickens for an hour and a half about a sexual assault. The court recognized that this period of detention exceeded the permissible scope of an investigatory stop. *People v. Mickens,* 734 P.2d 646 (Colo. App. 1986).

Lingren was stopped by police for failure to observe a flashing red light. During the course of the stop, the officer noticed a large quantity of new clothing piled high on the back seat, and observed that the clothing displayed price tags and brand name labels, and were on wooden hangers. The officer questioned Lingren concerning the goods, and Lingren replied that he had purchased the clothing at a flea market four days earlier. Shortly thereafter, two additional police officers arrived at the scene. One of these officers informed the others of a previous stop of Lingren that night and no clothes were in the car at that time. Photographs of the clothes were then taken with Lingren's consent and, during the photographing, the radio dispatch officer was notified and began to check for recent burglaries in the vicinity. When advised by the dispatcher that no burglaries in the area had been reported, Lingren was ticketed for the traffic violations and allowed to leave. Hours later, the police learned of a burglary at a nearby clothing store. Police showed the owner the photographs, who identified them as the items stolen, and Lingren was later arrested without the clothes. Although the entire detention took nearly an hour, the Colorado Supreme Court held that the extra time that Lingren was detained was reasonable because the police were acting diligently and because the circumstances contributed to deepening suspicion justifying further investigation. *People v. Lingren,* 739 P.2d 895 (Colo. App. 1987).

After a lawful traffic stop for speeding was concluded and the driver's documents were returned to her, the officer told her to "[p]lease slow down, get an insurance card, and have a safe trip." However, within a second or so, the officer told the defendant he

had concerns about her story, and continued to question her. She eventually gave consent to search her car, and the officers uncovered a large amount of cocaine. The Colorado Court of Appeals held that the continued questioning after the officer returned the driver's documents was an illegal detention because a reasonable person in the driver's position would not have believed she was free to leave or ignore the officer's repeated questioning. *People v. Brandon*, 140 P.3d 15 (Colo. App. 2005).

An officer on patrol made observations of a vehicle that were consistent with an individual about to commit a burglary or vandalism. The officer began to approach the vehicle, but as he turned his patrol car around, the vehicle began to drive off. He stopped the vehicle as it was about to leave the parking lot and asked Pacheco and a passenger for identification, which they provided. The officer questioned the occupants about their activities, and they provided suspicious responses. Approximately three minutes into the stop, another patrol car arrived. The original officer asked the arriving officer to wait with the stopped vehicle and its occupants while he walked over and inspected the exterior of the building. The officer did not find any evidence of illegal activity at the building and returned to the vehicle, intending to release it. When the officer returned to the vehicle, the other officer informed him that he had smelled marijuana coming from the vehicle. At that point, the officers asked the men to exit the vehicle and patted them down. A third officer arrived with a drug-sniffing dog, who alerted to the presence of drugs in the vehicle. The court held that the officers' actions during the stop did not unlawfully extend the duration of the stop. *People v. Pacheco*, 182 P.3d 1180 (Colo. 2008).

Suggested Technique:

In situations where a detention lasts longer than a few minutes, always tell the detainee what his or her status is and try to get his or her consent to remain.

3. Exigencies

When exigent circumstances exist an officer may respond with reasonable force during the emergency. The Colorado Supreme Court has in fact recognized a "trend . . . to include within the rubric of investigatory stops in some circumstances the use of handcuffs, the placing of suspects in police cruisers, the drawing of weapons and other measures of force more traditionally associated with arrest than with investigatory detention." *People v. Archuleta,* 980 P.2d 509 (Colo.

1999). The following are examples of exigent circumstances and the permissible conduct by an officer.

a. Suspect has a Weapon

If an officer reasonably believes that a suspect to be stopped is armed, it is permissible for the officer to draw his weapon briefly until the emergency passes.

Example:

Officers were looking for a person wanted for a sexual assault committed with a shotgun and a handgun. They saw two men, each matching the suspect's description, walking outside of a building. The officers stopped both men with their guns drawn to determine if either was the desired suspect. The court ruled it was reasonable to believe the suspect might be armed and the police could therefore ensure their own safety by drawing their guns and stopping the two men. *People v. Cooper,* 731 P.2d 781 (Colo. App. 1986).

b. Suspect Flees

A detainee may be physically restrained if he attempts to leave. The amount of restraint an officer may use must be reasonable under the circumstances. This could include confining the suspect in a patrol car or handcuffing him during the detention.

Examples:

An officer observed Archuleta huddled with other individuals in an alley near a bar known for illegal drug activity. When Archuleta saw the officer he ran and the officer pursued him up the alley and down the street toward the entrance of the bar. The officer saw Archuleta push over a bicyclist and then enter the bar. The officer drew his gun, entered the bar, and found Archuleta hiding under a table in the dining area. With the assistance of a fellow officer, Archuleta was removed from under the table and, in the process, the officers observed narcotics where Archuleta had been laying. The Colorado Supreme Court later held that, under the circumstances, the officer could reasonably have harbored concerns for his safety, and his action in drawing his weapon did not constitute an arrest but was merely a justifiable measure of precaution ensuring his protection in the course of

conducting an investigatory stop. *People v. Archuleta,* 980 P.2d 509 (Colo. 1999).

An officer stopped a suspect on reasonable suspicion. After the officer asked the suspect his name, the suspect replied that he did not have to talk and started to walk away. The officer then grabbed the suspect and, while attempting to restrain him, got into a scuffle. The California court ruled that an officer must have the limited power to freeze a suspect during a detention, and the restraint in this case was reasonable under the circumstances. *In re: Gregory S.,* 169 Cal. Rptr. 540 (Cal. App. 1981).

c. Suspect Committed a Violent Crime

If an officer has reasonable suspicion to believe the suspect has just committed a violent crime, the officer may draw his weapon and use handcuffs as a safety measure.

Example:

Officers were alerted that two armed robberies had just occurred in a residential neighborhood, with the second robbery resulting in the death of one victim and serious injury to another. The suspects were reportedly armed with a sawed-off shotgun and other weapons. Officers stopped Weeams and a confederate, both of whom matched the suspects' description and upon the arrival of backup officers they ordered Weeams to get out of the vehicle, frisked him for weapons, and handcuffed him. The court subsequently held that, when weighed against the exigencies of the situation confronting the officers, it was not unreasonable to handcuff Weeams to ensure the safety of the officers, and the restraints employed by the police did not convert the investigatory stop into an arrest. *People v. Weeams,* 665 P.2d 619 (Colo. 1983).

d. Other Exigencies

Narcotics officers conducted a "knock and talk" at a residence, and as a woman opened the door they detected a strong smell of marijuana. The officers identified themselves and asked to speak to a resident, and the woman shut and locked the door. A man then opened the door and the officers again smelled marijuana. The officers decided to enter the residence and another man attempted to block their entry. Inside the house, the officers found several

adults, including one who was hiding marijuana and suspected methamphetamine. Shortly thereafter, Hardrick and a companion arrived, and as they entered the house Hardrick kept his hands in his pockets. An officer ordered Hardrick to remove his hands from his pockets, but he continued to keep one hand in his pocket, clenched in a fist. Hardrick then turned away from the officer, who then grabbed Hardrick's wrist and pulled his hand from his pocket. Although the trial court ruled that Hardrick's mere presence in a crime scene did not give rise to reasonable suspicion, the Colorado Supreme Court reversed. The court held that the circumstances taken as a whole justified the stop of Hardrick, inasmuch as drugs were found which increased the risk of violence, the occupants of the house were not cooperative, and Hardrick did not comply with the officer's attempts to ensure that he was not a safety threat. *People v. Hardrick,* 60 P.3d 264 (Colo. 2002).

F. Consent

An officer may ask a detainee if he or she will consent to movement (e.g. come to the police station or get into a patrol car). It may be difficult for an officer to justify such movement to a court, so the officer should be very careful in using this technique to obtain evidence.

Examples:

The owner of a burglarized gas station told an officer that he thought a former employee, Pancoast, committed the burglary. The officer went to Pancoast's home and asked Pancoast if he would accompany the officer the police station in order to answer some questions about the burglary. After arrival at the station, Pancoast waived his rights and confessed to the crime and then led the police to the stolen property. The trial court suppressed the statement and the evidence, ruling that Pancoast had been taken into custody without probable cause. However, the Colorado Supreme Court returned the case to the trial court for a determination of whether Pancoast consented. The determination of consent must be made by assessing the "totality of the circumstances" surrounding the encounter with Pancoast. Pertinent factors include:

a. the time, place, and purpose of the encounter;
b. the words used by the officer;
c. the tone of voice and general demeanor of the officer in requesting the defendant to accompany him to the police station;
d. the officer's statements to others who were present during the encounter;

e. the manner in which the defendant was escorted out of the house and transported to the station house;
f. the officer's response to any questions by the defendant or his parents regarding the defendant's right to refuse to go to the station house;
g. the defendant's verbal or non-verbal responses to any directions given to him by the officer.

People v. Pancoast, 659 P.2d 1348 (Colo. 1983).

Officers investigating a sexual assault contacted Mickens. They told him that he was not under arrest and that they would appreciate his coming down to headquarters and answering a few questions. Mickens readily agreed. At the police station, Mickens provided police with statements that they wished to verify through his mother. Mickens remained in a locked holding cell at the police station after agreeing to this procedure. He later agreed to provide more statements. The court ruled that Micken's express consent, in the absence of threats or coercion, to go to police headquarters for further questioning effectively waived any challenge he might otherwise have had to the duration or the scope of the detention. *People v. Mickens,* 734 P.2d 646 (Colo. App. 1986).

G. Investigatory Stop De-Escalating to a Consensual Encounter

Once the purpose of the investigatory stop is accomplished and no further reasonable suspicion exists to support further investigation, the officer generally may not further detain the suspect. However, further questioning is permissible if the initial detention becomes a consensual encounter.

Examples:

An officer stopped Cervantes for traffic violations. During the course of the investigatory stop the officer obtained Cervantes's driver's license and vehicle registration, and also observed two air fresheners and spray cans of engine degreaser that the officer suspected may be "masking agents" used to disguise the odor of drugs. After issuing the traffic ticket, but without indicating that Cervantes was free to go, the officer then began asking Cervantes additional questions about his travel plans. The officer ultimately requested and obtained consent to search the car and illegal drugs were found. The Colorado Supreme Court returned the case to the trial court to make a determination of whether the initial traffic stop terminated and the continuing interaction became a mere consensual encounter. Among the factors that bear upon this determination are whether the officer returned Cervantes's license and

registration, the tone of the questioning, and the demeanor of the officer. *People v. Cervantes-Arredondo,* 17 P.3d 141 (Colo. 2001).

In *People v. Castaneda,* 187 P.3d 107 (Colo. 2008), officers stopped the defendant for traffic violations, verified that he had no outstanding arrest warrants, wrote him a warning ticket for a cracked windshield, returned his documents, and told him that he was free to leave. The officer then asked for permission to ask the defendant a few more questions. After asking a few questions, the officer requested and received the defendant's consent to search the vehicle. The Colorado Supreme Court held that what began as an investigatory stop concluded when the officer returned the defendant's documents and told him he was free to leave, and that the request for consent to search occurred during a consensual encounter.

At the conclusion of a traffic stop, the officer returned the defendant's documents, informed him he was not going to receive a ticket, and told him good-bye. As the defendant started walking back towards his car, the officer asked if he had any drugs or guns, and if he could search the car. The defendant agreed. The Court of Appeals held that the consent to search was given after the investigatory detention had concluded and had transformed into a consensual encounter. *People v. Montalvo-Lopez,* 215 P.3d 1139 (Colo. App. 2008).

Compare with:

After a lawful traffic stop for speeding was concluded and the driver's documents were returned to her, the officer told the driver that he had concerns about her previous statements, and asked follow-up questions. He also asked whether she had anything illegal in the car, including drugs, weapons, or cash. She said she did not. The officer asked whether he could search her car for drugs; she asked, "Why?" and he said he just wanted "to look" and "it will take just a few minutes and you can be on your way." After two requests, the driver gave consent to search. The Colorado Court of Appeals held that the investigatory stop had concluded when the driver was returned her documents and told that she could leave, and that the ensuing encounter was not consensual. Thus, the consent was obtained during an unlawful detention. *People v. Brandon,* 140 P.3d 15 (Colo. App. 2005).

H. Detentions After Vehicle Stops

An officer has generally the same powers with respect to detainees who are occupants of vehicles as he does to pedestrian-detainees. With respect to the movement of vehicle occupants, the courts permit an officer to order a suspect out of a car and over to the curb if necessary for the officer's protection.

Pennsylvania v. Mimms, 434 U.S. 106 (1977). Removal of the passengers from the car for safety reasons, without particularized suspicion, is also permissible. *People v. Fines,* 127 P.3d 79, (Colo. 2006). However, further substantial direction of a passenger's movements may not be allowed without individualized suspicion of criminal activity. *Id.*

See also Chapter 4, **SEARCH AND SEIZURE – VEHICLES.**

I. Detention During the Execution of a Search Warrant

It is permissible for officers while executing a search warrant to detain the occupants of the premises or individuals who are associated with the premises. Although the detention constitutes a "seizure," it does not constitute an arrest requiring probable cause.

Examples:

Police encountered Summers as he descended the front steps of a house they were about to search pursuant to a search warrant. The police requested his assistance in gaining entry, and they then brought him inside and detained him while the warrant was executed. When the police found drugs in the basement and ascertained that Summers owned the house, he was arrested and searched, resulting in the discovery of heroin in his pocket. The United States Supreme Court held that the initial detention of Summers while the police executed the valid search warrant did not violate the Fourth Amendment because the warrant implicitly carried with it a limited authority to detain the occupants of the premises while a proper search was conducted. Since it was permissible to detain Summers until evidence establishing probable cause to arrest him was found, his arrest and the search incident thereto was likewise permissible. *Michigan v. Summers,* 452 U.S. 692 (1981).

While executing a search warrant for contraband in Ornales's home, police placed Ornales and his guests in handcuffs. A search of the premises then disclosed over a kilogram of cocaine, measuring scales and a large amount of cash. The Colorado Court of Appeals held that the search warrant implicitly carried with it the limited authority to detain the occupants of the premises while the search was being conducted until evidence establishing probable cause to arrest was found. It was likewise permissible to restrain the individuals in handcuffs to prevent flight, to protect the security of the officers, and to prevent disposal of contraband being sought under the search warrant. *People v. Ornelas,* 937 P.2d 867 (Colo. App. 1996).

Officers investigating a gang-related drive-by shooting obtained a warrant to search for deadly weapons and evidence of gang membership.

In light of the high degree of risk of searching a residence suspected of housing at least one armed gang member, a SWAT team was used to secure the residence before the search. Officers detained the several individuals found in the home with handcuffs while they executed the search warrant. The United States Supreme Court held that the detention with handcuffs during the length of the search (2-3 hours) was permissible under the circumstances. *Muehler v. Mena*, 544 U.S. 93 (2005).

Compare with:

Officers were at Pierce's door executing a search warrant when they saw Pierce drive by. The officers stopped Pierce and brought him back to his home and asked him if he would open the door. Pierce was then detained and later made incriminating statements. The court later ruled that, *by bringing Pierce back to the residence,* he was in custody (arrested), and his incriminating statements were inadmissible. *People v. Pierce,* 562 P.2d 760 (1977).

J. *Miranda* Warnings

An officer must give a suspect his *Miranda* warnings only if the suspect is in "custody" and subject to "interrogation." The courts have ruled, however, that investigatory stops, while "seizures" under the Fourth Amendment, do not constitute "custody" for purposes of *Miranda* unless the detention is lengthy and the officers use force.

Examples:

An officer observed Reddersen driving a vehicle. The officer had recently stopped Reddersen for driving with expired license plates and suspected that the plates were still expired. Redderson eventually parked his car in front of a friend's house and the officer approached him to ask him about the status of his plates. The officer confirmed the plates remained expired and then obtained Redderson's driver's license to check its validity and for outstanding warrants. While waiting for a response from the dispatcher, the officer asked Redderson whether he had any illegal substances and obtained his consent to search him. The officer ultimately found illegal drugs in Redderson's pocket. The Colorado Supreme Court recognized that, as a general rule, routine traffic stops do not constitute custody for *Miranda* purposes. Here, the traffic stop was brief in duration, the officer's demeanor was not threatening or coercive, and there was no indication that the officer used force usually associated with a formal arrest. Redderson's statements to the officer during the stop were therefore admissible. *People v. Redderson,* 992 P.2d 1176 (Colo. 2000).

Officers arrived at the scene of a homicide, removed Raglin from his car and handcuffed him. An officer advised Raglin of his *Miranda* rights (but did not obtain a waiver of those rights) and then asked Raglin his name, date of birth, and an explanation of what had happened. The officer later asked Raglin whether the blood on his clothing belonged to him. The court acknowledged that the investigatory detention of Raglin did not constitute "custody" for purposes of *Miranda,* and his statements to police were admissible. *People v. Raglin,* 21 P.3d 419 (Colo. App. 2000).

During a traffic stop, the officer took the defendant's driver's license, told him to remain in the car, and then ordered him and the passenger out of the car so that he could conduct a consensual search. The Colorado Supreme Court first noted that these activities were routine aspects of a traffic stop, and did not rise to a level tantamount to formal arrest. The Court also reiterated that "custody for *Miranda* purposes under the Fifth Amendment is determined under a different analysis from that applied to determine whether there has been a seizure under the Fourth Amendment." Thus, the Court held that the defendant was not in custody for *Miranda* purposes, although he was being detained pursuant to a valid investigatory stop. *People v. Stephenson,* 159 P.3d 617 (Colo. 2007).

K. Detentions for Identifications

Normally when an officer moves a detainee to determine whether the suspect has the characteristics of the person who committed the crime, the officer has arrested the suspect. This means that, unless the officer already has probable cause to arrest, an officer may not move a suspect to obtain fingerprints, blood samples, etc., unless the detainee gives consent, emergency circumstances exist, or a court order is obtained.

Example:

The victim was sexually assaulted in her home and the perpetrator left fingerprints at the scene. Officers suspected that Davis committed the crime but did not have probable cause to arrest him. The officers picked Davis up and took him to the station, where they obtained his fingerprints. After determining that Davis's fingerprints matched the prints found at the crime scene, Davis was arrested. However, the United States Supreme Court ruled that by taking Davis to the station for fingerprinting he had been arrested without probable cause. Therefore, all the evidence gathered after the prints were obtained was suppressed because Davis never would have become a suspect were it not for his illegal detention. *Davis v. Mississippi,* 394 U.S. 721 (1969).

1. Court Order

An officer who has probable cause to believe a crime has been committed but only "reasonable grounds not amounting to probable cause" to believe that the suspect committed the crime may obtain a court order to detain a suspect in order to obtain evidence, such as photographs, handwriting or voice exemplars, or hair and bodily fluids (blood, saliva, etc.). Crim. P. 41.1.

a. Reasonable Grounds

"Reasonable grounds" is the same as reasonable suspicion.

Examples:

Two men kidnapped and robbed a woman. The same day officers received an anonymous call that Davis was involved in the robbery and kidnapping. Davis matched the description provided by the victim and the caller stated that he had heard Davis talking about "some robberies. The officers then obtained an order for non-testimonial identification to get Davis' voice sample, photograph, and fingerprints. The Colorado Supreme Court ruled that there were "reasonable grounds" (reasonable suspicion) to obtain the evidence under Rule 41.1, and the evidence obtained was admissible. *People v. Davis,* 669 P.2d 130 (Colo. 1983).

An officer knew that Madson had been with, and argued with, the victim on the day of the victim's death, and that Madson had been previously convicted of murder. Samples of hair, blood, saliva and handwriting samples were then obtained from Madson. The court ruled that it was constitutional to seize Madson to obtain physical characteristics on reasonable suspicion when an order is obtained under Crim. P. 41.1. *People v. Madson,* 638 P.2d 18 (Colo. 1981).

b. Other Provisions

Some of the important provisions of Crim. P. 41.1 are:

1. The detention to obtain the characteristics must be brief. The detention must be no longer than is reasonably necessary to conduct the non-testimonial procedure.

2. The order must normally be executed during the day and returned within 10 days.

3. The officer may not conduct a search of the detainee except a protective search for weapons, unless a separate search warrant has been issued.

c. Impermissible Actions

An officer detaining a suspect under a Crim. P. 41.1 court order must be very careful not to do any more than the order specifically allows. The courts will be very strict in suppressing any evidence obtained during the detention except what the order spells out. The reason is that the order has already authorized an officer to take more steps (i.e., greater restraint on liberty) than is normally allowed absent probable cause.

If an officer wishes to question the detainee or take other steps (like searching), he or she should not do it during the detention **even with the suspect's consent**. Instead, the officer should tell the suspect he would like to talk later, and then release the suspect.

Example:

Harris was suspected of committing a sexual assault and was served with a Crim. P. 41.1 court order. He was first taken in a police car to a hospital for the extraction of bodily samples and then was taken to an armory building for a lineup. On the way to the hospital a police detective advised Harris of his *Miranda* rights and obtained a waiver. The detective then questioned Harris on the way to the hospital, at the hospital, and on the way to the armory building. The court of appeals ruled that the detective's questioning exceeded the purposes of the Crim. P. 41.1 order and therefore constituted an illegal search. The Colorado Supreme Court agreed, stating that a Fourth Amendment violation occurs when an individual is questioned **during** custody obtained pursuant to Crim. P. 41.1 order. *People v. Harris,* 762 P.2d 651 (Colo. 1988).

Caveat: The Suspect Initiates Conversation

A statement of a suspect who is detained pursuant to a Crim. P. 41.1 order may be admissible under circumstances in which the suspect initiates a conversation with the police and, despite a lack of coercion or interrogation, voluntarily offers

information. *People v. Wilson,* 841 P.2d 337 (Colo. App. 1992).

2. Consent

Absent a court order, an officer can obtain a detainee's consent to the "taking" of physical characteristics at the station.

Example:

Although the victim apparently had seen Mattas sometime prior to the assault, she did not immediately identify him as her assailant. However, certain of the attacker's statements to the victim and marks in the new-fallen snow around the victim's apartment led the police to suspect that an individual staying in Mattas's trailer had committed the assault. Sheriff's deputies were allowed into the trailer and Mattas voluntarily handed over to this officer the underwear he was wearing and furnished a sample of his pubic hair for comparison with hairs recovered from the victim's sheets. Expert testimony at trial matched a hair found in the victim's bed with the Mattaas' hairs. Although the hair samples were not obtained pursuant to a Crim. P. 41.1 order, the court nevertheless found that Mattas surrendered the evidence voluntarily and such voluntary surrender of nontestimonial evidence waived Fourth Amendment protections. *People v. Mattas,* 645 P.2d 254 (Colo. 1982).

A motel-beautyshop-liquor store complex in Boulder was robbed. Hannaman, who was a tenant in the motel who had had access to part of the robbery scene, was asked by the police to give comparison fingerprints. He agreed to do so, and the fingerprints and a voice identification by the victim comprised the primary evidence against him at trial. The court ruled that, because Hennaman voluntarily submitted to fingerprinting, he thereby waived his Fourth Amendment rights. *People v. Hannaman,* 507 P.2d 466 (Colo. 1973).

3. Emergency Circumstances

An officer may move a suspect to "match physical characteristics" without a warrant or consent when emergency circumstances exist. However, because such an intrusion exceeds the limited deprivation of liberty associated with an investigatory stop, the officer should be prepared to justify the emergency and explain why a Crim. P. 41.1 order could not have been obtained.

4. Detention of Witnesses

Officers should do all they can to obtain statements and evidence from all witnesses. However, the practice of "picking witnesses up" and taking them into the station for questioning, without their voluntary consent, is unconstitutional.

Example:

Zamora assaulted his wife and her friend. A week later Zamora was arrested at his home. At the time of the arrest Zamora's five roommates were taken down to the station for questioning. Several of the witnesses gave valuable information about the assaults. The court stated that the "pick ups" of these witnesses were unlawful arrests and violations of their constitutional rights. *People v. Zamora,* 695 P.2d 292 (Colo. 1985).

5. Suggested Techniques

If you want to talk to a suspect but you do not have probable cause, consider the following tips:

1. Use as little force as possible.

2. The more serious the offense the more likely the court is to justify the stop, especially if the officers limit their power as much as possible.

3. It the suspect was initially stopped rather than arrested, always document the facts which show the suspect was merely detained and not arrested.

You should consider the following techniques while detaining a suspect unless you are certain probable cause exists:

1. Try to act as friendly and non-accusatory as possible under the detention circumstances. The officer's demeanor and tone of voice are very important.

2. Never move or physically restrain a detainee except:
   a. under emergency circumstances (e.g., officer safety);
   b. with the detainee's consent;
   c. under a court order.

3. If it appears that you must do something that will look like custody to the court (e.g., exceeding time limitations), try to get the detainee's consent.

4. You don't have to tell the detainee what his status is. *People v. Paynter,* 955 P.2d 68 (Colo. 1998). However, it is much more difficult for a suspect to complain in court that he or she was arrested if the officer told the suspect he or she was free to leave or only being briefly detained. This is especially important if the suspect asks if he is under arrest. The proper response is, "you are being detained briefly until we straighten this out."

5. If an eyewitness identification is necessary to establish probable cause, always bring the witness to the suspect if possible.

6. Keep the detainee talking. If the detainee committed the crime what he or she says can be crucial in establishing probable cause or obtaining a conviction. Document in your report anything the detainee says.

7. Document in your report all factors which reflect that the suspect was being detained rather than arrested.

8. If asked during cross-examination whether the detainee was free to leave, or what you would have done if the detainee tried to walk away, truthfully state that the detainee was not free to leave for a short period of time. Do not testify that a detainee was "in custody" if he or she was not.

IV. SEARCHES DURING DETENTIONS

Officers may conduct a protective search for weapons (and only weapons) during a detention of a suspect; however, a full search for other types of evidence is prohibited unless there is probable cause to arrest. When such a search or "frisk" is conducted, the officer should be prepared to state the specific reasons why he was in fear for his safety. *See* section 16-3-103(2), C.R.S. (2008).

Example:

Officers on foot patrol saw an elderly man chasing Cobbin. They radioed ahead that a robbery may be in progress. When officers caught Cobbin, they handcuffed and searched him, and during the search the officers discovered a wad of bills stolen from the elderly man's cash register. The court ruled that, although it was proper to stop and frisk Cobbin for their protection (since

there was a possible robbery), it was illegal to fully search him without probable cause. *People v. Cobbin,* 692 P.2d 1069 (Colo. 1984).

Many officers think that "stop-n-frisk" is one word. However, the Colorado Supreme Court has dispelled that notion: "a valid stop does not necessarily justify a frisk. For a frisk to be valid there must be (a) some reason for the officer to confront the citizen in the first place [reasonable suspicion], (b) **something in the circumstances**, including the citizen's reaction to the confrontation, **must give the officer reason to suspect that the citizen may be armed and, thus dangerous to the officer or others,** and (c) the search must be limited to a frisk directed at discovery and appropriation of weapons and not at evidence in general." *People v. Sherman,* 593 P.2d 971 (Colo. 1979).

A. The Danger Requirement

In order to search for weapons during a detention an officer must be able to specifically state what objective facts led him or her to be afraid or in a dangerous situation.

1. Violent Crimes

When the officer suspects a detainee has committed, or is about to commit, a violent crime, it is usually easy for the officer to prove that he or she was in fear for his or her safety, or the safety of others. As a United States Supreme Court Justice has stated, "there is no reason why an officer, rightfully but forcibly confronting a person suspected of a serious crime, should have to ask one question and take the risk that the answer might be a bullet." *Terry v. Ohio,* 392 U.S. 1 (1968)(concurring opinion).

Examples:

Officers responded to a residence on a **domestic abuse** report, lawfully entered the residence, and discovered Mascarenas in the basement. Although Mascarenas appeared to be sleeping, the officers observed a cold, full open beer can next to him, and they deduced that he had just gone downstairs. Mascarenas's girlfriend denied that weapons were involved in the assault, but she had not given the officers truthful information as to Mascaraneas's whereabouts. The officers conducted a pat-down search of Mascarenas's outer clothing, felt a hard object in his sock, and removed the object which turned out to be a container containing illegal drugs. The court of appeals held that the pat-down search was proper, even though it occurred in a private residence because the officers had reasonable suspicion to detain Mascarenas and they testified that domestic violence situations were particularly

dangerous. *People v. Mascarenas,* 972 P.2d 717 (Colo. App. 1998).

An officer with 35 years of experience in law enforcement saw men who appeared to be casing a store to rob it. When the officer obtained reasonable suspicion to talk to the men, he stopped and frisked them. The United States Supreme Court held that because **the crime was one where weapons were used** the frisk was a reasonable search. Therefore, the guns that the officer discovered were admissible. *Terry v. Ohio,* 392 U.S. 1 (1968).

A man **robbed and raped** the victim. The victim provided police with a description of the attacker's beard and shirt, and within 10 minutes of the attack, Shackelford, who generally matched the description, was seen in the vicinity of the attack. The officer stopped Shackelford, frisked him, and demanded to see what was in Shackelford's hand. The court ruled that it was reasonable to conduct a frisk under the circumstances, and the evidence discovered in the frisk was admissible. *People v. Shackelford,* 546 P.2d 964 (Colo. App. 1976).

An officer responded to a gas station because the two owners were threatening each other. Upon arrival at the station, the officer noticed that Savage had a folding knife in his hand. About two weeks later, the same officer responded back to the gas station on a report of a man threatening people with a knife. He saw Savage walking away in an apparent agitated state and several persons were focusing on Savage. The officer told Savage to stop and take his hands out of his pocket, and then he asked for consent to search him. When Savage did not respond, the officer told Savage that he was going to search him, whereupon Savage removed a knife from his pocket. The court ruled that the officer would have been justified in conducting a protective search for weapons in these circumstances, even if Savage had not consented to the search. *People v. Savage,* 630 P.2d 1070 (Colo. 1981).

Note: In this case the officer testified that he would have conducted a pat-down even if Savage had responded "no" to the request to search him, which persuaded the court that the officer was in fact in fear for his safety. While an officer's declarations of his or her intentions at the time of the search may be persuasive to a court in establishing the danger requirement, the officer's subjective intent is not critical to the resolution of the issue. Instead, courts must determine whether the purpose of the search (i.e., search for weapons v. search

for other evidence) was **objectively reasonable** in light of the circumstances confronting the officer at the time of the search. Therefore, even if an officer may not have been subjectively concerned about his or her safety, the frisk may nevertheless be objectively reasonable if the totality of circumstances establish a dangerous situation. *See People v. Altman,* 938 P.2d 142 (Colo. 1997).

2. Non-Violent Crimes

If an officer has reasonable suspicion to believe a detainee has committed or is about to commit a non-violent crime he or she may have more difficulty justifying a protective search for weapons.

Examples:

Officers saw four youths carrying beer bottles. After stopping the youths, an officer frisked Sherman and discovered crime-related evidence. The court ruled that because the officer could not state any reason why he feared for his safety the frisk was unconstitutional. Therefore, the evidence was suppressed. *People v. Sherman,* 593 P.2d 971 (Colo. 1979).

While serving a search warrant, an officer frisked a detainee at the scene. The United States Supreme Court ruled that the officer never stated any specific reason to be afraid of the detainee, and the crime-related evidence discovered as a result of the frisk was inadmissible. *Ybarra v. Illinois,* 444 U.S. 85 (1979). [But compare the facts and result of this case to the *Casias* and *Hardrick* cases, discussed below.]

Compare with:

An officer saw Taylor unloading a large pile of clothing from his car. The officer stopped and frisked Taylor and discovered a pistol. It was later determined that the clothes were not stolen, but Taylor was convicted of possession of a weapon by a previous offender. The Colorado Supreme Court ruled that the frisk was proper because the officer recognized Taylor and had read that he may presently be armed, and an unusual number of previous arrestees in the area had been armed. *People v. Taylor,* 544 P.2d 392 (Colo. 1975).

An officer observed a man acting suspiciously in a convenience store and, suspecting that the man had stolen something, the officer

followed the suspect until his car stopped. The man jumped out of the car and rapidly approached the officer's patrol car. The officer feared that the man and his passengers were armed. After stopping the man, who was unable to produce identification, the officer performed a pat-down search and placed him in the back seat of the patrol car. The Colorado Supreme Court concluded that the frisk was reasonably related to the officer's concern for his safety. *People v. Sutherland,* 886 P.2d 681 (Colo. 1994).

3. Narcotics-Related Crimes

Courts frequently acknowledge the potential for violence when investigating narcotics-related crimes, and the propensity for drug dealers to possess and use weapons in the course of their narcotics transactions. However, an officer cannot automatically assume that that people carrying or selling illegal drugs to be carrying guns as well; the officer must be prepared to state specific facts in each individual case establishing grounds to conduct the frisk. *See Florida v. J.L.,* 529 U.S. 266 (2000)(declining to adopt a "firearm" exception wherein a tip, whether reliable or not, alleging the possession of an illegal gun would automatically justify a stop and frisk).

Examples:

Officers executed a search warrant at a residence and found cocaine, handguns, rifles, shotguns and knives. As the search was in progress, Martinez drove up to the residence and walked to the front door. Before he could enter the home, an officer drew his gun, ordered Martinez to stop and raise his hands, and then drop to his knees. Martinez began to comply but then made a sudden movement toward his pocket. The officer again ordered Martinez to raise his hands, and then handcuffed and frisked him. The Colorado Supreme Court concluded that, under these circumstances, where the police were conducting a search with guns and drugs present and a third person approached, the officer "could not possibly know whether [he] was armed without performing a pat-down search." The frisk was therefore justified. *People v. Martinez,* 801 P.2d 542 (Colo. 1990).

Note: The Colorado Supreme Court reached the identical result in *People v. Hardrick,* 60 P.3d 264 (Colo. 2002), even though the officers had not discovered firearms during the execution of the search warrant: "When there is an ongoing search or arrest and a third party voluntarily arrives at the scene, it is unreasonable to ask an officer to simply send the interloper away from the

immediate area and hope that he is not setting himself up for an ambush. It is equally unreasonable for the officer to allow the third party into the volatile situation without insuring that the party is not armed."

Officers went to Casias' home with a search warrant to look for narcotics. When Casias came out of his house, the officers confronted him with the warrant. Casias then moved back suddenly, turned away and put his right hand into his right front pants pocket. The officer then grabbed Casias and pulled his hand out of the pocket. The officer then reached with his own hand into the pocket, felt an object and pulled it out. The court ruled that Casias' conduct justified the frisk and the tin-foil object that was recovered in the frisk was admissible. *People v. Casias,* 563 P.2d 926 (Colo. 1977).

Acting upon information by a reliable informant, officers obtained and executed a search warrant for narcotics at Spaccamonti's apartment. Hughes, who was present in the apartment at the time of the search, matched the description of Spaccamonti's supplier. Officers then frisked Hughes for weapons and discovered a canister containing cocaine. The Colorado Supreme Court ruled that, based on the officers' experience and the fact that Hughes matched the informant's description, officers had reasonable suspicion to believe that Hughes was Spaccamonti's supplier and, as such, likely to be armed. The protective frisk for weapons was therefore permissible in order to protect those at the scene. *People v. Hughes,* 767 P.2d 1201 (Colo. 1989).

4. Consent

The rules regarding protective searches for weapons do not preclude an officer from seeking a suspect's consent to search, either for weapons or for other evidence. If a suspect voluntarily consents the search will be upheld. *People v. Morales,* 935 P.2d 936 (Colo. 1997).

B. The Area Which May Be Searched

Normally officers are limited in their searches of detainees to a "frisk" or "pat-down" of the detainee's outer clothing. In extraordinary circumstances, however, an officer may be permitted to search other areas around the suspect

to ensure the officer's protection during the detention. These searches are better described as "searches incident to detention" rather than frisks or pat-downs.

1. Closed Containers

An officer conducting an investigatory stop may have to decide if it is permissible to search a container incident to the detention. In order to conduct such a search, the officer must be able to prove to a court that he or she had a good faith fear that the container held a weapon, and that an immediate search of that container was necessary to protect his or her safety or the safety of others. If other alternatives are available, such as seizing the container or moving the detainee away from it, a "search incident to detention" should be avoided.

Examples:

Police officers observed Ratcliff in a high drug trafficking area making contact with a known drug dealer. Police detained him while they conducted an investigatory stop and frisk. During the frisk, a police officer found a vial, opened it, and discovered rock cocaine. The Colorado Supreme Court held that the seizure of the vial was proper, even though one of the officer's purposes in stopping the defendant was to search for and seize drugs on his person. The court reasoned that there was a sufficient objective basis to justify a protective "frisk" and the officer had the right to make a cursory visual examination of the large solid object (i.e. the vial) to assure himself that it posed no threat of danger to himself or others. The officer could not, however, open the vial and examine its contents where he could not point to specific and articulable facts supporting a reasonable suspicion that the contents of the container posed a danger to himself or to others. *People v. Ratcliff*, 778 P.2d 1371 (Colo. 1989).

Corpany was a passenger in a vehicle stopped by officers for a traffic violation. An officer observed Corpany place something under the front seat as the vehicle was coming to a stop. After ordering all passengers out of the vehicle, officers searched the area under the seat and found a fanny pack. There was nothing that the officer could feel from the outside of the pack that caused him to believe there was a weapon inside the pack. Nonetheless, the officer opened the pack and found methamphetamine inside. The Colorado Supreme Court ruled that, although the search under the seat was proper, the exploration into the fanny pack after the officer was unable to detect weapons during the pat-down was unrelated to the sole justification for a protective search (i.e., the

safety of the officer and others nearby) and it therefore exceed constitutionally permissible bounds. *People v. Corpany,* 859 P.2d 865 (Colo. 1993).

2. Vehicles

During the course of an investigatory stop a police officer may conduct a search of those areas of a vehicle's passenger compartment in which a weapon may be placed or hidden. This, however, does not mean that the police may automatically search the passenger compartment. An officer may conduct a search of the passenger compartment only if he or she possesses a reasonable belief based on specific and articulable facts that the suspect is dangerous and may gain immediate control of weapons.

Examples:

Two officers stopped a vehicle for a traffic infraction. During the course of checking the driver's license and registration one of the officers noticed a bag of blue pills and a jar with a substance in it on the floorboard by Altman's feet. The officers returned to their patrol car, and while they were checking Altman's documents they saw him bending over in his seat and making motions toward the bottom of his seat. The officers again approached the car, ordered Altman out of the car and patted him down for weapons. One of the officers then searched under the seat and discovered illegal drugs. The Colorado Supreme Court concluded that the officers had legitimately stopped the vehicle, and that the "furtive action" by Altman provided a reasonable belief based on specific and articulable facts that Altman was armed and dangerous. *People v. Altman,* 938 P.2d 142 (Colo. 1997).

A narcotics officer was making a deal for the purchase of cocaine at a motel. When the agent tested the cocaine he told the suspect that it was not good enough, and the agent then watched the suspect go to a parking lot and talk with Lewis. The suspect then returned with a new supply of cocaine. The agent arrested the suspect and radioed other agents regarding the arrest and the fact that the suspect was armed. Other officers responded to the parking lot and observed Lewis nervously watching the motel in his rear-view mirror. They ordered Lewis out of the car and then quickly looked around the front seat for a weapon, during which they saw bags of cocaine. The court ruled that the officers were reasonable in fearing that Lewis might have a gun near the driver's seat, and the cocaine discovered during the search was admissible. *People v. Lewis,* 659 P.2d 676 (Colo. 1983).

During a traffic stop, the officer saw the defendant lean forward in her vehicle and disappear completely from the officer's line of sight. The defendant remained out of sight for a period of time, which caused the officer to be concerned for her safety. As a result, the officer returned to the driver's side of the vehicle and asked the defendant to step out of her vehicle and to give the officer consent to search. The defendant consented to the search, and the officer located two small plastic baggies containing amphetamine. The Colorado Supreme Court held that the search was valid because the officer had a reasonable belief based on articulable facts from the defendant's behavior that she could have been trying to gain control of a weapon. *People v. McDaniel*, 160 P.3d 247 (Colo. 2007).

3. Other Areas

An officer may search any area around the suspect incident to a detention as long as the officer is prepared to explain why he or she felt that a dangerous detainee could obtain a weapon from the area.

C. Plain Feel Doctrine

If, during a frisk of a suspect for weapons, the officer encounters an object of which the incriminating nature of the object is immediately apparent, he or she may seize that object. However, the officer must have reasonable grounds to believe that the object is incriminating without conducting further search or manipulation of the object. In *People v. Rushdoony*, 97 P.3d 338 (Colo. App. 2004), the officer was conducting a pat down search of the suspect when he felt an item in the defendant's pocket "consistent from previous dealings that felt like a [drug] pipe." The Colorado Court of Appeals held that the seizure of the pipe was lawful under the "plain feel" doctrine, as its incriminating nature was immediately apparent.

D. Suggested Techniques

1. If possible, seek the consent of the detainee before searching for weapons. A detainee can waive his Fourth Amendment right to be free from pat-down searches.

2. Ask questions:

   a. Before the frisk, ask the suspect if he has any weapons or what he or she have in their pocket or purse.

   b. After the frisk, if you feel something which could not be a weapon but may be crime-related, ask the detainee what it is.

Any answer the suspect gives will help greatly in establishing probable cause to search and/or seize it.

3. If you document in your report why you were afraid or believed the situation was dangerous the courts will bend over backward to justify a good-faith frisk.

Note: **Your safety is far more important than the Fourth Amendment**, and any "close questions" on the street should obviously be resolved in favor of officer safety. In such situations, so long as you can specifically detail the reasons for your fears in your reports and testimony, it is likely that the evidence recovered from a protective search will be admissible. However, even if a court should disagree with your reasons for conducting the protective search, exclusion of evidence is far preferable than subjecting yourself to death or physical injury.

V. ARRESTS

When an officer "significantly restrains" a person the officer has arrested that person, whether the officer intended to do so or not. In order to arrest a suspect, an officer must have probable cause to arrest. Furthermore, even when probable cause to arrest does exist, an officer often must obtain a warrant unless exigent circumstances exist that prevent him or her from obtaining an warrant (such as an offense taking place in the officer's presence).

Both the concept of probable cause and the warrant requirements are discussed at great length in other chapters. These concepts are therefore only briefly and generally discussed here.

A. Probable Cause Requirement

[See Chapter 7, **PROBABLE CAUSE**]

Sometimes an officer arrests a person when there is simply not enough evidence to take the person into custody, or when the evidence is not trustworthy enough. When this happens, not only is the evidence gathered inadmissible in court, but the officer may also be liable for false arrest.

1. Amount of Evidence Necessary to Establish Probable Cause

The "formula" the courts use to decide if an officer had probable cause to arrest is "whether the facts available to a reasonably cautious officer

at the moment of arrest warranted the belief that an offense had been or was being committed by the person being arrested." *People v. Hazelhurst,* 662 P.2d 1081 (Colo. 1981). However, as the Colorado Supreme Court has noted, "the probable cause standard is a practical, non-technical conception involving common-sense conclusions about human behavior . . . It is a 'fluid concept,' turning on the assessment of probabilities in particular factual contexts that are not reducible to a neat set of legal rules." *People v. Polander,* 41 P.3d 698 (Colo. 2001). The following examples of facts the courts have said do and do not establish probable cause may help to make this formula more understandable.

Examples:

Officers were led to a marijuana "garden" in a box canyon off a trial frequented by hunters and hikers. While placing a surveillance camera at the garden, officers discovered an airline luggage tag with the name "Tim Gulick." Officers obtained an address for Gulick, went to that address, and observed a blue Nissan pickup registered to King. An officer spoke to King and observed that he was approximately six-feet tall with dishwater blond hair. The officers did not see Gulick, but records showed him as also around six-feet tall with longer, shoulder-length hair. Later, officers retrieved the surveillance tape which showed nighttime footage of two men in the garden, but did not reveal any distinguishing features except that one of the men had long light hair. During a subsequent live surveillance an agent observed a blue Nissan pickup, which was the same vehicle observed at the Gulick residence belonging to King. One hour later the officer observed two men with flashlights, and one carrying a backpack and the other with long hair, walk out of the canyon. The two men drove out of the canyon in the blue Nissan pickup and were then stopped and arrested. The Colorado Supreme Court held that the officers possessed probable cause to believe that the crime of cultivation of marijuana had been committed. However, while the evidence merited the suspicion that King and Gulick had visited the garden, the facts known to the officers at the time of the arrest did not establish probable cause that either individual committed the crime of cultivation of marijuana. *People v. King,* 16 P.3d 807 (Colo. 2001).

Officers were called to an apartment in a public housing complex, given a key to an apartment and advised that there might be unauthorized persons in the apartment. When they arrived at the apartment the officers knocked on the door and identified themselves as police officers. They heard movement inside the apartment but no one came to the door. The officers then entered

the apartment and found Trusty and another man in the apartment. Trusty was then arrested for trespassing. The court of appeals concluded that these circumstances were sufficient to support a reasonable belief by the officers that Trusty was trespassing. *People v. Trusty,* 53 P.3d 668 (Colo. App. 2002).

Martinez and Foster were in Martinez's truck, transporting a motorcycle in the trailer, when they were stopped for a traffic violation. Martinez consented to an examination of the motorcycle, which was reported as stolen nine weeks previously. Both were arrested for the theft of the motorcycle, and during a search incident to arrest, cocaine was found on Foster. The Colorado Supreme Court held that Foster's mere presence as a passenger in a truck which was used to transport a stolen motorcycle was insufficient to constitute probable cause for his arrest. *People v. Foster,* 788 P.2d 825 (Colo. 1990).

Police officers observed Ratcliff and a known drug trafficker surreptitiously exchange something outside a bar located in a high drug trafficking area. The court concluded that the circumstances did not rise to the level of probable cause to arrest (although reasonable suspicion would permit an investigatory stop). *People v. Ratcliff,* 778 P.2d 1371 (Colo. 1989).

Grand Junction police recorded a 911 call where the unidentified caller reported that he had committed a stabbing. Both the victim's father and an officer identified the recorded voice as belonging to Drake. In addition, Drake's wife told police that Drake, who lived in Louisiana, was present in Grand Junction. Drake's brother confirmed that Drake was in Grand Junction and provided the location of the motel where Drake was staying. The Colorado Supreme Court held that the facts and information known to the arresting officers would warrant a person of reasonable caution to believe that Drake had committed the stabbing, and probable cause to arrest was therefore established. *People v. Drake,* 785 P.2d 1257 (Colo. 1990).

Upon arriving at the house of Baker, a suspected drug dealer, an officer knocked at the door The officer was refused entry, but after smelling burning marijuana he forcibly entered and arrested the occupants. The Colorado Supreme Court held that the smell of marijuana constituted adequate probable cause to believe a crime was being committed by the occupants. *People v. Baker,* 813 P.2d 331 (Colo. 1991).

A jewelry store in Colorado was robbed and later that month New Orleans police received two separate reports of a man attempting to sell pieces of expensive jewelry at greatly reduced prices. One of the reports described McCoy's appearance and where he was located. Officers went to that location, arrested McCoy without any prior questioning, and discovered a bag of expensive jewelry on his person. The Colorado Supreme Court held that there was insufficient probable cause to arrest McCoy. There are innocent reasons why a person might have to sell personal jewelry at greatly reduced prices, and this activity alone, without other information that a crime had in fact been committed, does not constitute probable cause for arrest. The court also emphasized that it is not a requirement that the officer have specific information that a particular crime has been committed in order to establish probable cause for a warrantless arrest. It is sufficient if other facts known to the officer warrant a belief that an offense has been or is being committed by the person to be arrested. However, the court suggested that when police do not have specific information that a particular crime has been committed, more and better evidence might be necessary to prove that probable cause exists to support an arrest without a warrant. *People v. McCoy,* 870 P.2d 1231 (Colo. 1994).

An undercover officer entered a residence to investigate a cocaine operation. While waiting to obtain cocaine from another person at the residence, the officer struck up a conversation with Washington, who was also at the residence. Washington told the officer that he previously sold drugs to a major gang and made the offer to sell crack cocaine to the officer at a cheaper price. Washington gave the officer his phone number and street name for the express purpose of conducting drug transactions. He also told the officer that he previously distributed drugs for a major street gang and that he expected the officer to call him in order to complete the proposed deal at a price that was less than what the officer was currently paying. Washington was subsequently arrested. The Colorado Supreme Court found that there was ample evidence that Washington's intent was to induce the officer to purchase cocaine from him and, therefore, probable cause to believe that a crime had been committed was established. *People v. Washington,* 865 P.2d 145 (Colo. 1994).

After stopping a car for speeding, the police officer searched the car and found over $700 in cash in the glove compartment and five baggies of cocaine between the back seat armrest and the back seat. The United States Supreme Court held that the officer had probable cause to arrest any or all of the car's three occupants, as it

was reasonable for the officer to infer a common drug dealing enterprise among them. *Maryland v. Pringle*, 540 U.S. 366 (2003).

Police observed the defendant's vehicle follow another vehicle into a parking lot at the approximate time of an arranged drug deal. The defendant then parked his vehicle next to the first vehicle and waited while the first vehicle's occupant made contact with a confidential informant. After the confidential informant gave the first vehicle's occupant $200 for drugs, police heard that person say he had to go "to the truck" to get the drugs. The first vehicle's occupant then immediately got into the defendant's vehicle before getting in to his own vehicle and delivering the drugs to the confidential informant. The first vehicle and the defendant's vehicle then left the parking lot at the same time. Based upon these facts, the Colorado Court of Appeals held that there was sufficient probable cause to believe an offense had been committed by the defendant. *People v. Flowers*, 128 P.3d 285 (Colo. App. 2005).

An undercover officer conducted a drug transaction with Beltran, and at that time the defendant's car was observed at Beltran's house. The police later saw Beltran arrive at the defendant's house after the undercover officer suggested that he go to his supplier to get drugs to sell. After the undercover officer arranged to buy methamphetamine from Beltran and the defendant was told that Beltran was waiting for his "supplier" to arrive with the drugs, defendant arrived at Beltran's house, and was arrested. The Court of Appeals held that there was probable cause to believe that the defendant was supplying drugs. *People v. Villano*, 181 P.3d 1225 (Colo. App. 2008).

2. Establishing Probable Cause: Informants

When probable cause is based upon hearsay (i.e., what someone has told officers) officers must prove not only that they have enough evidence to arrest but also that the source of the information on which probable cause is based is reliable. [Because this issue is discussed at great length in the **PROBABLE CAUSE** chapter, the requirements for probable cause based upon hearsay are discussed only in summary manner here.]

a. Reliability of the Informant

In order to arrest a person based on hearsay the officer must be prepared to prove that the informant is reliable. In many instances, such as where the informant is a victim or "citizen-witness" of a crime, reliability is presumed. If, however, the informant has any

reason for giving the information, other than just being a good citizen, the officer must somehow prove the informant's reliability.

Citizen Informants

In many cases the informant is a citizen who is the victim of or witness to a crime. In such circumstances the officer normally has little trouble establishing reliability (as long as the informant does not wish to remain "confidential" or anonymous to all others besides the officer).

Example:

A citizen informant reported that he had recently observed a high volume of short-term visitors at a trailer he believed to be inhabited by Delgado, a pregnant woman, and a small child. The informant also reported that he had seen Delgado driving a small red car, and gave officers the license number. Delgado was arrested after officers spotted him driving a small red car with the same license number with a pregnant woman and young child as passengers. The Colorado Court of Appeals found that probable cause to arrest Delgado existed based on the informant's information. *People v. Delgado,* 832 P.2d 971 (Colo. App. 1991).

Fellow Officers

An officer who does not personally possess sufficient information to constitute probable cause may nevertheless make a valid arrest if he acts upon the direction or as a result of a communication from a fellow officer, and the police, as a whole, possess sufficient information to constitute probable cause.

Examples:

An officer stopped a vehicle outside Durango for speeding and discovered that the passenger, Ertz, had a warrant for his arrest in Mesa County. The warrant stated that Mesa County would only transport an arrestee within a 100-mile radius of that county. Since the location of the traffic stop was more than 100 miles from Mesa County the officer did not attempt to stop Ertz. However, the officer notified other officers of the vehicle's direction of travel, and another officer stopped the vehicle in Montrose County, which was within 100 miles of Mesa County. The officer confirmed the existence of the warrant, arrested Ertz, and then conducted a search of the car

incident to the arrest, which disclosed illegal drugs. The Colorado Supreme Court concluded under these facts that the second officer clearly had probable cause to stop and arrest Ertz based on the information he received from a fellow officer. *People v. Daverin,* 967 P.2d 629 (Colo. 1998).

Denver police received information from an FBI agent that Thompson was wanted on an outstanding fugitive warrant in Washington. The agent reported that Thompson was using the alias "Jules White" and was selling narcotics from his motel room in Denver and provided a description of the suspect. Officers acting upon this information went to the motel, confirmed both defendant's alias and physical description, and arrested him. Following the arrest, officers learned that the arrest warrant was a no-extradition warrant valid only in Washington. Applying the "fellow officer rule," the Colorado Supreme Court ruled that Denver police acted in reliance upon the FBI agent's communication and that the police as a whole possessed sufficient information to constitute probable cause. *People v. Thompson,* 793 P.2d 1173 (Colo. 1990).

Police officers in Illinois received a tip from an informant who reported that Alexander was wanted and gave the defendant's address and date of birth. In verifying this information with Denver police, the officers received notice of an outstanding Colorado arrest warrant that provided a physical description of Alexander but erroneously listed two dates of birth. Illinois officers acted upon the notice of the warrant and arrested Alexander. The Colorado Supreme Court found that the notice of the warrant was a communication from a fellow officer and that probable cause to arrest existed where officers verified the informant's report with Denver police. Because the notice gave a physical description of Alexander, the arrest was not invalidated by the fact that it erroneously listed two dates of birth. *People v. Alexander,* 797 P.2d 1250 (Colo. 1990).

Summit County Drug Task Force agents witnessed what they believed to be a drug transaction from a white truck, so they followed the truck for several days. The agents then obtained a warrant to place a GPS device on the truck. Agents thereafter observed the truck make several stops before driving toward Denver. Upon arriving in Denver, the driver of the truck was engaged in suspicious driving maneuvers and again made numerous stops. Believing the driver was

involved in drug activity, a task force agent contacted the Denver police to request that a uniformed patrol officer conduct a traffic stop and seek permission to search the truck. However, the agent did not inform dispatch about the earlier observations; instead, he specifically requested that the Denver officer develop an independent basis for a traffic stop. Hearing the dispatch broadcast, a Denver officer followed the truck but observed no traffic violations. He stopped the car based on the air freshener hanging from the rearview mirror, believing it to be a violation of § 42-4-201(4). The driver was then arrested for an outstanding warrant, and drugs were found in the truck and on his person. The Colorado Supreme Court held that the stop was not valid under § 42-4-201(4), and that the stop could not be justified on the basis of the task force agent's observations because the drug task force agent did not direct the patrol officer to stop the defendant based on existing information; instead, he advised the officer to find an independent basis for stopping the vehicle. Therefore, the Court found that the fellow officer rule was inapplicable. *People v. Arias*, 159 P.3d 134 (Colo. 2007).

Unreliable Informants

Unreliable informants normally cannot establish probable cause unless the officer can prove in some way that the information they provide is truthful. Examples of unreliable informants are persons who want something in return for the information (e.g., charges dropped, money, etc.), persons who have an "axe to grind" against the suspect, or persons who have any other motive to lie about the information or the suspect.

Example:

Howell collided with Pate in a traffic accident and tried to lodge a complaint against her with the police. Later he told officers he had just partied with Pate and had seen her snorting cocaine. He told the officers where Pate had the cocaine. The court held that Howell was a citizen-informant and, therefore, was presumed to provide reliable information. However, three of the seven justices disagreed, insisting that Howell was not a disinterested citizen who acted out of public spirit, but was rather acting out of vindictiveness and accordingly should not have been cloaked with the reliability

accorded to citizen informants. *People v. Pate,* 705 P.2d 519 (Colo. 1985).

b. Personal Knowledge

Probable cause to arrest must be based upon first-hand knowledge of the facts. This means that an officer can never assume that the informant saw, heard or smelled the facts about which he or she speaks. When an informant tells an officer that crime-related activity took place the officer must find out how the informant got this information. For example:

"**I SAW** the suspect steal the property."

"**I HEARD** the suspect say that he stole the property."

"**I SMELLED** the substance and it smelled like marijuana."

Examples:

Officers responded to a bad accident scene. An apparent witness, Joe Muro, told an officer that Donnelly had run a stop sign. The investigating officer went to the hospital to see Donnelly. Donnelly smelled of alcohol, spoke with a slur and had watery, red eyes. He was then arrested, made incriminating statements and the officer had blood drawn. The Colorado Supreme Court held there was no probable cause for the arrest because there was no evidence at the suppression hearing that the witness actually saw the events testified to (i.e. actually saw Donnelly drive and run the stop sign). Therefore, the evidence obtained as a result of the arrest were suppressed. *People v. Donnelly,* 691 P.2d 747 (Colo. 1987).

Moral: Never *assume* that an informant personally witnessed something. You must be able to establish in court how the informant got his or her information, so **ALWAYS** ask and then put that information in your report.

c. Corroboration

Anytime an informant is not reliable or the information is not based on personal knowledge, an officer must obtain corroboration to establish probable cause to arrest. Corroboration is information based on independent investigation which supports the informant's

story. Independent evidence which is "crime-related" is much stronger corroboration than evidence which simply confirms innocent details of the informant's story. Also, information provided by a named source or "citizen witness" typically requires less corroboration than information supplied by an anonymous or interested source.

Examples:

An anonymous caller told officers that individuals were stripping a red vehicle and loading parts into a nearby purple vehicle. At the scene, an officer observed a purple car with four occupants, as well as a nearby red car with its wheels and "T-tops" missing. The defendant exited the purple car and headed in the officer's direction. He was stopped by the officer, who then inspected the red car and found its parts were either missing or broken. The Colorado Supreme Court held that "the corroboration of the anonymous tip by the investigating officers coupled with the officers' testimony [about additional observations] provided probable cause to arrest." *People v. Contreras,* 780 P.2d 552 (Colo. 1989).

Police were informed by three different confidential informants that Diaz was trafficking cocaine at the Green Light Tavern. Two of the three informants did not disclose how they came by this information, and there was no indication why the police considered the information from any of the three informants to be reliable. The police went to the Green Light Tavern and saw Diaz sitting at the bar. They approached him, asked him to move behind the bar and discovered cocaine. Under these facts the Colorado Supreme Court held that the police lacked probable cause to arrest Diaz because the record failed to demonstrate the veracity or reliability of the informants and there was little attempt to corroborate their stories. One informant had, after all, indicated that Diaz also frequented the tavern even when he was not selling drugs. There was "no reason to believe, at this particular time, Diaz was intending to sell cocaine." *People v. Diaz,* 793 P.2d 1181 (Colo. 1990).

For other examples of what does and does not constitute sufficient corroboration of an informant's information, refer to the discussion of **anonymous tips** in the preceding section regarding reasonable suspicion.

B. Warrant Requirement

An officer should get an arrest warrant whenever circumstances permit. If an officer makes a warrantless arrest and cannot show that circumstances prevented getting a warrant, he or she runs the risk that all evidence obtained as a result of the arrest will be suppressed. Conversely, when an arrest warrant has been obtained, reviewing courts are typically more inclined to give the officer the "benefit of the doubt" and find probable cause, particularly in close or questionable cases. As the United States Supreme Court has stated, "law enforcement officers may find it wise to seek warrants when practicable to do so, and their judgments about probable cause may be more readily accepted when backed by a warrant issued by a magistrate." *United States v. Watson,* 423 U.S. 411 (1976).

1. Arrests in a Public Place

If a suspect is in public he or she may be arrested on probable cause without a warrant.

Examples:

A postal inspector had probable cause to believe Watson had stolen credit cards from the mail. The inspector's informant arranged a mid-day meeting with Watson at a restaurant, and on a pre-arranged signal the inspector arrived and arrested Watson without a warrant. The United States Supreme Court held that the arrest was legal, ruling that the Fourth Amendment does not require an officer to have a warrant in order to arrest a felony suspect in public. *United States v. Watson,* 423 U.S. 411 (1976).

A victim saw three burglars flee from his closed restaurant. He recognized Burns as a patron. Officers went with the victim to Burns' apartment, knocked on the door and identified themselves. Burns opened the door and the victim identified him as one of the burglars. The officers arrested Burns while he was "standing in the doorway of his apartment." The Colorado Supreme Court ruled the arrest without a warrant was lawful because Burns was arrested in his open doorway where he "was as exposed to the public view, speech, hearing, and touch as if [he] had been standing completely outside [his apartment] and where he, therefore, had no expectation of privacy within the scope of the Fourth Amendment." *People v. Burns,* 615 P.2d 686 (Colo. 1980).

2. Arrests in the Suspect's Home

An officer must have an arrest warrant to arrest a suspect in his home unless exigent circumstances exist. Furthermore, before an officer may enter a residence to execute such an arrest warrant, the officer must possess a reasonable basis to believe that the arrestee is currently in the residence, and a reasonable basis to believe that the arrestee lives in the residence. *People v. Aarness*, 150 P.3d 1271 (Colo. 2006).

Examples:

Payton robbed and murdered a gas station attendant. Two days later officers developed probable cause to arrest him. The next day officers went to Payton's home without a warrant to arrest him. After knocking on the door and announcing their presence, and receiving no response, the officers entered Payton's apartment, arrested him and collected evidence in plain view that connected Payton to the crimes. The United States Supreme Court ruled that the warrantless entry was illegal because, despite the existence of probable cause, there was no exigency that required immediate entry without a warrant. The evidence seized as a result of the entry was therefore inadmissible. *Payton v. New York,* 445 U.S. 573 (1980).

After receiving an anonymous tip that the defendant, a fugitive with outstanding arrest warrants, was currently in a particular apartment, the police went to the apartment and knocked on the door. After observing a man matching the description of the defendant sitting inside, the officers ordered him out of the apartment. The Colorado Supreme Court held that the police had reason to believe that the defendant was in the apartment because they had knocked on the door and observed the defendant sitting in a recliner. However, because the police had no knowledge about whether the defendant resided in the apartment, entry to execute the warrant for his arrest was deemed unlawful. *People v. Aarness*, 150 P.3d 1271 (Colo. 2006).

3. Arrests in a Third Party's Home

Due to the extremely high expectation of privacy accorded to a individual's home, an officer must have an arrest warrant and a search warrant to arrest a suspect in a third party's home unless exigent circumstances exist.

Examples:

Police suspected that Olson had committed a robbery and murder and went to the home of two women with whom they believed Olson was staying. An officer who telephoned the house heard a male voice say, "tell them I left." Officers entered the house with weapons drawn and arrested Olson without a warrant. The United States Supreme Court held that, as an overnight guest, Olson had a legitimate expectation of privacy in the woman's home. The warrantless entry and arrest were therefore impermissible. *Minnesota v. Olson,* 495 U.S. 91 (1990).

Officers had an arrest warrant for Ricky Lyons. When they learned Lyons was staying at Steagald's house they went there without a search warrant. After entering Steagald's home, the officers did not find Lyons but discovered 43 pounds of cocaine. The Supreme Court ruled that in order to invade an area where a third party has a reasonable expectation of privacy to arrest a suspect the officer must have a search warrant or consent or exigent circumstances. *Steagald v. United States,* 451 U.S. 254 (1981).

Compare with:

Harris was a suspect in a stabbing incident. Police officers, acting on a tip, went to the apartment complex where Harris was staying. When the police arrived the front door was open and Harris was sitting exposed to public view. The officers entered the apartment without a warrant and arrested him. The Colorado Court of Appeals held that Harris had no reasonable expectation of privacy in an apartment that was not leased to him, when the door was completely open and exposing him to public view. The warrantless entry and arrest was therefore permissible. *People v. Harris,* 762 P.2d 651 (Colo. 1988).

4. Exigencies

An officer may arrest a suspect without a warrant under exigent circumstances. In order to prove exigent circumstances, the officer must show that he did not get a warrant either because in the time it would have taken to get one the suspect might have fled or hurt someone or because the officer was in "fresh pursuit" of the suspect." The existence of exigent circumstances, however, does not negate the necessity of probable cause to search and/or arrest.

[**Note:** The circumstances under which an officer may enter a residence without a warrant based on probable cause and exigent circumstances is discussed in detail in Chapter 3, **SEARCH AND SEIZURE - PREMISES**. Those circumstances are therefore discussed only briefly and generally here.]

VI. SEARCHES INCIDENT TO ARREST

An officer may search the arrestee and areas around or accessible to the arrestee "incident to" a valid arrest.

A. Reason for the Law

The traditional reasons an officer may search incident to arrest are to (1) protect the officer from weapons that an arrestee might grab and (2) seize evidence which the suspect might try to destroy. Over time, the courts have "extended the rule beyond the reason for the rule." This means that the courts have permitted searches of areas even when there appears to be little chance that the arrestee could have grabbed a weapon or evidence.

Example:

Officers were let into Hufnagel's residence to arrest him on a warrant. They found Hufnagel lying on the couch and told him he was under arrest for selling cocaine. The officers handcuffed him with his hands behind his back. In the meantime, the sheriff searched the immediate area around Hufnagel for weapons. Concerned by a glance Hufnagel gave towards an end table, the sheriff opened the drawer in the table and found several baggies containing cocaine. The Colorado Supreme Court upheld the search here as incident to arrest, noting that handcuffing an arrestee does not completely eliminate his ability to reach for and grab weapons or other items. The court also noted that the search was contemporaneous with the arrest and was limited to the area immediately around the suspect. *People v. Hufnagel,* 745 P.2d 242 (Colo. 1987).

The United States Supreme Court has recently signaled an intent to retreat back to the original basis for the rule permitting these searches. *Arizona v. Gant*, 129 S. Ct. 1710 (2009). As will be discussed more fully beginning on page 116, the Court decided in *Gant* that a search of a vehicle incident to the arrest of a recent occupant is permissible only where the arrestee is unsecured and within reaching distance of the passenger compartment of the vehicle at the time of the search. Though this decision arose in the area of vehicle searches, there is no reason to believe a similar retraction will not be applied in the future to searches of homes, hotel rooms, and other locations.

B. The Contemporaneous Requirement

In general, the search incident to arrest should be conducted contemporaneously with the arrest. This means the search should be conducted at about the same time and place as the arrest.

Example:

Officers suspected that a footlocker transported by train was loaded with marijuana. When the footlocker was unloaded a drug-sniffing dog "alerted." When Chadwick claimed the footlocker, he was arrested. The footlocker was transported to a federal building and opened. The United States Supreme Court held that the search was not conducted in the same location and at the same time as the arrest. Therefore, it could not be justified as a search incident to arrest, and the evidence was suppressed. *United States v. Chadwick,* 433 U.S. 1 (1977).

Officers executed a search warrant for narcotics and found Jones, whom they had probable cause to arrest. Jones was dressed only in his underwear. After his arrest, Jones asked to put on a pair of pants. The officer complied, but first searched the pockets and found a wallet containing a marked $100 bill that had been used to purchase drugs from Jones by a police informant. The Colorado Supreme Court held that the seizure of the money was valid as a search incident to a lawful arrest. The court noted that police had the right to search the immediate area surrounding the arrestee either contemporarily with or immediately following an arrest. Because the pants and wallet were brought within the immediate area around the arrestee by virtue of his request to have them, the search was permissible. *People v. Jones,* 767 P.2d 236 (Colo. 1989).

An officer noticed an expensive car with the window rolled down at a motel in a high crime area. A computer check indicated that the car was stolen. The motel manager told the officer which room the driver of the car was staying in. When the defendant answered the door, the officer patted him down for weapons. The defendant invited the officer into the room and the officer noticed a gun on the nightstand. The police immediately handcuffed the defendant. The officer then noticed a switchblade knife on the top of a dresser. The officer conducted a search of the room to look for other people or weapons. During the search the officer found a plastic bag under the bed which contained a knife, stolen credit cards and other stolen property. The court of appeals held that as long as the search is made immediately following the defendant's arrest and is confined to the immediate area surrounding the arrested person, the search is constitutional, even if that person is handcuffed or physically unable to reach the area searched. The search

of the plastic bag and seizure of its contents was valid as a search incident to arrest, as the room in which the search was conducted was no larger than 12 feet by 15 feet, the defendant was within lunging distance of the items under the bed, and the officer determined that some of the items underneath the bed were stolen. *People v. Clouse,* 849 P.2d 228 (Colo. App. 1992).

The contemporaneous requirement was clarified in *People v. Malloy,* 178 P.3d 1283 (Colo. App. 2008). The court recognized that a search incident to arrest must be conducted contemporaneously with the arrest. However, it also noted that "time alone is never dispositive of the contemporaneity inquiry." Other factors to consider include whether the search took place as soon as it became practical, whether the arrestee remained at the scene of the arrest, and whether there were any intervening acts occurring before the search that were unrelated to the search. The ultimate question is whether the arrest and search were so separated in time or by intervening events that the latter cannot be said to have been incident to the former. The court found that the search of the defendant's motorcycle 30 minutes after his arrest did not violate the contemporaneous requirement because following the arrest, the arresting officer had to handcuff defendant and place him in a patrol car, the police were concerned with the presence of the two other men at the scene, and the defendant was still at the scene when the motorcycle was searched.

Note, that in light of the recent *Gant* decision, contemporaneous likely means at the same time. See pages 116- 117.

C. Scope of the Search: Custodial v. Non-Custodial Arrest

Arrests fall into two categories: custodial and non-custodial. A custodial arrest refers to a police officer's seizure of a person for the purpose of taking the person to the station house for booking procedures and the filing of criminal charges. A custodial arrest is prohibited if the applicable statute mandates issuance of a notice or summons and provides for release upon the signing of a promise to appear. In such circumstances, the arrest is non-custodial, which is made on probable cause but involves only a temporary detention of the suspect pending issuance of the notice or summons.

A search incident to a custodial arrest is quite broad and need not be limited to a mere pat-down of the arrestee's outer clothing but may extend to pockets and other containers, open or closed, found on the person of the arrestee or within his or her immediate reach. A search incident to a non-custodial arrest is limited to (1) a pat-down for weapons and (2) a search for instrumentalities or evidence of the specific crime for which the officer had probable cause to make the arrest.

Examples – Custodial Arrest:

Officers had probable cause to arrest Rios based upon a report that he was one of two men who had left a taxi without paying the fare. In a search incident to the arrest the police discovered drugs in a cookie tin Rios was carrying. The court of appeals rejected Rios's argument that the officers exceeded the scope of a permissible search because the offense the police were investigating was so minor the detention could be characterized as a non-custodial arrest: "Although the amount of the cab fare may have been small, defendant was nevertheless subject to prosecution for theft . . . ," and the arrest for which probable cause existed was therefore a custodial arrest. *People v. Rios,* 43 P.3d 726 (Colo. App. 2001).

Triantos was arrested for possession of drug paraphernalia, a class 2 petty offense. Following the arrest, officers conducted a full search of his person incident to the arrest and discovered a bag of methamphetamine in his pocket. A statute provided that persons arrested for class 2 petty offenses may either be given a penalty assessment notice and release or "taken before a judge of the county court" if the officer believed he or she would not comply with the terms of the penalty assessment notice. The Colorado Supreme Court held that the statute provided the officer with the choice of conducting either a custodial or a non-custodial arrest, and the officer's decision to conduct a custodial arrest in these circumstances empowered him to conduct a full search incident to that arrest. *People v. Triantos,* 55 P.3d 131 (Colo. 2002).

An officer stopped Robinson on a traffic offense and learned that Robinson did not have a license. Later, the officer stopped Robinson again and when Robinson did not have a license, the officer arrested him. Incident to the arrest, the officer searched a cigarette package Robinson had in his shirt pocket and discovered heroin. The United States Supreme Court ruled that an officer may conduct a full search the person of a traffic arrestee incident to a custodial arrest. The heroin was therefore found to be admissible. *United States v. Robinson,* 414 U.S. 291 (1973).

Meredith was driving with faulty brake lights. Officers stopped him and asked him for a license. Meredith produced no license, and when a check showed there was no license issued for the name and birth date he had given, the officers arrested him for driving without a license. The officers searched the car incident to arrest and found a gun and ammunition. The Colorado Supreme Court ruled the arrest was a lawful custodial arrest, so the search incident to the arrest was likewise lawful. *People v. Meredith,* 763 P.2d 562 (Colo. 1988).

An officer arrested and handcuffed Bischofberger on the basis of a warrant issued for failure to appear on traffic charges. The officer discovered a light blue cylindrical container in Bischofberger's shirt pocket. Another officer opened the container and found cocaine. The Colorado Supreme Court held that where, as here, a lawful custodial arrest is made, even in the context of a traffic infraction, officers need not limit their search to a pat-down of the arrestee's outer clothing but may conduct a thorough search incident to the arrest. *People v. Bischofberger,* 724 P.2d 660 (Colo. 1986).

Examples – Non-Custodial Arrest:

Knowles was stopped by a police officer for speeding and was issued a citation rather than arrested. The officer then conducted a full search of Knowles's car, incident to the citation, and found marijuana and other paraphernalia. The United States Supreme Court held that where a police officer stops an individual for a traffic violation and issues only a traffic citation, the officer may not conduct a full search of the individual's person or vehicle. Once the citation has been issued, "all the evidence necessary to prosecute that offense had been obtained. No further evidence of excessive speed was going to be found either on the person of the offender or in the passenger compartment of the car." *Knowles v. United States,* 525 U.S. 113 (1999).

Bland was arrested for possession of less than one ounce of marijuana. Pursuant to the statute, the officer was required to issue Bland a summons to appear in court, but could not subject him to a full custodial arrest. Incident to the arrest, the officer conducted a full search of Bland's person and discovered a bag of cocaine taped to his leg. The Colorado Supreme Court concluded that in the context of a non-custodial arrest, officers were entitled to make a limited search including a pat-down search for weapons and a search for evidence of the specific crime for which there was probable cause to make the arrest, which in this case, included the right to search Bland's clothing. *People v. Bland,* 884 P.2d 312 (Colo. 1994).

A patrol officer saw Blackmon drop an object from his coat pocket, which was found to be a broken crack pipe. He was arrested for possession of drug paraphernalia, an offense that did not permit a full custodial arrest. Incident to the arrest the officer then conducted a search Blackmon's pockets and discovered illegal drugs. The court of appeals held that it was permissible to conduct a pat-down for weapons and search for further evidence of drug paraphernalia because such evidence would be relevant to the offense for which Blackmon was being arrested. *People v. Blackmon,* 20 P.3d 1215 (Colo. 2000).

D. The Areas Which May be Searched

An officer may search the person of the arrestee and any area around him or her in which the arrestee could grab a weapon or evidence at the time and place of the arrest. The courts have characterized these places which may be searched as areas within "the immediate control" or "lunging distance" of the arrestee.

1. Premises

If a suspect has been arrested in a residence or on someone's premises, officers may search areas incident to the arrest that are within the immediate area surrounding the area where the person was arrested.

Example:

Following the defendant's arrest, the police searched a motel nightstand that was approximately six to seven feet away. The Colorado Supreme Court, after noting that the search occurred immediately following the defendant's arrest, and was confined to the area within the defendant's reach, held that the search was a valid search incident to arrest. *People v. Gothard*, 185 P.3d 180 (Colo. 2008).

2. Vehicles

An officer may search a vehicle incident to a lawful arrest of a recent occupant only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search, or when it is reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle. *Arizona v. Gant*, 129 S.Ct. 1710 (2009). Note that this is a drastic change from previous practice, based on many court decisions. Based on those earlier decisions, police officers have long searched a vehicle, including the passenger compartment, incident to the arrest of a recent occupant, even when the arrestee had been out of the vehicle for as much as 30 minutes, and even when there was no reason to believe that evidence of the crime of arrest may be found in the vehicle.

Example:

Gant was arrested for driving on a suspended license, handcuffed, and locked in a patrol car. Officers then searched his car and found cocaine in a jacket pocket. The United States Supreme Court ruled that the search was unreasonable because police could not reasonably have believed either that Gant could have accessed

his car at the time of the search or that evidence of the offense for which he was arrested might have been found. *Arizona v. Gant*, 129 S.Ct. 1710 (2009).

In deciding *Gant*, the Supreme Court acknowledged that a vehicle search incident to arrest will rarely be justified on officer safety grounds, stating: "Because officers have many means of ensuring the safe arrest of vehicle occupants, it will be the rare case in which an officer is unable to fully effectuate an arrest so that a real possibility of access to the arrestee's vehicle remains."

3. Closed Containers

An officer may conduct a complete search incident to a valid arrest, which includes inside any closed containers that are in the immediate vicinity of the arrest.

Examples:

Tinfoil packet in pocket. *People v. Casias*, 563 P.2d 926 (Colo. 1977).

Cylindrical container in pocket. *People v. Bischofberger,* 724 P.2d 660 (Colo. 1986).

Checkbook inside purse of car. *People v. Pate,* 705 P.2d 519 (Colo. 1985).

4. Suggestions for Officers

The following tips should help you when searching incident to a valid custodial arrest.

1. You are legally empowered to search any areas (including closed containers) which the arrestee could "lunge" to at the moment of the arrest.

2. Always search closed containers on the arrestee's body at the time of the arrest, preferably before you handcuff the arrestee.

3. Get as much information as you can (including consent to search if possible) before arresting. The more information you have supporting probable cause, the more "solid" the arrest. Anything you learn after arresting is useless in trying to prove you had probable cause. And once you do a nonconsensual search for

evidence, the only justification available is search incident to arrest.

VII. BODY SEARCHES

An officer must obtain a warrant or consent to penetrate the body surface to look for evidence unless exigent circumstances exist. When courts approve this type of seizure without a warrant, the legal theories are (1) "clear indication" plus exigency or (2) search incident to arrest (very minor intrusion).

A. Minor Bodily Intrusions

A warrant is not needed to seize evidence which can be seized by a minor bodily intrusion if:

a. there is probable cause to arrest; and

b. there is "clear indication" (more than probable cause) that the evidence will be found; and

c. exigent circumstances exist which make it impractical to get a warrant; and

d. the procedure to get the evidence is reasonable and is reasonably conducted.

Examples: Evidence Sufficient to Conduct Minor Body Intrusions

Officers witnessed Thompson, a suspected drug dealer, swallow an object they believed to be a drug-filled balloon. Shortly thereafter, they requested issuance of a search warrant requiring the defendant to submit to x-rays of his digestive system. The court of appeals upheld the issuance of the warrant, holding that there was probable cause to support Thompson's arrest, the facts set forth in the affidavit gave a "clear indication" that Thompson had swallowed a foreign object which, most likely, was a controlled substance, and an x-ray is only minimally more intrusive than a typical body search. *People v. Thompson,* 820 P.2d 1160 (Colo. App. 1991).

Officers arrived at the scene of a single-car accident and found Shepherd seriously injured and a passenger dead. They noticed that Shepherd's breath smelled of alcohol, that there were skid marks across three lanes of the highway, and empty beer cans were at the scene. Shepherd was transported to the hospital for treatment without being questioned or administered roadside sobriety tests. Further sobriety tests were not administered at the hospital because Sheperd was receiving medical

treatment and was to be transported by airplane to another hospital. Instead, officers collected two blood samples without Shepherd's consent or a warrant. The Colorado Supreme Court held that the blood samples were lawfully drawn from Shepherd because officers had probable cause to arrest him, that the blood sample would provide evidence of intoxication, that exigent circumstances made it impractical to obtain a search warrant, and that the blood test was reasonable. *People v. Shepherd,* 906 P.2d 607 (Colo. 1995).

Milhollin was taken to a hospital after being involved in a motorcycle collision with a car. An investigating officer, who arrived at the hospital two hours later, noticed Milhollin's bloodshot eyes and an odor of alcohol on his breath. The officer had information, obtained from witnesses at the scene, that Milhollin had been driving recklessly and had caused the accident. While not arresting Milhollin, the officer advised him that he was under investigation for driving under the influence of alcohol and offered him a choice between a blood or breath test. Milhollin chose a blood test. The Colorado Supreme Court held that the officer did not have to arrest Milhollin before obtaining a blood sample. The court reasoned that the officer had probable cause to arrest, the facts provided a clear indication that a blood sample would provide evidence of the level of Milhollin's intoxication, time was of the essence to obtain an accurate blood-alcohol reading, and the blood test was conducted in a reasonable manner in a hospital. *People v. Milhollin,* 751 P.2d 43 (Colo. 1988).

Duemig had an accident while driving his jeep and killed a passenger, his daughter. Duemig was taken to the hospital, and when he tried to leave he was restrained by officers in order to draw blood. The officer ordered a blood sample because it was believed that Duemig had been drinking and because of the seriousness of the accident. The court later ruled that there was a "clear indication that relevant evidence would be disclosed by the blood test." Therefore, the evidence was admissible. *People v. Duemig,* 620 P.2d 240 (Colo. 1980).

Examples: Evidence Not Sufficient to Conduct Minor Body Intrusion

Williams shot and killed her boyfriend, and an officer ordered that blood and urine tests be conducted because she had been seen drinking before the shooting. The court later ruled that there was no "clear indication of intoxication" and, therefore, the results of the tests were suppressed. *People v. Williams,* 557 P.2d 399 (Colo. 1976).

Based on the fact that Roybal was involved in an automobile accident and he smelled of alcohol, an officer ordered that a blood alcohol test be

conducted. The Colorado Supreme Court held that probable cause for arresting Roybal was lacking, and the results from the tests must therefore be suppressed. *People v. Roybal,* 665 P.2d 410 (Colo. 1982). The defendant was placed under arrest for suspicion of DUI. The defendant was provided with the option of taking either a breath or blood test; the defendant chose a blood test. When a blood test could not be performed because a person qualified to administer the test could not reach the defendant's location, the arresting officer told the defendant that a blood test was unavailable and offered a breath test instead. The defendant refused a breath test, but the officer told him that he could lose his license if he did not submit to a breath test. The defendant then submitted to the breath test. The Colorado Supreme Court held that the defendant's consent to the breath test was invalid because it was based on the officer's erroneous and coercive misstatement of the express consent law. *Turbyne v. People*, 151 P.3d 563 (Colo. 2007).

Note: While a parent or other responsible adult must be present for consent to be given for the taking of samples from a minor, the adult need not be present when blood, hair, or saliva samples are actually drawn. *People v. Lehmkuhl,* 117 P.3d 98 (Colo. App. 2004).

B. Major Body Intrusions

An officer must get a warrant or consent to conduct a major bodily intrusion unless emergency circumstances exist. A major bodily intrusion is deep invasion of a suspect's body such as a cavity or surgical search.

1. Cavity Searches

An officer should not search a suspect's cavities (e.g., stomach, vagina, anus) unless the officer has obtained a warrant or consent or emergency circumstances exist. If the suspect will not consent and a warrant must be obtained, an officer may detain or control the suspect until the warrant can be executed.

Example:

Officers saw Rochin swallow narcotics as they approached him. The officer took Rochin to the hospital where a doctor made him vomit up the narcotics. The United States Supreme Court ruled that the procedure used to extract the evidence "shocks the conscience," and found that the evidence must be suppressed. *Rochin v. California,* 342 U.S. 165 (1952).

Thompson was observed swallowing what officers suspected to be drug-filled balloons. After he submitted to x-rays of his digestive system, officers requested a search warrant requiring him to take a laxative to expedite a bowel movement. The court of appeals invalidated the warrant because the affidavit failed to demonstrate a "clear indication" that drugs were present in Thompson's body, a requirement for intrusive body searches. The affidavit also failed to allege that recently completed x-rays had confirmed the presence of drugs in his digestive system. Furthermore, it did not describe the laxative to be administered nor any possible side effects that might result, and it failed to state whether an investigation of Thompson's medical history had been conducted to assess any potential risks. *People v. Thompson,* 820 P.2d 1160 (Colo. App. 1991).

2. Surgical Searches

If surgery must be performed to obtain crime-related evidence, an officer must obtain either the suspect's consent or a warrant. A warrant will rarely be issued if the suspect does not consent.

Example:

Lee attempted an armed robbery but was shot in the left chest area by the victim. The state sought a court order to have the bullet removed. The bullet was lodged approximately one inch below the skin and surgery would require general anesthesia. The United States Supreme Court reasoned that the operation would intrude substantially on Lee's protected interest, the medical risks were uncertain and forced application of general anesthesia would be required Furthermore, the state's need for evidence was not compelling. Therefore, the court held that the search would be unreasonable. *Winston v. Lee,* 470 U.S. 753 (1985).

3. Medical Emergency Exception

Courts recognize that it is reasonable for public officials to respond to a medical emergency, even over the injured party's objection. Consequently, evidence revealed by treatment provided in the course of that emergency is not within the scope of the constitutional prohibition against warrantless searches.

Example:

Officers responded to the scene of a reported shooting and found Loggins lying on a porch with a serious gunshot wound. He was

transported to the hospital, and in the course of standard procedure for treating trauma victims Loggins's clothes were removed by emergency room personnel. In the course of removing the clothes, an attending doctor saw a small piece of plastic sticking out from between Loggins's buttocks. The doctor removed the plastic, discovered that it contained cocaine, and delivered the substance to police. The Colorado Court of Appeals first held that the substance was not discovered by a governmental official, and therefore there was no violation of Loggins's constitutional rights. However, the court stated that even if the discovery of the cocaine was the result of state action, " Loggins's rights were not violated because the cocaine was discovered during treatment in the course of a medical emergency and was justified by exigent circumstances. *People v. Loggins,* 981 P.2d 630 (Colo. App. 1998).

C. Suggested Techniques

1. Unless there is an emergency, an officer should contact a prosecutor before entering a suspect's body to seize evidence.

2. If evidence is going to be removed during a medical procedure, simply ask the doctor to save it and give it to you after the operation. But DO NOT ask the doctor to remove it.

VIII. PLAIN VIEW

The "plain view" theory is a well-established exception to the requirement that a warrant must first obtained before a search is conducted, and permits an officer to seize crime-related evidence that is plainly visible in an area where the officer is lawfully present. The plain view theory has also been extended to include plain smell, hearing, and feel. The plain view doctrine has only limited application to the search and seizure of persons, and will only be discussed generally here. For a more a thorough discussion of plain view, refer to Chapter 2, **SEARCH AND SEIZURE - PREMISES**.

A. Plain View

An officer may seize crime-related evidence found on a person if (1) the initial intrusion was legitimate (i.e. the suspect was legitimately stopped or arrested), (2) the police had a reasonable belief that the evidence seized was incriminating, and (3) the police had a lawful right of access to the object (e.g., discovered during a legal "frisk" or a legal search incident to arrest). *People v. Kluhsman,* 980 P.2d 529 (Colo. 1999). There is no requirement that the discovery of the item in plain view be "inadvertent."

Examples:

Officers responded to a residence on a report of a domestic dispute. The officers entered the residence and located Mascarenas in the basement. Although he appeared to be asleep, there was an open, cold beer bottle near him which led the officers to believe he had just recently come downstairs. Based on their experience the officers knew that domestic violence situations were particularly dangerous, so they conducted a pat-down of Mascarenas's outer clothing. Feeling a hard object in Mascarenas's sock, the officers began to pull it out and two bindles fell out of the sock. The officers opened the bindles and discovered cocaine. The court of appeals held that the officers were lawfully on the premises to investigate the domestic disturbance report and were justified in conducting the pat-down search for potential weapons. The bindles that fell out during the frisk were lawfully seized because they were discovered in plain view during the lawful frisk and were such as would cause an officer of reasonable caution to believe they contained illegal drugs. *People v. Mascarenas,* 972 P.2d 717 (Colo. App. 1998).

Note: In finding that the bindles seized in this case contained evidence of a crime, the court applied the "single purpose container rule," which allows a warrantless search of unique, single purpose containers that are used almost exclusively to carry illicit drugs and, thus, by their very shape and design provide the required nexus to criminal activity.

The defendant was taken into civil protective custody. At the jail, another officer conducted an inventory search of the defendant's belongings, and found a small, clear plastic bag containing a white crystalline substance. He opened the bag, conducted a field test on the contents, and determined that the substance was methamphetamine. The Colorado Court of Appeals held that seizure of the baggie was authorized because it was "immediately apparent" to the officer that the bag contained a controlled substance. And, the officer's training and experience and his view of the bag's contents were sufficient to establish probable cause to open the bag and field test the contents. *People v. Hammas*, 141 P.3d 966 (Colo. App. 2006).

The detective investigating a stolen vehicle contacted the defendant and asked permission to search her person. She said yes, and then pulled items - including a key in a black key holder - out of her pockets. At that time, the police were aware that the stolen pickup was a Ford, they had found the truck where the informant told them it was parked, they observed that it had license plates that did not belong on it, and they knew that the defendant had given them a false identity. Although the defendant identified the key as a "car key" when an officer asked what it

was, one of the officers testified that he had owned Ford vehicles before and recognized the key as a Ford truck key. Based on that belief, he asked another officer to try the key in the pickup. The court held that the police had probable cause to associate the key in the defendant's pocket with criminal activity; thus, it was properly seized. *People v. Manier*, 197 P.3d 254 (Colo. App. 2008).

Compare with:

An officer saw a foil package in plain view in Ware's shirt pocket. The officer seized the foil, opened it, and discovered that it contained hashish. The court ruled that the evidence was not apparently crime-related even though the officer testified that he knew drugs were often packaged in foil. Therefore, the evidence was suppressed. *People v. Ware*, 484 P.2d 103 (Colo. 1971).

Officers suspected Madson of murder and, while speaking to him, they observed what looked like blood on his shoe. The officers seized the shoe and retained it for analysis. The Colorado Supreme Court held that "once the police saw the blood, there were not required to close their eyes . . . nor were they required to return the evidence." Therefore, the evidence was admissible. *People v. Madson,* 586 P.2d 1338 (Colo. 1978).

B. Plain Smell

Normally, when an officer smells crime-related evidence on a suspect the smell will give the officer probable cause to search the person for the evidence. If the smell could be coming from any one of several persons present the officer should ask questions before searching.

Example:

An officer saw a group of persons and upon approaching them smelled marijuana smoke. The officer asked one of the persons, Valenzuela, what he had in his pocket. Valenzuela responded, "nothing." Because there was a bulge in Valenzuela's pocket the officer searched him and discovered marijuana. The Arizona court ruled that the odor of marijuana and the false answer gave the officer probable cause to search, and the evidence obtained in the search was admissible. *State v. Valenzuela,* 589 P.2d 1306 (Ariz. 1979).

C. Plain Feel

An officer who feels crime-related evidence on a suspect's person may seize the evidence. The issue almost always arises during a frisk for weapons. Of

course, the officer must have a legal justification for frisking in the first place (i.e., reasonable suspicion that the suspect is armed or dangerous). The big problem is that the officer must have probable cause to believe the evidence is crime-related before the search and seizure. If an officer feels something hard during the frisk that could possibly be a weapon, the courts permit the officer to find out what the object is. However, an officer who feels a balloon or plastic bag does not necessarily have probable cause to believe the evidence is crime-related. In such circumstances, the officer should get more information about the evidence by asking questions.

Example:

An officer stopped Dickerson, who came out of a known crack house acting suspiciously. A pat-down search revealed no weapons, but the officer noticed a lump in the pocket of Dickerson's nylon jacket. The officer determined that it was a lump of crack cocaine only after squeezing, sliding and otherwise manipulating the contents of the pocket. The officer then retrieved the cocaine and arrested Dickerson. The United States Supreme Court held that if a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons. If the object is contraband, its warrantless seizure is justified by the same practical considerations that inhere in the plain view context. However, here the officer's continued exploration of Dickerson's pocket after having concluded that it contained no weapons was unrelated to the sole justification of a protective search (i.e. the safety of the officer and others nearby) so it exceeded the bounds of a search for weapons. *Minnesota v. Dickerson,* 508 U.S. 366 (1993).

In *People v. Rushdoony*, 97 P.3d 338 (Colo. App. 2004), the officer was conducting a pat down search of the suspect when he felt an item in the defendant's pocket "consistent from previous dealings that felt like a [drug] pipe." The Colorado Court of Appeals held that the seizure of the pipe was lawful under the "plain feel" doctrine, as its incriminating nature was immediately apparent.

D. Plain Hearing

An officer may listen to conversations as long as the officer is lawfully present in the area where the conversation takes place.

Example:

Officers were lawfully present in a motel room adjacent to the suspects' room and overheard their conversations. The officers did not need

listening enhancing devices to hear the conversations. The court therefore held that the officers were not conducting a warrantless search. *People v. Hart,* 787 P.2d 186 (Colo. App. 1989).

Compare with:

An officer went into Lorenzana's front yard and up to a window, and from that location listened to a conversation relating to a drug deal. The officer also saw incriminating conduct while peering through the window. The California court ruled that the officer was not lawfully present when he listened to the conversation and made his observations. Therefore, the conversation and other evidence obtained were not admissible. *Lorenzana v. Superior Court,* 511 P.2d 33 (Cal. App. 1973).

E. Suggested Techniques

1. Anytime you see, smell or feel evidence on or around a suspect, ask the suspect about it before seizing it.

2. If you are lawfully in an area where you can hear a conversation without using electronic means, the conversation will be admissible.

IX. CONSENT SEARCHES AND/OR SEIZURE

Unfortunately, officers rarely seek consent to seize or search persons. A suspect can waive his search and seizure rights. Officers should always seek consent to search or seize if all possible. The point is that the officer cannot lose by seeking a suspect's consent, and he or she may be able to "save" an otherwise illegal search or seizure.

A. Seizures

Any time an officer detains or moves a suspect the officer should seek that person's consent. Often, if there is a serious question as to whether reasonable suspicion exists to detain or probable cause exists to move a suspect, the court will uphold the seizure if the officers obtained valid consent.

1. Detentions

The courts have ruled that when a person consents to a detention the detention may be reasonable even when there is a serious question as to whether reasonable suspicion exists or the suspect is questioned for an unreasonably long period of time.

Example:

Officers investigating a sexual assault contacted Mickens and told him that he was not under arrest but that they would appreciate his coming down to headquarters and answering a few questions. Mickens agreed, and at the police station he provided police with a statement. The officers sought to verify the statements through Mickens's mother and, with his consent, locked Mickens in a holding cell while the verification took place. The court recognized that the nature and length of the detention exceeded what is allowed for reasonable suspicion of detainees. However, the court ruled that Mickens's express consent, in the absence of threats or coercion, effectively waived any challenge he might otherwise have had to the duration or the scope of the detention. *People v. Mickens,* 734 P.2d 646 (Colo. App. 1986).

2. Movement

Often when an officer orders a detainee to move around, especially to come to the police station, the detainee has been illegally arrested unless probable cause exists. If, however, the detainee consents to the movement the courts are much more likely to rule the seizure reasonable. *People v. Pancoast,* 659 P.2d 1348 (Colo. 1983).

B. Searches

The benefits of obtaining consent to search the suspect's person can not be overemphasized. Some of the situations are very obvious (e.g., the suspect's stomach) while others are less obvious (e.g., frisk).

1. Frisk

A frisk is the most common and least intrusive search of a person. However, an officer must at least have reasonable cause to believe the detainee is armed in order to conduct such a protective pat down. If an officer is in doubt as to whether he has enough evidence to pat the suspect down he or she might simply ask the detainee whether "you mind if I pat you down to make sure you don't have any weapons." Even if reasonable suspicion is not found by the court in a later proceeding, the suspect's voluntary consent will likely render evidence recovered in the frisk to be admissible.

2. Searches Incident to Arrest

A search incident to arrest is valid only if the arrest is lawful. If the arrest is unlawful all evidence seized as a result of the search will be

suppressed. In order to protect themselves, officers might seek consent to search the suspect and areas around the suspect before the arrest, if possible.

Note: Officers have a tendency to order rather than ask for consent. Be careful what words you use when attempting to obtain a suspect's consent.

3. Body Searches

Any time officers want to search the clothing, body, or body cavities of a suspect they should always seek consent in addition to any other theories for the search.

C. Legality of Consent

The legality of consent depends primarily upon whether or not the consent was voluntarily given. Occasionally the legality of the consent depends upon the authority of the person to consent. The issue of consent is discussed extensively in other chapters, especially Chapter 6, **SEARCH AND SEIZURE – MISCELLANEOUS.** It is discussed only briefly below.

1. Voluntariness

It is very important that an officer who obtains consent be able to prove the consent was voluntary. Consent is voluntary if it is the product of an essentially free and unconstrained choice by its maker and not the result of circumstances which overbear the consenting party's will and critically impair his or her capacity for self-determination.

a. Factors Bearing on Whether Consent is Voluntary

(1) signed written consent form
(2) *Miranda* warnings
(3) person giving consent is intelligent or sophisticated
(4) person giving consent admits guilt before consent given
(5) person giving consent aids in the search.

b. Factors Tending to Show Involuntariness

(1) threats
(2) promises or inducements
(3) deception
(4) custody
(5) person giving consent hinders the search

(6) person giving consent is very old, very young, unsophisticated, etc.

2. Scope

An officer may search or seize only to the extent that the suspect gives specific consent, and the scope of the search must be confined only those areas for which permission to search was allowed. If the search exceeds the scope of the consent, evidence found thereto will be suppressed.

Example:

Lingo, who was suspected of attempting to smuggle drugs into a prison, was detained and taken from the prison grounds to the sheriff's office, where she was strip-searched. The search was conducted pursuant to a statute providing that visitors must consent to searches while inside prison facilities. Although she consented, the search exceeded the scope of her consent because it took place off the prison grounds. *People v. Lingo,* 806 P.2d 949 (Colo. 1991).

3. Withdrawal

If during the course of the detention or search the detainee withdraws his or her consent, the officer should stop the search unless there is some additional theory to justify the detention or search.

D. Suggested Techniques

Always seek consent to search or detain in addition to other grounds, and seek that consent politely.

Chapter 3

SEARCH AND SEIZURE - PREMISES

CONSTITUTION OF THE UNITED STATES 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 describing the place to be searched and the persons or things to be seized."

I. INTRODUCTION

The Fourth Amendment specifically protects persons against unreasonable searches and seizures relating to "houses." The courts have expanded this protection to include areas around houses where a person has a "reasonable expectation of privacy." This area is usually referred to as "premises." *See People v. Muniz,* 194, 597 P.2d 580 (1979)("the word 'premises' does not have a particular meaning beyond that dictated by the circumstances in which it is used. 'Premises' can refer to a single room, a large tract of farmland or an apartment building"). This chapter discusses the areas which are and are not protected and what an officer must do to search areas which are protected.

Note: This chapter discusses all of the legal theories which justify the entry of premises. It is highly advisable, however, to obtain a warrant whenever possible prior to entering upon and searching someone's premises.

II. REASONABLE EXPECTATION OF PRIVACY

The Constitution protects individuals from unreasonable governmental intrusions into areas in which there is a "reasonable expectation of privacy." According to the courts, a reasonable person has different privacy expectations depending upon the type of premises the officer wishes to search, and the level of "cause" required by the government to intrude into such areas is dictated by the privacy expectations. For example, if a person has a high expectation of privacy in the area (e.g., a house), the officer must obtain a warrant, consent, or encounter some form of emergency or exigency in order to intrude. If the person has little or no reasonable expectation of privacy in the area (e.g., a public parking lot) the officer may require little or no cause to intrude.

Reasonable Expectation of Privacy Defined

Whether an individual's expectation of privacy is "reasonable" depends on two factors:

a. Has the individual done something to demonstrate a **subjective** expectation that the place to be searched is intended to be private; and

b. Is the individual's subjective expectation **objectively** reasonable (i.e., is society willing to recognize that expectation as being reasonable).

Fourth Amendment Protects Against Unreasonable Intrusions

The Fourth Amendment protects individuals against unreasonable "searches and seizures." A "search" occurs when an expectation of privacy that society is prepared to consider reasonable is infringed by the government. If there is no governmental intrusion upon an individual's right of privacy, then there can be no constitutional violation.

Example:

An officer responded to a private residence on a call of excessive noise coming from that residence. When the officer arrived he heard loud noises emanating from the residence so he knocked loudly in order to get the attention of the occupants. As a result of the knocking the door swung open which allowed him to see a marijuana "bong" and smell burning marijuana. The officer then entered the residence and arrested Holmes for possession of drug paraphernalia. A search incident to the arrest revealed cocaine in Holmes's pants. The Colorado Supreme Court held that the act of knocking on the door of a residence for the purpose of investigating a crime is reasonable police conduct and does not infringe upon the occupant's right of privacy. The court recognized that any member of the public could have knocked loudly and thereby caused the door to open. Thus, even if Holmes had a subjective expectation that no one would knock hard enough to unlatch his door, that expectation was not objectively reasonable. *People v. Holmes,* 981 P.2d 168 (Colo. 1999).

Acting upon information from an informant that the driver of a particular vehicle was selling drugs, an officer spotted the vehicle and followed it. The driver, Baker, parked the car in front of a house and went inside. The officer then approached the house, knocked on the door and sought Baker's consent to search. The Colorado Supreme Court concluded that an inquiry regarding the possibility of a narcotics offense is sufficient justification for the officer's entry upon Baker's property, and knocking on the door is reasonable police conduct which does not infringe upon a person's right of privacy where that person retains the right to refuse to open the door or refuse to talk to the

officer. *People v. Baker,* 813 P.2d 331 (Colo. 1991). *See also People v. Milton,* 826 P.2d 1282 (Colo. 1992)(four uniformed officers knocking at the door at 6:40 a.m. does not rise to the effect of intimidating or threatening or use of force against the person answering the door).

However, if the police intrude into premises upon which an individual has a reasonable expectation of privacy, the intrusion must be justified by a warrant, or probable cause plus some form of exigent circumstances, or lawful consent.

A. The House

A person's house is specifically protected by the Fourth Amendment against entry by an officer. In fact, unreasonable physical entry into the home is the "chief evil" against which the Fourth Amendment is directed. Since an individual's home is entitled the highest protection from governmental intrusion, an officer may not enter a home without a warrant unless lawful consent is obtained, there is probable cause and exigent circumstances, or the officer is responding to true emergency situation.

Examples:

Drug enforcement officers conducted a "knock and talk" at O'Hearn's residence late in the evening. When O'Hearn opened the door, the officers walked into her living room without obtaining permission to enter. O'Hearn was asked if she used narcotics and if she had any narcotics on the premises. She answered that she occasionally used marijuana and had a small quantity in the house, and thereafter refused on four occasions to allow officers to conduct a search of the house. An officer left and returned two hours later with a search warrant. A search conducted pursuant to the warrant revealed illegal drugs. The Colorado Supreme Court upheld the trial court's determination that the officers' entry into the residence was nonconsensual and all evidence discovered after the unlawful entry should be suppressed. *People v. O'Hearn,* 931 P.2d 1168 (Colo. 1997).

Taube's home was "seized" as a public nuisance, under the authority of a temporary restraining order (TRO) issued by the court upon information that Taube was conducting drug transactions from the residence. Although the court issued the TRO, no separate search warrant was issued and admittedly there was not probable cause existing at the time of the seizure that could support a warrant. Based upon the "seizure" of the house the police conducted a thorough search and found cocaine and money inside a floor safe. The Colorado Supreme Court held that the TRO, when construed in conjunction with the nuisance statute, did not authorize the entry and search of the home. The court also rejected the assertion that the seizure was based upon an inventory

search (the search terminated immediately upon discovery of the drugs and no inventory of the contents was ever compiled), and the plain view exception was inapplicable because the officers did not lawfully enter the premises. *People v. Taube,* 864 P.2d 123 (Colo. 1994).

Note: The protection of a person's "home" does not simply include "houses," but extends to all forms of premises used by individuals for habitation, such as **hotel and motel rooms**, *People v. Lewis,* 975 P.2d 160 (Colo. 1999); **apartments**, *People v. Hastings,* 983 P.2d 78 (Colo. App. 1998); even **tents**, *People v. Schafer,* 946 P.2d 938 (Colo. 1997).

Example:

A convenience store was robbed and the robber fled on foot. Police were informed that a "transient" was camping in a tent in the area where the robber fled, and the police located the tent on privately owned but publicly accessible land. There were no signs prohibiting entry on the land. Schafer, who owned the tent and articles contained inside, was not present when the officers arrived. The officers found the flaps of the tent closed and the entrance was zippered shut. Without a warrant, they unzipped and entered the tent and recovered items. Schafer was later arrested for the robbery and sought suppression of items recovered from his tent that were incriminating. The Colorado Supreme Court held that "whether of short or longer term duration, one's occupation in a tent is entitled to equivalent protection from unreasonable government intrusion as that afforded to homes or hotel rooms." Since Schafer was not trespassing, and because the officers entered the tent without probable cause and exigent circumstances (or consent), the entry was illegal and the items seized were suppressed. *People v. Schafer,* 946 P.2d 938 (Colo. 1997).

B. The Garage or Carport

A garage or carport may be given Fourth Amendment protection similar to that of the house itself. These areas may normally not be entered without a warrant, unless there is valid consent or probable cause and exigent circumstances.

Example:

An officer followed a car because the driver made some "evasive" moves" early in the morning. The car was driven into the carport of a home, the two occupants got out of the car and approached the officer, who inquired about his observations. The suspects said they were trying

to "elude some girls." The officer then entered the carport and saw stolen property in and in front of the car. The court ruled that the suspects had a reasonable expectation of privacy in the carport, and since there was no consent or other exception to allow entry into the "private" area the evidence discovered there was inadmissible. *People v. Apodaca,* 561 P.2d 351 (Colo. App. 1976).

Note: The Fourth Amendment does not extend to places or things exposed to public view. Normally, an officer may walk up to the entrance of a garage without violating the resident's privacy.

Example:

An officer went up to the entrance of a carport which was enclosed on three sides. Without entering the carport the officer could smell marijuana. The officer then sought and obtained a search warrant. The Arizona court ruled that the suspect did not have a reasonable expectation of privacy in the area just outside the garage, and the evidence recovered was admissible. *State v. Lopez,* 563 P.2d 295 (Ariz. App.1977).

C. Other Structures on the Premises

Other structures on premises are normally given Fourth Amendment protection similar to that of the house or garage. Officers should avoid entering these structures unless a warrant or valid consent is obtained, or unless the officer has probable cause and there is some exigency or emergency which requires immediate entry.

Examples:

An officer, having received information that Peterson was growing large quantities of marijuana on his farm, went to the property to investigate. Peterson was not present but Weller, a 19-year old caretaker, was present and he invited the officer onto Peterson's property. After observing a small amount of marijuana inside Peterson's house, Weller allowed the officer to inspect other buildings on the property, including a padlocked outbuilding. The officer saw what he believed to be marijuana in the outbuilding, obtained a warrant, and discovered a large quantity of marijuana. The Colorado Supreme Court later held, however, that Weller did not have the authority to allow the officer to enter the property, and the officer's observations (search) as to Peterson's house and the outbuilding were unlawful. *Peterson v. People,* 939 P.2d 824 (Colo. 1997).

Officers had a warrant to search Weisenberger's residence. When the officers could not find the evidence in the residence they searched a chicken house located on Weisenberger's property and found contraband. The court ruled that Weisenberger had a reasonable expectation of privacy in his chicken house just like he did in his home. Because the officers had a warrant to search just the house and not the "premises," or chicken house, the evidence was suppressed. *People v. Weisenberger,* 516 P.2d 1128 (Colo. 1973).

D. The Back Yard

Normally, a person can reasonably expect privacy in his or her back yard such that an officer will not enter that area to search for evidence without a warrant, consent or exigency. Obviously, a person's expectation of privacy decreases somewhat if the back yard is unfenced and decreases a great deal if the only entrance to the premises is though a back yard. A person cannot reasonably expect his back yard to be free from naked eye observations from navigable air space above the yard.

Examples:

Officers, acting on an anonymous tip, went to the alley behind Hoffman's backyard, looked through a wire mesh fence, and saw what they believed to be marijuana growing in the garden. After taking photographs of the plants from their position in the alley, the officers entered the backyard, took additional photographs, uprooted the plants, and took them to the sheriff's office. The Colorado Supreme Court found that the officers did not conduct a search by viewing the plants from their position in the alley, because a wire mesh fence is insufficient to establish a subjective expectation of privacy that society recognizes as reasonable. *People v. Hoffman,* 780 P.2d 471 (Colo. 1989).

Note: Although the Court found that no "search" had occurred, the officer's entry onto Hoffman's property and removing the plants without a warrant or exigent circumstances was unconstitutional.

Unable to view Ciraolo's yard because of a six-foot high outer fence and a 10-foot high inner fence, officers obtained a private airplane and flew over the house at an altitude of 1,000 feet, within navigable air space. There, the officers saw 8 to 10-feet high marijuana plants growing in the yard. The plants were photographed with a standard 35 millimeter camera. The United States Supreme Court held that it was unreasonable for Ciraolo to expect that his marijuana plants were constitutionally protected from being observed with the naked eye at an altitude of 1,000 feet. *California v. Ciraolo,* 476 U.S. 207 (1986).

Officers flew over Henderson's property and, from an altitude of 500 to 700 feet, observed a shed in his backyard with a plastic roof and green plant material growing underneath. The officers subsequently obtained a search warrant and seized marijuana and cultivation equipment. The Colorado Supreme Court held that, under either the federal or state constitution, Henderson could not reasonably expect that his property would not be subject to observation from airplane in navigable air space and observe items in plain view. *Henderson v. People,* 879 P.2d 383 (Colo. 1994).

Officers received a tip that marijuana could be seen growing in Wimer's yard from a nearby multi-story building. Investigating officers parked in an alley behind Wimer's house and peered through cracks in Wimer's six-foot high privacy fence, and observed marijuana. They subsequently obtained a warrant and seized the plants. The Colorado Court of Appeals ruled that Wimer's subjective expectation of privacy was not reasonable as the plants were plainly visible from a nearby multi-story building and Wimer had not take steps to fix the cracks in the fence so as to shield the yard from the view of curious passersby in the alley. Police, therefore, did not execute a search by looking through the cracks in the fence. *People v. Wimer,* 799 P.2d 436 (Colo. App. 1990).

Officers suspected that stolen property might be located at a certain address. The officers went to the address to investigate. When no one answered the door some children said that a resident was in a car in the back yard. The officers went to the back yard and saw a person and some of the stolen property in the car. The court ruled that neither a warrant nor probable cause was necessary because no "right of privacy was infringed." There, the evidence was admissible. *Blincoe v. People,* 494 P.2d 1285 (Colo. 1972).

E. Windows

A person can reasonably expect that an officer will not look through the windows of the person's home if the person takes reasonable precautions to protect his or her privacy. However, "[w]hat a person knowingly exposes to the public, even in his own home or officer, is not subject to Fourth Amendment protection." *Katz v. United States,* 389 U.S. 347 (1972).

A good rule of thumb for officers is that if an officer can see through a window from a position where the public has a right to be, and the officer does not need to use extraordinary means to see in (e.g., peeking between shades or use of binoculars) the viewing is constitutional.

1. Lawful Presence

An officer may look (or listen) through windows if the officer is lawfully present in the area where he or she conducts the viewing (or listening). In order to be lawfully present the officer must be in a place where the suspect has no (or very low) expectation of privacy; that is, where the public would feel free to walk.

Example:

An officer went into the suspect's yard and up to the window where the public would not normally go. From that position he listened to a conversation about a narcotics deal and saw incriminating conduct. The California court ruled that the officer conducted a "search" when he positioned himself at the window. Therefore, the conversation was not admissible. *Lorenzana v. Superior Court,* 511 P.2d 33 (Cal. App. 1973).

Compare with:

Narcotics officers followed a suspected drug trafficker and observed him check into a motel room. The officers obtained permission from the motel manager to occupy an adjoining room. The officers then learned that they could overhear, without any electronic devices, portions of Hart's conversations. Based, in part, on the conversations the officers obtained a warrant to search Hart's motel room and discovered illegal drugs. The Colorado Court of Appeals held that when a police officer overhears a conversation without the aid of any listening device, from a vantage point at which he is legally present, the officer's use of his sense of hearing does not constitute a Fourth Amendment search. *People v. Hart,* 787 P.2d 186 (Colo. App. 1989).

2. Observing v. Peeking

It is unreasonable for a person to expect that officers will not look through windows and see what the general public can see. But a person is reasonable in expecting that officers will not come "peeking" into his or her windows.

a. Observing – No Search

An officer who can easily and naturally see crime related evidence through a window does not invade any reasonable privacy expectation, and therefore does not conduct a "search."

Examples:

An officer who suspected that the occupants of a motel room had committed a series of thefts went to the room. As the officer approached the room he saw Gomez through a gap in the window curtains. The officer observed from that position that Gomez was cutting cocaine. The court ruled that the officers' observation from the common passageway was constitutional. *People v. Gomez,* 632 P.2d 586 (Colo. 1981).

A woman told an officer that she had been chased by a man whom she believed came from a certain apartment. When the officer walked by the window of the apartment he saw six or seven people. The officer then knocked on the window and one of the individuals threw a baggie of marijuana and a pipe under a coffee table. In reversing the trial court's suppression of the evidence, the Colorado Supreme Court held that "if [the officer] observed illegal activity inside the defendant's apartment by looking through the living room window from a common entrance or similar passageway those observations would not constitute a search." *People v. Donald,* 637 P.2d 392 (Colo. 1981).

b. Peeking - A Search

When an officer has to peek to see through the window he or she has conducted a "search" which must be justified by probable cause and a warrant or exigency or consent.

Examples:

An officer peeked through a very small portion of a Venetian blind and saw crime-related evidence. The California court ruled that the viewing was a search and suppressed the evidence that was recovered by virtue of the search. *Jacobs v. Superior Court,* 111 Cal. Rptr. 449 (Cal. App. 1974).

Ammons's employer called police because Ammons did not show up for work. The officer went to Ammons's home and knocked on the door. Because the officer was sincerely concerned that Ammons was ill or hurt, the officer peeked through a window and saw evidence that bolstered his concern. He then entered the house and found Ammons dead. The officer also found evidence which later led to the conviction of Ammons's wife for the murder. The California court ruled that the officer conducted a search by looking

through the window. However, the court did not suppress the evidence recovered as the result of the search because exigent circumstances justified the warrantless entry. *People v. Ammons,* 162 Cal. Rptr. 792 (Cal. App. 1980).

F. Fences and Walls

Fences and walls tend to increase a person's expectation of privacy in his or her premises. In order for an officer to view evidence through or over fences or walls the officer (1) must be lawfully in the area where the observation is made and (2) the officer must not employ extraordinary means to make the viewing.

1. Lawful Presence

An officer is lawfully present to view over walls or through fences when the officer is standing in an area where the suspect ha a low or no reasonable expectation of privacy where the public might be expected to walk. The following are areas where the courts usually rule that such observations are permitted:

a. alleys
b. neighbor's premises
c. driveways
d. sidewalks

2. Extraordinary Means

Even if the officer is lawfully present, his or her observations will be considered a "search" if extraordinary means are required to view the crime-related activity or evidence. The following are examples of extraordinary means which cannot be used except under exigent circumstances:

a. use of a stepladder
b. "peeking" through bushes, trees, fences, etc.

G. The Porch

A person does not have a reasonable expectation of privacy in residential areas that are open to casual visitors. This normally includes items on the porch accessible to the public.

Examples:

Police officers investigating a murder first spoke to White's girlfriend at her home, where they found incriminating evidence. The police then contacted White at his father's house at 1:30 a.m. When police arrived at the father's house they entered the porch and then knocked on the sliding glass door, as they had done on previous occasions. They were thereafter admitted by guests present on the premises. The Colorado Court of Appeals recognized that while the area immediately surrounding a residence (curtilage) is protected by the Fourth Amendment, the fact that a search occurs in that area is not dispositive "if the area's public accessibility dispels any reasonable expectation of privacy." Here, the court found that since the porch door was not always closed and that residents of the house might not know if a visitor was present unless he or she knocked on the sliding glass door inside the porch, it was not unreasonable for the police to enter the porch and contact the residents. *People v. White,* 64 P.3d 864 (Colo. App. 2002).

Officers saw Shorty by his apartment door. Based on Shorty's actions and information that Shorty sold drugs from his apartment, the officers approached him to get identification and an explanation of his actions. The officers looked around the "porch," which was a landing at the bottom of a stairway leading only to Shorty's apartment unit. Without probable cause, an officer lifted up a piece of carpet serving as a doormat and discovered a packet of cocaine. The Colorado Supreme Court ruled that Shorty's expectation of privacy in the area under the mat was not "reasonable" because the mat was in an area open to casual visitors and could be "moved, tripped over, walked upon, looked under or lifted up by any business or personal visitor." Therefore, lifting up the mat was not a "search." *People v. Shorty,* 731 P.2d 679 (Colo. 1987).

After officers searched a home pursuant to the owner's consent, they went to the back of the house and observed a shed. The shed had an electrical cord running to it from the house, and the front door had a peephole and a deadbolt. The officers knocked on the door, announced their presence, and told the occupant to open the door. Ultimately, the defendant opened the door, was discovered to be in possession of a weapon, and was arrested. The Colorado Supreme Court held that the defendant impliedly held open the area outside the shed door to casual visitors, thus, he lacked standing to claim that the officers' presence there when they knocked on the door violated his rights. *People v. Terrazas-Urquidi,* 172 P.3d 453 (Colo. 2007).

Observations Made While On Porch

An officer may, by virtue of his or her lawful presence on a porch, be in a position to observe items or activities inside the house which he or she might not have been able to observe from other vantage points.

Example:

Officers arrested the driver of an automobile on an outstanding arrest warrant and discovered illegal drugs in the car in a search incident to the arrest. The driver then informed officers that he had been enroute to see Winpigler at his residence. Officers went to Winpigler's house, knocked on the door, but received no response. Two individuals arrived shortly thereafter who said they were staying with Winpigler and that Winpigler was probably asleep in the house. They opened the front door and, at the request of the officers, went inside to wake up Winpigler. As the individuals had left the front door open, the officers could see partially into the residence from their position on the front porch. From that location the officers observed a collection of swords mounted on a wall and smelled the strong odor of iodine which, from their experience, was consistent with the manufacture of methamphetamine. In holding that the officer's smelling of iodine contributed to the existence of probable cause that crime-related activity was occurring inside the residence, the Colorado Supreme Court implicitly recognized that the officer's observations, made from a location where they had a lawful right to be, did not violate any reasonable expectation of privacy (although the subsequent warrantless and non-consensual entry was not justified by exigent circumstances). *People v. Winpigler*, 8 P.3d 439 (Colo. 1999).

H. The Front Yard

A person normally has very little or no expectation of privacy in his or her front yard. Therefore, usually an officer may enter a front yard without reasonable suspicion unless there is a "locked gate, a high solid fence blocking the front yard from view, a written notice to keep out or 'beware of dog' or perhaps a doorbell at the front gate . . .. [or other] warning . . . that the visitor was unwelcome." *People v. Mendoza,* 176 Cal. Rptr. 293 (Cal. 1981).

Example:

Officers were informed that an individual named "J" or "Johnny" lived at a particular address and was in possession of a large quantity of methamphetamine. Within minutes, officers went to that address and saw a man standing in the front yard. An officer approached Melton and asked him if his name was "J" or "Johnny." Melton answered that his name was "Johnny." Officers then asked Melton to step to the curb,

conducted a pat down search, and found drugs in his fanny pack. On appeal to the Colorado Supreme Court, four of the seven justices did not specifically consider whether Melton had a reasonable expectation of privacy in his front yard in holding that the initial encounter was consensual because a reasonable person under the circumstances would believe that he or she was free to leave. The three concurring justices would have remanded the case to the trial court for findings on that issue. *People v. Melton,* 910 P.2d 672 (Colo. 1996).

An officer believed that Mendoza was dealing in heroin and went to Mendoza's house to investigate. Mendoza's house and yard were surrounded by a chain-link fence with an unlocked front gate. When the officer saw Mendoza in the front yard he entered the gate and walked up to Mendoza. While talking to Mendoza, the officer observed crime-related evidence and arrested Mendoza. The California court ruled that Mendoza did not have a reasonable expectation in his front yard. Therefore, the evidence was admissible. *People v. Mendoza,* 176 Cal. App. 293 (Cal. 1981).

I. The Driveway

Although a person may have some expectation of privacy in his or her driveway, that expectation is very low. Normally, an officer may enter a person's driveway without intruding on any reasonable privacy interests.

Examples:

An officer received information that McGahey had some marijuana plants which he was growing in a picture window of McGahey's home. The officer drove up McGahey's driveway toward the house, which was 100 to 150 yards off the street, whereupon he observed marijuana plants in the picture window. The officer then obtained a warrant to seize the plants. The court ruled that the officer's observation violated no reasonable privacy right and reversed the trial court's suppression of the evidence. *People v. McGahey,* 500 P.2d 977 (Colo. 1972).

Officers with reason to believe the residents of a certain house committed robberies went to the house to investigate. They walked up the driveway and looked into a vehicle. They then saw leather thongs which looked like those used in a robbery. The court ruled that the officers did not violate the suspect's privacy rights and stated "whether the use of the driveway constituted [trespass] is irrelevant." The thongs were therefore admissible. *People v. Johnson,* 560 P.2d 465 (Colo. 1977).

J. Sidewalks

"A sidewalk, pathway, common entrance or similar passageway offers an implied permission to the pubic to enter which necessarily negates any reasonable expectation of privacy in regard to observations made there." *Lorenzana v. Superior Court,* 511 P.2d 33 (Cal. App. 1973).

Example:

A representative of an apartment complex told police that a person had stolen some apartment furniture. The officer and a representative of the apartment complex went to the suspect's home and, while standing on the sidewalk in front of her apartment, saw the furniture through an un-curtained window. The court ruled that a person has no reasonable expectation of privacy in areas which can be viewed from a sidewalk. Therefore, the evidence was admissible. *People v. Becker,* 533 P.2d 494 (Colo. 1975).

K. Open Fields

A person normally has no reasonable expectation of privacy in the "open fields" on his or her premises, even if there are "no trespassing" signs that have been posted.

Examples:

Officers had reports that marijuana was being grown on Oliver's farm. Two officers went to the farm, walked along a foot path past the locked gate with a "no trespassing" sign, and found marijuana in the field one mile from Oliver's home. The United States Supreme Court ruled that the officers did not need to obtain a warrant, consent, or exigency to enter that area, to which Oliver possessed no reasonable expectation of privacy. *Oliver v. United States,* 466 U.S. 170 (1984).

While standing in an open field an officer observed a bright light and marijuana plants in Oynes bedroom window. The Colorado Court of Appeals affirmed the trial court's ruling that, for constitutional purposes, no search occurred because the observations were made from an open field (i.e., an area over which Oynes enjoyed no reasonable expectation of privacy). *People v. Oynes,* 920 P.2d 880 (Colo. App. 1996).

McClaugherty stole 21 bee colonies and placed them in his pasture about 150-200 feet from a county road. Police and the victim entered the pasture through an unlocked gate and the victim identified the bees as belonging to him. The court ruled that the conduct of the police was not

a "search" under the constitution because McClaugherty did not have a reasonable expectation of privacy in his "open pasture." *People v. McClaugherty,* 566 P.2d 361 (Colo. 1977).

L. Curtilage

If a particular area is within the "curtilage" (i.e,. the living area) of premises, it is not considered part of the "open fields" and has the same Fourth Amendment protection as the house. The United States Supreme Court in *United States v. Dunn,* 480 U.S. 294 (1987) has listed the factors that courts should consider when deciding whether a particular area is within the curtilage:

a. how close the area in question is to the home;

b. whether the area is within an enclosure (a fence, for example) surrounding the home;

c. what the area is used for; and

d. what steps have been taken to protect the area from observations by passersby.

Example:

DEA agents went to Dunn's ranch, passed through a perimeter fence, several barbed wire fences, and a wooden fence enclosing the front of a barn. The officers then went to the locked, waist high gates of the barn and stopped. From that location they saw a drug laboratory inside the barn. (Although there was a barbed wire fence that encircled the house, there was no such fence surrounding the barn. The barn was 60 yards from the house.) The agents then obtained a search warrant and seized evidence inside the barn. Under these facts the United States Supreme Court held that the barn was not within the "curtilage" of the house and the agents therefore did not conduct a search when they looked inside it. *United States v. Dunn,* 480 U.S. 294 (1987).

M. Views from Neighboring Premises

When a person does not shield his or her activities or property from the view of neighbors, the person cannot expect privacy from such viewings by an officer who is lawfully present on the neighbor's premises. As long as the officer can view the evidence naturally (e.g,. from a second-story window) rather than by the use of extraordinary means (e.g., peeking through bushes or using a ladder) the viewing is not a "search.

Example:

Dillon's neighbor called police and said that Dillon was growing marijuana in his backyard. Because of a fence around Dillon's backyard, the only way the officer could see the plants was from the neighbor's second-story window. The court ruled that this viewing was proper because "[t]he view of the backyard was vulnerable to observation by any of [Dillon's] neighbors." *Dillon v. Superior Court,* 497 P.2d 505 (Cal. 1972).

N. Use of Binoculars

An officer does not violate a person's reasonable expectation of privacy when the officer uses binoculars to view that which could lawfully be viewed from a closer distance with the naked eye. In other words, if the only reason for the use of binoculars is to avoid detection by the suspects, the use of binoculars will normally not be considered a search.

Examples:

An officer used binoculars to observe marijuana plants in Oynes's bedroom window. The court of appeals held that no search occurred because Oynes's high intensity "grow light" could be seen at a great distance and there was no evidence in the record that the binoculars used were extraordinarily powerful. *People v. Oynes,* 920 P.2d 880 (Colo. App. 1996).

Officers used a telescope to look through Kim's window, a quarter of a mile away. As a result of this viewing the officers observed enough crime-related activity to obtain a wiretap order. The court ruled that the observation was a search because the officers could not have seen the crime-related activity with the naked eye from a closer lawful position. Therefore, the evidence was inadmissible and the wiretap was improperly issued. *United States v. Kim,* 415 F. Supp. 122 (D. Haw. 1976).

O. Aerial Views

An officer may view from the air what he or she lawfully could view from the ground. This rule is similar to the rule for binoculars; if the only reason to view from the air is to avoid detection, the aerial surveillance will not be a search. Moreover, naked eye observations from navigable air space above a premises are not a search even if the officer can see things that could not be seen from the ground. The reason is that a person cannot reasonably expect that people (including officers) will not see things from the airspace which they have a lawful right to use.

Examples:

Unable to view Ciraolo's yard because of a six-foot high outer fence and a 10-foot high inner fence, officers obtained a private airplane and flew over the house at an altitude of 1,000 feet, within navigable air space. There, the officers saw 8 to 10-feet high marijuana plants growing in the yard. The plants were photographed with a standard 35 millimeter camera. The United States Supreme Court held that it was unreasonable for Ciraolo to expect that his marijuana plants were constitutionally protected from being observed with the naked eye at an altitude of 1,000 feet. *California v. Ciraolo,* 476 U.S. 207 (1986).

Officers flew over Henderson's property in a news helicopter at an FAA-permissible altitude of 500 to 700 feet. During the flight the officers saw a shed to the south of the residence with a plastic roof and green plant material growing underneath the plastic. The officer subsequently obtained a no-knock search warrant and seized marijuana and cultivation equipment. The Colorado Supreme Court held that the fly-over was not a search under the federal or state constitution, as Henderson could not reasonably expect that his curtilage would not be subject to observation from an altitude of 500 to 700 feet. Here, the use of the helicopter never constituted a violation of FAA regulations and the marijuana was in plain view to anyone legally viewing the shed from the helicopter. The observation also posed a very limited degree of intrusiveness, as the helicopter made approximately five passes over the course of several minutes, never flew below 500 feet and there was no evidence of noise, wind, dust, threat of injury, or interference with the use of the curtilage. *Henderson v. People,* 879 P.2d 383 (Colo. 1994).

Compare with:

During an instructional flight of a helicopter, officers observed what they believed were marijuana plants growing in a yard that was surrounded by a privacy fence. They descended to an altitude of 200 feet, hovered there several minutes, and created enough noise to cause numerous people to come out of their homes to see what was happening. Upon verifying that the plants were marijuana, Pollock's premises were secured and the marijuana plants were seized. The court of appeals held that officers viewing the property under these circumstances constituted a search that violated Pollock's reasonable expectation of privacy. The court cited the infrequency of flights that fly at such a low altitude and the loud noise produced by the helicopter as controlling factors. *People v. Pollock,* 796 P.2d 63 (Colo. App. 1990).

P. Business Premises

Normally there is a low expectation of privacy as to business premises that are open and available to the public.

Example:

A search warrant was executed at the bar which Rowe managed and where an altercation occurred. The bar was a commercial establishment and the police entered the premises with the consent of bar employees. The items recovered were from the public portion of the bar ordinarily open to the public. There was no evidence that Rowe locked the bar after the altercation or otherwise attempted to exclude the public or conceal evidence seized. The court of appeals held that Rowe lacked a legitimate expectation of privacy in items seized from the public portion of the bar that he managed. *People v. Rowe,* 837 P.2d 260 (Colo. App. 1992) *reversed on other gnds* 865 P.2d 486 (Colo. 1993).

Compare:

Officers entered the back room of a liquor store to assist an injured individual, despite the defendant's lack of consent, and found bricks of marijuana. The defendant (who was the night manager) and the owner were the only people who had unrestricted access to the back room. The Colorado Supreme Court held that the defendant had a legitimate expectation of privacy from government intrusion in the back room of the store, and thus had standing to assert a Fourth Amendment violation. *People v. Galvadon*, 103 P.3d 923 (Colo. 2005).

Q. Suggested Techniques

1. Before attempting to view (hear, smell) evidence on premises without a warrant ask yourself, "would the crime-related evidence be visible (audible, "smellable") to a passerby, mailman, salesman, neighbor, etc., without any extra effort?"

2. If it would not, the court will usually require that you get a warrant, obtain consent, or be faced with an emergency to intrude.

3. Even if you do see evidence from a lawful position that does not mean you can seize it. Always obtain a warrant to seize evidence in homes unless you obtain consent or emergency circumstances exist.

III. LEGAL THEORIES FOR SEARCHES OR SEIZURES IN HOMES

In order to search a home an officer must satisfy a certain legal theory for the search. The following is a discussion of the legal theories which justify a search or seizure in a home.

A. Warrants

Whenever an officer enters the areas of premises where a person has a high expectation of privacy, the officer must have a warrant except under certain specific situations. No amount of probable cause (even 100% certainty that the evidence or "wanted" person is inside a home) will justify an officer entering a house without a warrant.

1. Searches for Persons

An officer who has probable cause to arrest a suspect inside a home must have a warrant unless exigent circumstances exist (or valid consent is given).

a. The Suspect's Home

In order to enter a suspect's home to arrest, the officer must have an **arrest warrant** unless there are exigent circumstances. The officer must also have a reasonable belief that the suspect is within the premises, and that the home is the suspect's residence.

Examples:

Zamora stuck his wife and a friend with his car and he was arrested shortly afterwards. Zamora was then released and, about a week later, an officer arrived at his home and arrested him again. The Colorado Supreme Court held that Zamora's Fourth Amendment rights "were clearly violated by his arrest (in his home)" without a warrant. *People v. Zamora,* 695 P.2d 292 (Colo. 1985).

Officers went to Hogan's home in order to take him to the station and served him with a summons for disturbance by telephone. After Hogan answered the door the officers entered without permission and asked for identification. Hogan gave the officers the driver's license of a burglary victim. He was then arrested. Later evidence was obtained from the home by order of a search warrant. The court ultimately held that entering Hogan's house to arrest him without a warrant was unconstitutional, and evidence later

recovered was suppressed. *People v. Hogan,* 649 P.2d 326 (Colo. 1982).

Officers received a tip that the defendant, who had warrants out for his arrest, was currently located at a particular apartment. The officers went to the apartment, knocked on the door, and when the door was opened they observed the defendant sitting on a chair inside. They entered the apartment and arrested the defendant. The Colorado Supreme Court held that the entry was unlawful because, while the officers had a reasonable belief that the defendant was within the apartment, they did not have any information about whether the apartment was the defendant's residence. *People v. Aarness*, 150 P.3d 1271 (Colo. 2006).

b. Third Party's Home

In order to enter a third-party's home on probable cause (where the arrestee is not a resident) an officer must have a **search warrant** unless exigent circumstances exist.

Example:

Officers entered Steagald's home with an arrest warrant for Ricky Lyons. Although Lyons was not there the officers discovered a large quantity of cocaine. The United States Supreme Court held that the evidence was not admissible against Steagald because the officers did not have a search warrant to invade Steagald's privacy. *Steagald v. United States,* 451 U.S. 254 (1981).

2. Searches for Evidence

An officer must have a search warrant or consent to enter a home to search for evidence unless exigent circumstances exist.

Example:

Officers had two arrest warrants for Vale. They went to Vale's home to arrest him and saw a known addict in front of Vale's home. When the men saw the officers Vale walked toward his front door and the addict hurriedly swallowed something. After arresting the two men the officers searched Vale's home and found narcotics. The United States Supreme Court ruled that an officer may not enter a home to search for evidence without a warrant unless exigent circumstances exist (or unless consent is obtained).

Because the officers later admitted that they knew before the search that no one was in the home who might destroy evidence there were no exigent circumstances which would justify the warrantless search. Therefore, the narcotics were suppressed. *Vale v. Louisiana,* 399 U.S. 30 (1970).

B. Exigencies and Emergencies

Normally an officer may not make a warrantless entry into a person's home except under emergency circumstances (or unless consent is given). One of the "narrowly defined exceptions" to the warrant requirement applies when "exigent circumstances" exist that necessitate immediate police action. Exigent circumstances are recognized in three situations:

a. the bona fide "hot pursuit" of a fleeing suspect;

b. the risk of immediate destruction of evidence;

c. a colorable claim of emergency which threatens the life or safety of another.

It is important to understand that the doctrine of "exigent circumstances" is an exception only to the warrant requirement. To make a warrantless entry onto premises upon exigent circumstances, the officer must nevertheless possess probable cause that a criminal suspect or crime-related evidence will be found on the premises. The one exception is if an officer is responding to a true emergency that threatens the life of an individual or the safety of the public.

1. Searches for Persons

An officer may enter a home to search for persons only in an emergency (or with a warrant). If a court rules that the warrant was defective or the exigency did not exist (or if consent was invalid or involuntary), all evidence gathered as a result of the entry will be suppressed.

a. Pursuit of a Fleeing Felon

An officer may enter a home without a warrant to arrest a "fleeing" felon. Normally, unless there are exceptional reasons, an officer must prove that he or she was in "fresh" or "hot" pursuit of the felon in order to warrantlessly enter a home. This does not mean that the suspect must be constantly in view. Rather, it means that the entry must occur fairly soon after the crime such that the pursuit is continuous and the suspect's trail did not become "cold" during the chase. However, "in order for a warrantless entry to be justified as hot pursuit, the police must have been provided with

some sort of direction, whether it be the result of a chase or the result of a tip from a witness, which leads them to a particular premises." *People v. Lewis,* 975 P.2d 160 (Colo. 1999).

As a general rule, the more dangerous the suspect the more lenient the courts are in permitting a warrantless entry. The less dangerous the suspect, the more likely the court will require "very hot" pursuit or proof from an officer that the suspect would escape if the officer took the time to obtain a warrant. Among the factors the courts consider that may justify a warrantless search for a suspect are whether:

a. a grave offense is involved;
b. the suspect is reasonably believed to be armed;
c. there exists a clear showing of probable cause to believe that the suspect committed the crime;
d. there is a strong reason to believe that the suspect is in the premises being entered;
e. the likelihood exists that the suspect will escape if not swiftly apprehended; and
f. the entry is made peaceably.

People v. Schafer, 946 P.2d 938 (Colo. 1997).

Examples:

Hayden, while armed with a gun, robbed a cab company and ran. Cab drivers, by keeping in radio contact, followed Hayden to his home. Soon afterward, officers arrived, knocked and entered Hayden's home. The officers searched the entire house for the suspect and weapon and found Hayden and other crime-related evidence. The United States Supreme Court ruled that the warrantless entry and search was proper because the officers were in "hot pursuit" of an armed fleeing felon. Therefore the evidence discovered in the search was admissible. *Warden v. Hayden,* 387 U.S. 294 (1967).

Officers had probable cause to believe Drake committed a murder earlier in the day and learned from Drake's wife that he would be returning to Louisiana that day. As nightfall approached, officers went to the motel where Drake was staying, phoned him from the lobby, and told him to come out. After Drake did not come out of his room, an officer again directed him to come out, saying that they "didn't want anyone to get hurt." Drake stepped out of the room and was

arrested in the parking lot of the motel. Although the court did not actually decide whether the officer's calls to Drake's room constituted the sort of intrusion requiring a warrant, the court appeared to adopt for the sake of argument the view that a warrantless entry had occurred. The court held that a warrantless intrusion was justified because of exigent circumstances where the crime was particularly serious, the officers knew Drake planned to leave town that day, and falling darkness presented an enhanced opportunity for escape. *People v. Drake,* 785 P.2d 1257 (Colo. 1990).

Lindsey, a murder suspect, was arrested without a warrant in his girlfriend's house six weeks after the crime. The officers, who were admitted to the house with the girlfriend's consent, were suspicious that the defendant was on the premises as the result of speaking with the girlfriend. Hearing a noise in the closet, the officers discovered Lindsey hiding therein and arrested him. The Colorado Court of Appeals ruled that exigent circumstances justified the warrantless search and subsequent arrest where there was a strong likelihood that Lindsey was on the premises, armed, and apt to escape if not swiftly apprehended. *People v. Lindsey,* 805 P.2d 1134 (Colo. App. 1990).

A tavern was robbed by two Spanish-American males, one of whom had a gun. Shortly thereafter a witness saw two Spanish-American males enter an apartment carrying a grocery sack. When the witness looked into the apartment, he saw that the sack contained money and a gun. The witness then phoned police, who arrived and knocked on the suspects' door. When a woman answered, the officers said they wanted to search the apartment for the armed robbers. The police then entered the apartment, found the suspects and the crime-related evidence. The Colorado Supreme Court ruled that the warrantless entry was constitutional because of the exigent circumstances then present. *People v. Baca,* 600 P.2d 770 (Colo. 1979).

A witness met Saars and three other men for the first time in a bar. After a brief discussion the five men went to the victim's home to buy drugs. When they arrived, the four men drew weapons and sexually assaulted and robbed the victim while the witness watched. After the assault, the witness called police and gave them descriptions of the suspects and the suspects' car. Soon thereafter, officers located Saars at his residence, entered without a warrant, and

arrested him. The officers found the victim's property on Saars's person and took a statement from him. The Colorado Supreme Court ruled that "exigent circumstances clearly existed here where Saars and his cohorts were armed and fleeing from the scene. Time was of the essence." *People v. Saars,* 584 P.2d 622 (Colo. 1978).

Compare with:

A man robbed a 7-11 store at gunpoint, taking money and cigarettes. An officer arrived approximately five minutes later and obtained a description of the robber. After finding no one on the street that matched the description, the officer stopped at a nearby motel and, from a distance of 50 feet, noticed a woman talking to a man inside one of the motel rooms. As the officer approached the woman noticed him and closed the door to the motel room, while remaining outside the room. The officer directed the woman to open the door. She complied and as the door opened the officer saw four men who all appeared to generally match the description of the robber. The officer entered, detained all four men at gunpoint, and ultimately searched the motel room, finding crime-related evidence. The Colorado Supreme Court held that, while the officer had a general description of the robbery suspect, that description was "vague," and that description alone did not give the officer probable cause to believe that the man he saw speaking to the woman in the doorway of the motel was the robber. In addition, the circumstances did not rise to the level of "hot pursuit" because, although proximate in terms of time, neither the witness nor the officer claimed to have followed the suspect from the 7-11 or to have seen him entering the motel room: "as such, [the officer] had no reason to believe that the robber was at the . . . motel." *People v. Lewis,* 975 P.2d 160 (Colo. 1999).

A convenience store was robbed and the robber fled on foot. Police were informed that a "transient" was camping in a tent in the area where the robber fled, and the police located the tent on privately owned but publicly accessible land. Schafer, who owned the tent and articles contained inside, was not present when the officers arrived. The officers found the flaps of the tent closed and the entrance was zippered shut and, without a warrant, they unzipped and entered it and recovered items. Schafer was later arrested for the robbery and sought suppression of items recovered from his tent that

were incriminating. The court ruled that no exigent circumstances existed to justify the warrantless entry because no one was observed in the vicinity of the tent and the officers had no reasonable belief that the robbery suspect was the camper or was inside the tent. *People v. Schafer,* 946 P.2d 938 (Colo. 1997).

The victim of a recent sexual assault reported the location of the assailant's apartment and told officers that he was asleep when she left. The officer went to the apartment, surrounded all possible exits, and knocked loudly. After receiving no answer, officers made a warrantless entry through the unlocked door and found Miller asleep. The Colorado Supreme Court found that the warrantless entry was not justified, stating that where it would have taken only a short time to obtain a warrant, Miller's escape was precluded and it was unlikely evidence would be destroyed. Therefore, exigent circumstances did not exist. *People v. Miller,* 773 P.2d 1053 (Colo. 1989).

Marez and his brother were involved in a fight at a party that led to Marez firing a gun into a crowd. Three hours later, after completing their investigation at the scene, officers drove to the motel where Marez lived. Marez's mother answered the door and told the officer that her sons were asleep. However, officers entered the room, arrested Marez and his brother, and seized a gun. The Colorado Court of Appeals concluded that the warrantless entry was not justified because there was no evidence that Marez presented a real and immediate danger to others after he left he scene of the shooting and there was sufficient time for officers to obtain a warrant. *People v. Marez,* 916 P.2d 543 (Colo. App. 1995).

See also, People v. Santisteven, 693 P.2d 1008 (Colo. App. 1984)(no exigent circumstances to enter a home at 2:00 a.m. to arrest the suspect in a stabbing where officers testified that, had the suspect's mother not consented to the entry (which consent was found to be involuntary) they would have "backed off, secured the home and obtained an arrest warrant").

b. Protective Sweeps

An officer who is making an arrest just outside or inside a residence may search throughout the house for other suspects only

if the officer can prove to a court that he or she had a reasonable fear that other armed suspects may be in the house who could hurt the officer. It is much easier for an officer to justify a "protective sweep" if the arrest is lawfully made inside rather than outside the house.

Examples:

Following a robbery during which one of the suspects wore a red running suit officers obtained and executed a search warrant for Buie in his home. Buie was arrested as he emerged from the basement. Although Buie was under police control, one of the officers entered the basement "in case there was someone else there," and seized a red running suit lying in plain view. The United States Supreme Court held that the "protective sweep" of the basement was permissible where the officer had a reasonable belief based on specific and articulable facts that the area harbored an individual posing danger to those at the arrest scene. The court considered significant the fact that Buie's accomplice was still at large and that the crime committed was a serious offense. *United States v. Buie,* 494 U.S. 325 (1990).

After arresting Aarness upon an arrest warrant, the officers learned that another individual was still inside the apartment. The police also had reason to believe that there may have been weapons in the apartment because they had found a loaded handgun clip on Aarness's person. The Colorado Supreme Court held that under these circumstances, the police were justified in conducting a "protective sweep" of the residence incident to Aarness's lawful arrest. *People v. Aarness*, 150 P.3d 1271 (Colo. 2006).

Officers obtained a warrant to search Gillis's residence for stolen property. Knowing that rifles were among the items identified in the warrant, the officers, out of concern for their safety, initially conducted a security search of the house. While the officer was conducting the protective search Gillis indicated that the address on the warrant was incorrect. The security search of the house was immediately terminated, but Gillis later consented to a search of the house. Stolen property was later discovered. The court of appeals held that the security sweep was not an unconstitutional search that rendered the subsequent search invalid. The court did not need to determine whether the incorrect address invalidated the warrant because a warrantless search is valid when, as in

this case, the officers were justified in believing that they are dealing with a potentially armed and dangerous individual and conduct a limited search for weapons to insure their own safety. *People v. Gillis,* 883 P.2d 554 (Colo. App. 1994).

Police arranged a drug purchase between a suspect named Rounds and an informant. The officers watched Rounds come out of his house, walk to the informant's vehicle in front of the house, and hand the informant cocaine. As the police converged on the scene, one officer noticed Barry in the window of the residence, and saw him duck and close the window curtains when he was seen by the officer. The officer then ran into the house and found Barry with a baggie of cocaine. The court of appeals found that in drug transactions, the possibility of violence involving armed drug dealers exists and, thus, a protective search for weapons provided a justification for the warrantless entry and search. *People v. Barry,* 888 P.2d 327 (Colo. App. 1994).

Compare with:

A teenage babysitter and her mother called the police to inform them there was marijuana and marijuana paraphernalia in Walter's bedroom. Officers were admitted into Walter's residence by the babysitter's mother and taken upstairs to Walter's bedroom by the babysitter and her mother. The court of appeals affirmed the trial court's finding that no exigent circumstances justified the search of Walter's bedroom because none of the individuals at the residence were considered a threat and there was no danger to the officers. *People v. Walter,* 890 P.2d 240 (Colo. App. 1995).

Officers had probable cause to arrest Barndt for selling drugs and arrested him in the doorway of his home. Since Barndt was a big supplier of narcotics the officers entered the house in order "to discover any other person who might harm the officers or destroy possible evidence." Upon entering the house the officers saw cocaine and marijuana. The court ruled that there "were no indications of a third party who could do damage to either fellow officers to possible evidence." Therefore, there was no emergency justifying the warrantless entry. *People v. Barndt,* 604 P.2d 1173 (Colo. 1980).

c. Lives or safety at risk

Another type of exigency recognized by the Colorado Supreme Court, which also requires probable cause to believe that the residence contains contraband or evidence of criminal activity, is one where the officer believes that his own life or the lives of others are at risk. In order to determine whether the circumstances are sufficiently exigent to justify a warrantless entry, the following factors are considered:

(1) whether a grave offense is involved, particularly a crime of violence;
(2) whether the suspect is reasonably believed to be armed;
(3) whether there exists a clear showing of probable cause to believe that the suspect committed the crime;
(4) whether there is a strong reason to believe the suspect is in the premises being entered;
(5) the likelihood that the suspect will escape if not swiftly apprehended;
(6) whether the entry is made peaceably.

Whether the entry is made at night is an additional consideration. *People v. Aarness*, 150 P.3d 1271 (Colo. 2006).

Example:

In *Aarness*, the police had information that Aarness was an armed and wanted fugitive. When they went to the apartment and located him sitting in a recliner inside, the officers observed him reach into the seat of his recliner-possibly for a weapon. Aarness also refused to show his hands when ordered to do so. The Colorado Supreme Court held that under these circumstances, the police were justified in making a warrantless entry to arrest Aarness.

d. Injured, Ill, In Danger, Etc. – The Emergency Aid Doctrine

An officer may enter a home without a warrant if the officer can prove that he reasonably believed someone inside the house might be in need of immediate assistance. Unlike the "exigent circumstances exception" to the warrant requirement, which requires both the presence of the exigency and probable cause that contraband or evidence of criminal activity is located at a particular place, a warrantless entry under the "emergency doctrine does not require probable cause. "If an officer's purpose in effecting a warrantless entry – even though he was originally on

the scene in an investigative capacity - is to render emergency assistance, probable cause that contraband or evidence of criminal activity is located at a particular place is not required. Rather, the officer's actions are justified by a duty separate from the investigation of crime." *People v. Hebert,* 46 P.3d 473 (Colo. 2002).

A warrantless entry based on the emergency doctrine requires a reasonable belief both that (1) an immediate crisis exists and (2) the probability that assistance will be helpful. Although under the emergency doctrine police do not need to have probable cause to believe that contraband or evidence of criminal activity is located in a particular location, police must have a reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched.

Examples:

Officers were advised by a gathering of neighbors that Kluhsman was hiding in a resident's shed and had "gone crazy." As an officer approached the shed Kluhsman rushed out and charged toward the officer with what appeared to be a baseball bat or pipe. After Kluhsman was subdued, he told officers that people had been chasing him all night, he had killed several of them, and that many people were inside his residence with whom he had engaged in sexual acts. The officers observed that Kluhsman was covered with dried and wet blood, he had cuts on his skin, and he was sweating profusely. Based on Kluhsman's statements, officers entered the residence to look for injured people and observed bomb-making materials in plain view. The officers then conducted a thorough search of the residence and found bombs, guns, and additional bomb-making materials. The Colorado Supreme Court held that the potential presence of injured people inside the house created a justification for the officers to enter the house and search every area in which they reasonably believed they could find a person. Furthermore, following their legitimate entry the officers discovered a second colorable claim of emergency (i.e., the possibility of volatile explosives) which provided further justification to search any area in the house where explosives could be located. *People v. Kluhsman,* 980 P.2d 529 (Colo. 1999).

See also People v. Higbee, 802 P.2d 1085 (Colo. 1990)(officers with probable cause that suspect transported explosives and detonating devices from his car to his

residence properly entered the residence to neutralize any explosive device contained inside the house, particularly where it would take several hours to obtain a warrant and the risk of an explosion and injury to the occupants and others increased with each moment of delay).

The fire department was called to a fire at Harper's trailer home. Firefighters entered through the front door and extinguished a fire in Harper's bedroom. The smoldering mattress and box spring were removed and, in removing it, firefighters discovered a bucket of marijuana. The Colorado Supreme Court reversed the trial court's suppression order, holding that the entry was justified by the emergency doctrine. *People v. Harper,* 902 P.2d 842 (Colo. 1995).

Officers investigating an automobile collision found Copenhaver at the scene and they noticed blood inside the car. Copenhaver denied he was the driver of the car, a driver's license belonging to someone else was found inside the car, and the car was listed as belonging to someone else. The officers also saw blood on the slightly opened door to Copenhaver's apartment. The officers called inside the apartment, asking "is anybody hurt," and then followed a trail of blood through the apartment, where they found cocaine in plain view. The Colorado Court of Appeals concluded that, under these circumstances, the officers had a legitimate concern that there could be another injured party inside the apartment and that the warrantless entry into the apartment was therefore justified. *People v. Copenhaver,* 21 P.3d 413 (Colo. App. 2000).

Officers arrived at a residence on a domestic disturbance call. Mascarenas's girlfriend opened the door and, although she denied that any violence had occurred, her face was flushed, she appeared upset, she had an old black eye and the house appeared "a little ransacked." The officers entered the house, contacted Mascaraneas in the basement, and discovered illegal drugs in a protective frisk for weapons. The court of appeals held that it was not unreasonable for the officers under these circumstances to enter the home based upon the likelihood that an immediate crisis had occurred in the home and the probability that police assistance would be helpful in alleviating that crisis. *People v. Mascarenas,* 972 P.2d 71[illegible] (Colo. App. 1998).

See also People v. Thompson, 770 P.2d 1282 (Colo. 1989)(warrantless entry justified when officers responded to domestic disturbance call and found victim badly beaten and observed shell casings, damage to the screen door, and blood on the doorknob and porch; search was valid due to the exigent circumstance that others could be injured in the house.); *People v. Malczewski,* 744 P.2d 62 (Colo. 1987)(officers, who were informed that suspect had abducted a baby and was drinking, were justified in entering his apartment after hearing the baby crying in the background and being refused entry by the suspect; officers had reason to believe that an immediate crisis existed regarding the safety of the baby and that their entry would help end that crisis); *People v. Amato,* 562 P.2d 422 (Colo. 1977)(officers were justified in entering a residence believing suspect was seriously ill due to a drug overdose; officers had a legal right to be present in response to the general emergency call.)

The defendant called 911 and reported that he and the victim had been attacked by an intruder in his apartment. The defendant gave the dispatcher the location of his apartment complex and first stated that his apartment number was M-201, then said it was N-201. Upon arrival, officers discovered that apartment M-201 was vacant, and N-201 was inhabited by a couple who stated there had been no disturbance. The officers returned to building M and noticed a light on in apartment M-301. After knocking on the door and receiving no response, the officers entered the apartment and discovered the victim's body inside. The Colorado Court of Appeals held that the entry was justified under the emergency aid exception, as the information provided by the defendant was that the victim was being beaten, thus the officers could have reasonably believed that the attack was ongoing at the apartment complex. The court also held that under the circumstances, the officers reasonably concluded that the attack might have been occurring in apartment M-301, and their purpose in entering was to render emergency assistance. *People v. Souva,* 141 P.3d 845 (Colo. App. 2005).

Compare with:

Officers, investigating a call of a car observed in a neighborhood "running all day" discovered the dead body of Hebert's wife in the trunk. Officers were then sent to establish a surveillance on Hebert's residence, during which

they observed nothing suspicious or out of the ordinary. After observing the house for approximately 45 minutes, officers contacted Hebert, who was inside the house, and transported him to police headquarters. A detective later determined that a search of the house was necessary "to see if there were any other victims, injured or dead" inside the house. Officers then entered the house without a warrant and found crime-related evidence. The Colorado Supreme Court held that the warrantless entry of the house was not justified based on the emergency doctrine because the claim of an immediate crisis was only "theoretical" and was unsubstantiated by any concrete facts. *People v. Hebert,* 46 P.3d 473 (Colo. 2002).

Officers went to Winpigler's residence based on information that he might be involved in the sale of illegal drugs. They contacted two individuals who were entering the residence and asked them to summon Winpigler. As the officers waited on the porch they observed a collection of swords on the wall and detected the strong odor of iodine inside the residence, which the officers knew to be consistent with the manufacture of methamphetamine. After waiting approximately 30 seconds, the officers entered the house, secured the residents, and conducted a search where they found illegal drugs. The Colorado Supreme Court ruled that the officers had no particularized information in support of their assertion that chemicals or waste products might be present and might explode if they were improperly mixed or dumped. There was therefore no showing of an "immediate crisis" requiring immediate entry under the emergency doctrine. *People v. Winpigler,* 8 P.3d 439 (Colo. 1999).

Note: The Court also held that, although the officers observed the collection of swords on the wall, the officers did not see anyone approach the swords or attempt to remove them from the wall, nor was there any reason why, if the officers believed Winpigler was arming himself as they waited on the porch, the officers could not simply "back off," secure the scene, and obtain a warrant. Therefore, the entry was not justified as a "protective sweep" for officer safety.

Officers responded to a 911 call about a burglary in progress, but found no evidence of a burglary at the given address. As they were about to leave, they encountered two individuals

who directed the officers to a group of nearby apartments where they had heard a disturbance. Upon approaching the apartments, one officer saw a man walking towards him with blood on his face. The man told the police where he had come from, and said only that his friend "was inside." The officers then went to the apartment, observed broken window glass, but saw no other signs of a disturbance or a burglary. The officers entered the apartment, contacted the defendant, and asked him if he had any drugs or weapons. He was searched after admitting that he had drugs on his person. The Colorado Supreme Court held that the officers' entry was not justified under the emergency aid exception. The court first held that there was no evidence that an immediate crisis existed, as the officers had no information about what had occurred or that anyone was injured. The court then concluded that there was no evidence to show that the officers entered the home to provide emergency assistance, as they immediately questioned the defendant about drugs and weapons rather than whether he was hurt and needed help. *People v. Pate*, 71 P.3d 1005 (Colo. 2003).

The police went to the Allison residence after a 911 hang-up call. A woman answered the door, revealed that a domestic dispute had occurred, and eventually let an officer inside. The officer removed the woman and man involved in the altercation from the residence and then reentered the residence. During this reentry, the officer discovered marijuana and drug paraphernalia in the home. The Colorado Supreme Court held that the reentry was not justified under the emergency aid exception because there was no evidence that anyone else was involved in the domestic violence incident, thus, there was no indication that an immediate crisis existed. The court also noted that upon reentry, the officer conducted a search for evidence, not for the purpose of rendering emergency assistance. *People v. Allison*, 86 P.3d 421 (Colo. 2004).

e. Crime Scenes

There is no "crime scene" exception to the warrant requirement. However, an officer may enter a home which is the scene of a recent violent crime or burglary without a warrant in order to search for persons who might have been involved in the crime. It is important to remember that, under such circumstances, officers must obtain a search warrant or consent to search after the

emergency has passed (i.e., the premises have been secured). *Mincey v. Arizona,* 438 U.S. 385 (1978).

Examples:

Police received a 911 call reporting that several men had entered an apartment through the window, admitted another man through the door and then pulled the curtains. The caller "didn't believe they lived there" but was not certain. Officers responded and were able to see Thompson seated on a couch inside the apartment. The officers then knocked on the door and when Thompson answered the officers immediately entered and handcuffed him without questioning him about whether he lived there or the identity and reason for the presence of the other men seen entering the apartment. No signs of a burglary were observed. The officers extracted Grazier from the shower, retrieved his clothes and, in a protective frisk of the clothes, discovered illegal drugs. The officers later ascertained that Thompson lived in the apartment with his girlfriend. The Colorado Supreme Court recognized that in some circumstances police officers may enter a house without a warrant when they have probable cause to believe a burglary has just recently occurred or is in progress, in order to secure the premises and search for suspects or victims. However, under the circumstances of this case the court concluded that the information and observations available to the officers did not establish probable cause to believe a burglary was in progress. The evidence recovered in the warrantless search and seizure was therefore suppressed. *People v. Grazier,* 992 P.2d 1149 (Colo. 2000).

Roark was living with his girlfriend when he struck and killed his girlfriend's daughter. The police were called and, after removing everyone from the apartment and securing the scene, "the police conducted a more extensive search and seized several items of incriminating evidence." The court held that the search after the scene was secured could not be justified by any exigency or "death scene exception." Therefore, unless valid consent was obtained, evidence obtained from the search would be inadmissible. *People v. Roark,* 643 P.2d 756 (Colo. 1982).

Draper called the fire department to request emergency assistance for a baby Draper was babysitting. Firefighters arrived and the baby died. The police then came to question

Draper and, after a three-hour search of the house, they discovered evidence linking Draper to the death of the baby. The court ruled that there was no exigency and that the officers should have obtained a warrant or consent before the search. Therefore, the evidence was suppressed. *People v. Draper,* 586 P.2d 231 (1978).

2. Searches for Evidence

In *United States v. Johnson,* 333 U.S. 10 (1948), the United States Supreme Court held that an officer may enter a person's home and search for crime-related evidence without a warrant only if the officer can prove that the evidence is "threatened with removal or destruction." The threat that evidence is being *destroyed,* or may be destroyed in the time required for an officer to obtain a warrant, must be both "immediate" and "real." Moreover, exigent circumstances do not necessarily exist when officers fear that evidence may be *removed* from premises. *Mendez v. People,* 986 P.2d 275 (Colo. 1999). In such cases, it is more advisable to secure the premises and obtain a warrant to seize the evidence. Moreover, this exception to the warrant requirement presupposes that the officers have probable cause to believe that contraband or crime-related evidence is located within a certain premises. *See People v. Mendoza-Balderama,* 981 P.2d 150 (Colo. 1999)(case remanded to the trial court to determine whether officers were informed whether drugs were hidden in suspect's home; if no probable cause to believe drugs were on the premises, the warrantless entry was illegal; if probable cause exists, then court may determine whether exigent circumstances justified the warrantless entry.)

Among the factors that the Colorado Supreme Court has discussed in deciding whether a warrantless entry is justified to prevent the destruction of crime-related evidence are:

a. the degree of urgency and the time necessary to obtain a warrant;
b. whether there is a reasonable belief that evidence or contraband would be removed or destroyed;
c. whether the officer has information to believe that the suspects in possession of the evidence or contraband are aware that the police are closing in; and
d. the ease of destroying the evidence or contraband and the awareness by the officers that offenders often try to dispose of such evidence and escape under the circumstances.

People v. Bustam, 641 P.2d 968 (Colo. 1982).

Examples:

Officers responded to a motel to investigate a complaint that an unregistered guest was trespassing in one of the rooms in the motel. As an officer was waiting for an elevator he smelled a "strong odor of burning marijuana" emanating from under the door of a nearby room. The officer then summoned the motel manager and, fearing that the occupant heard the police activity in the hallway and would attempt to flush the evidence down a toilet, he asked the manager to open the door with his master key. As the officer entered the room he observed Mendez running into the bathroom and he heard the toilet flushing. He also observed a baggie of marijuana and syringes on the dresser in plain view. The Colorado Supreme Court held that the distinctive smell of burning marijuana, in conjunction with the officer's training and experience, provided probable cause to believe that contraband or evidence of criminal activity existed inside Mendez's motel room. In addition, the observation that the marijuana was burning indicated that contraband was being destroyed and produced a "very real and substantial likelihood that contraband would continue to be destroyed before a warrant could be obtained to search the motel room." *Mendez v. People,* 986 P.2d 275 (Colo. 1999).

See also People v. Baker, 813 P.2d 331 (Colo. 1991)(officers knocked on door but then forcibly entered upon smelling burning marijuana and hearing an occupant warn others inside the premises of the presence of the police; probable cause and exigent circumstances existed and warrantless entry was proper); *People v. Magoon,* 645 P.2d 286 (Colo. App. 1982) (exigent circumstances justified warrantless entry into a home where, after purchasing marijuana from a suspect, officers knocked on the door of the suspect's supplier and smelled burning marijuana); *compare People v. Aarness*, 150 P.3d 1271 (Colo. 2006) (although police smelled burned marijuana from their position at the front door, entry was not justified because all of the occupants were already outside, except for one other person upstairs asleep).

A woman called the police and reported she had been a victim of sexual assault. Officers met the victim outside the building where the assault occurred and then entered the building and arrested Crawford. A pair of women's shoes and underwear found lying by Crawford's bed were seized by the officer. The Colorado Supreme Court concluded that the police properly entered the building to secure the crime scene to prevent the destruction and removal of any evidence. *People v. Crawford,* 891 P.2d 225 (Colo. 1995).

See also People v. Wallen, 996 P.2d 182 (Colo. 1999)(officer investigating a sexual assault was admitted into Wallen's house by Wallen's wife, who then showed the officer which pair of jeans Wallen had been wearing at the time of the sexual assault; seizure of the jeans justified because there was probable cause to believe the jeans contained crime-related evidence and evidence of a sexual assault can be easily lost; Wallen's wife told the officer she planned to do laundry that day).

Compare with:

Officers went to Winpigler's residence based on information that he might be involved in the sale of illegal drugs. They contacted two individuals who were entering the residence and asked them to summon Winpigler. As the officers waited on the porch they detected the strong odor of iodine inside the residence, which the officers knew to be consistent with the manufacture of methamphetamine. After waiting approximately 30 seconds, the officers entered the house, secured the residents, and conducted a search where they found illegal drugs. The Colorado Supreme Court ruled that the officers did not inform any of the occupants that they had detected the smell of iodine and they had no particularized information that anyone inside the residence was destroying or about to destroy evidence. The warrantless entry was therefore unlawful. *People v. Winpigler,* 8 P.3d 439 (Colo. 1999).

A convenience store was robbed and the robber fled on foot. Police were informed that a "transient" was camping in a tent in the area where the robber fled, and the police located the tent on privately owned but publicly accessible land. Schafer, who owned the tent and articles contained inside, was not present when the officers arrived. The officers found the flaps of the tent closed and the entrance was zippered shut and, without a warrant, they unzipped and entered it and recovered items. Schafer was later arrested for the robbery and sought suppression of items recovered from his tent that were incriminating. The Colorado Supreme Court held that there was no probable cause to believe that the tent might contain either the robbery suspect or evidence relating to the crime. Moreover, there was no danger of immediate destruction of evidence since the occupant of the tent was not present and the officers could easily place it under surveillance while they obtained a warrant. *People v. Schafer,* 946 P.2d 938 (Colo. 1997).

Officers received a tip that Guerin was selling narcotics from his business and storing cocaine and marijuana on the business

premises. The officers conducted surveillance and corroborated the tip, and then knocked on the locked door and entered without a warrant when the door was opened. Upon gaining entry the officers observed the corner of a baggie sticking out of a partially closed drawer which was recovered and found to contain marijuana. The Colorado Supreme Court held that exigent circumstances justifying a warrantless entry and search did not exist where the suspect was unaware of police surveillance and the narcotics were not readily accessible and could not be easily destroyed. *People v. Guerin,* 769 P.2d 1068 (Colo. 1989).

Police officers were able to see in plain view marijuana plants growing in Hoffman's back yard. They then entered the yard and seized the plants. The Colorado Supreme Court reiterated that observing contraband in plain view on an individual's premises is insufficient to seize such evidence without a warrant. Both probable cause and exigent circumstances are required to justify an entry into Hoffman's yard for the purpose of seizing the plants. Here, there was no such exigency because Hoffman had not been alerted to the presence of the police. *People v. Hoffman,* 780 P.2d 471 (Colo. 1989).

a. Impoundment

It is very difficult for an officer to prove to a court that exigent circumstances existed to the extent that a search warrant could not be obtained. When exigent circumstances exist, however, an officer may enter a home and secure the premises until a warrant can be obtained.

(1) Plain View Seizures

If while securing the residence the officer sees crime-related evidence the officer may seize it. It is much better usually, however, if the officer in such circumstances does not seize the evidence but just gets a warrant for the evidence.

Examples:

Officers conducting surveillance of Bustam's condominium obtained probable cause to believe that Bustam was selling narcotics. When a suspect left Bustam's apartment he told Bustam he would be right back. Officers arrested the suspect, entered the condominium, and found one-half pound of cocaine. The officers then impounded Bustam's apartment and

obtained a search warrant. During the execution of the search warrant the officers discovered additional evidence. The court ruled that the warrantless entry to secure the premises was proper because of the emergency circumstances. Bustam expected the suspect to return in a few minutes, and if the officers had taken the time to obtain a warrant Bustam might have become alarmed at the suspect's failure to return and destroyed the evidence or fled. *People v. Bustam,* 641 P.2d 968 (Colo. 1982).

Officers made a deal with Salnajs to buy a pound of cocaine. Salnajs took the officers to the home of his supplier and, while the officers waited outside, Salnajs got the cocaine. When Salnajs gave the cocaine to the officers he was arrested. The officers then warrantlessly entered the house because Salnajs was to receive an ounce of cocaine from the suppliers for acting as a middleman and the suppliers would reasonably become alarmed when Salanjs did not immediately return with the money obtained from the purchase ($30,400.00). The court ruled that these facts created an emergency justifying the warrantless entry, and evidence observed in plain view during the impoundment was admissible. *People v. Williams,* 613 P.2d 879 (Colo. 1980).

Officers entered a motel room after hearing a domestic dispute in progress. While talking to the woman, one officer observed a ziploc baggie with a clear crystal substance, which appeared to be methamphetamine, sitting on a nightstand about six or seven feet away. The Colorado Supreme Court held that the seizure of the baggie under the plain view exception was justified, as the officers were lawfully in the room under the exigent circumstances doctrine, and the incriminating nature of the contents of the baggie was immediately apparent. *People v. Gothard,* 185 P.3d 180 (Colo. 2008).

(2) Consent

Under some circumstances a person residing in the impounded premises may prefer to consent to the search rather than wait for officers to obtain a warrant. Although such searches may appear to be "reasonable" if the person

has authority to consent, many courts may feel the circumstances are too coercive for the consent to be voluntary. Although officers should try to obtain consent from anyone present for the detention and search (in writing, if possible), the officers should *also* obtain a warrant.

(3) Seeking Consent – "Creating" an Emergency

If the officer's actions are what cause the exigency then the officer is hard-pressed to use the exigency as justification for a warrantless entry. "Courts analyzing a claim that exigent circumstances excuse officers' failure to obtain a warrant should consider the investigatory context. In a rapidly developing situation where probable cause matures in the field, there may be a greater likelihood that exigencies could arise which would make obtaining a warrant unreasonable . . Conversely, when the warrantless intrusion is 'planned' based on an investigation at another location, claims of exigent circumstances are viewed with disfavor." *People v. Mendoza-Balderama,* 981 P.2d 150 (Colo. 1999).

Example:

Officers who, after discovering illegal drugs on a suspect in a search incident to the suspects arrest, were advised that the suspect had been enroute to Winigler's house at the time of the arrest. The officers then went to Winpigler's residence. They contacted two individuals who were entering the residence and asked them to summon Winpigler. As the officers waited on the porch they detected the strong odor of iodine inside the residence, which the officers knew to be consistent with the manufacture of methamphetamine. After waiting approximately 30 seconds, the officers entered the house, secured the residents, and conducted a search where they found illegal drugs. In holding that the officers did not demonstrate a real and immediate danger that contraband would be destroyed, the court recognized that the situation prompting the officer's concern was created by the officers themselves when they chose to send other residents into the house to summon Winpigler. *People v. Winpigler,* 8 P.3d 439 (Colo. 1999).

Officers with probable cause to search Shuey's home knocked on his door and sought his consent for the

search. Shuey declined. The officers then impounded the premises, got a warrant and found crime-related evidence. The California court ruled that the officers created their own exigency by seeking consent rather than a warrant. If the evidence would not have been found except for the illegal entry to "secure" the house, the evidence would be suppressed. *Shuey v. Superior Court,* 106 Cal. Rptr. 452 (Cal. App. 1973).

Obviously, the officer who seeks consent instead of obtaining a warrant must understand that if the resident refuses the evidence will probably be gone by the time the officer returns with a warrant.

Example:

The victim told officers that office equipment had been stolen from his office. While investigating, an officer saw distinctive fresh footprints at the scene. The victim also told the officer that he had seen Papez "casing the place." The officer went to Papez's residence and saw the same footprints leading into the residence. The officer contacted Papez at the residence and noticed that Papez's shoes matched those which left the prints. The officer then asked for consent to search Papez's home, but the request was denied. The officer then left and returned with a search warrant, but failed to find any crime-related evidence in the residence. *People v. Papez,* 652 P.2d 619 (Colo. App. 1982).

(4) Detention of Persons Present

It is usually a reasonable seizure to detain residents of the premises to be searched. *Michigan v. Summers,* 452 U.S. 692 (1981). Visitors who cannot be immediately tied to crime-related activity should not be detained, unless the officer has reasonable concerns for his or her safety, or the safety of others. It is advisable to attempt to obtain everyone's consent for a brief detention.

(a) Detention of Persons Present – Time Limitations

It may be proper to detain occupants of the residence while obtaining a search warrant, especially if the

subject of the search is narcotics. The problem is: how long may the detainees be held? There is no certain time limitation, other than the "reasonableness" standard underlying the Fourth Amendment. A good rule of thumb, however, would be that if the search lasts longer than twenty or thirty minutes the detainees should be allowed to leave unless probable cause to arrest has been developed.

Example:

Police were summoned by McArthur's wife to keep the peace while she removed her belongings from McArthur's trailer. After the wife removed her belongings she suggested that police check the trailer because "[McArthur] had dope in there." An officer then requested permission to search the trailer, but McArthur refused. The officer then detained McArthur outside the trailer while another officer left to obtain a search warrant. The officer returned approximately 2 hours later with a warrant, and drugs were thereafter found during the search of the trailer. The United States Supreme Court held that the police had probable cause to believe that contraband was inside the trailer; the police had good reason to fear that McArthur might destroy the evidence if he were not restrained; the police made reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy; and the restraint was imposed for a limited period of time. *Illinois v. McArthur,* 531 U.S. 326 (2001).

(b) Crime Scenes

An officer may secure premises which are the scene of a recent crime of violence or burglary. Where emergency circumstances exist an officer may also "search" the crime scene. However, once an officer has "secured" the scene and it appears that a resident may have committed a crime, the officer should obtain a warrant or consent to search further.

Examples:

Officers searched a fire scene without a warrant long after the fire was extinguished and there was probable cause to believe the fire was started by an arsonist. The United States Supreme Court ruled that the evidence obtained in the search was inadmissible against the owner. *Michigan v. Tyler,* 436 U.S. 499 (1978).

Elkhatib leased a store which he burned at night. Arson investigators could not properly investigate the cause of the fire because of the heat and darkness, so they returned the next day and asked Elkhatib for his consent to investigate. Elkhatib agreed, and the investigators recovered incriminating evidence against Elkhatib. The Colorado Supreme Court ruled that the consent search was proper, and the evidence recovered was therefore admissible. *People v. Elkhatib,* 632 P.2d 275 (Colo. 1981).

(c) Entering Other Rooms

An officer who is lawfully in one portion of a house may not enter other portions to search for evidence without a warrant, consent or emergency.

Example:

Officers, while making a lawful arrest for narcotics in the living room, heard a toilet flush. An officer ran into the bathroom and caught a suspect trying to "flush" cocaine. The court ruled that the officer was justified in his belief that drugs were being destroyed and that exigent circumstances existed to enter the bathroom. Therefore, the evidence was admissible. *People v. Williams,* 613 P.2d 879 (Colo. 1980).

3. Suggested Techniques

a. Before entering a home under the emergency theory you should think, "What am I going to say when I'm later asked (by the prosecutor, defense attorney or judge) why I did not obtain a warrant?"

b. After entry, you must limit your search to the emergency being investigated. However, if you discover evidence in plain view creating another emergency, you may investigate areas in the premises pertinent to that emergency as well.

c. After the emergency has passed or the scene is secured, you must then obtain consent or a warrant to search further.

C. Searches Incident to Arrest

An officer may search for evidence in the area around an arrestee when the suspect is arrested in a home.

Example:

Officers arrested Chimel in his home on a warrant for burglarizing a coin shop. The officers asked Chimel for permission to "look around," and he refused. The officers then searched Chimel's entire house "incident to arrest" and found many of the stolen coins. The United States Supreme Court ruled that because the officers found the coins outside the area where the arrest took place the search was unconstitutional. Therefore, the coins were inadmissible at trial. *Chimel v. California,* 395 U.S. 752 (1969).

1. Reason for the Law

The reason an officer may search incident to arrest is to prevent the suspect from grabbing a weapon or destroying evidence. The courts have been very lenient in the application of this rule as long as the officer searches only areas near the suspect as soon as possible after the arrest.

2. Contemporaneous Requirement

The search incident to an arrest on premises must be conducted contemporaneously with (at about the same time as) the arrest. After the arrestee has been transported from the scene of the arrest an officer will not be able to justify a search of the area where the suspect was arrested as a search incident to arrest.

3. Custodial Arrest Requirement

Arrests fall into two categories: custodial and non-custodial. A custodial arrest refers to a police officer's seizure of a person for the purpose of taking the person to the station house for booking procedures and the filing of criminal charges. A custodial arrest is prohibited if the

applicable statute mandates issuance of a notice or summons and provides for release upon the signing of a promise to appear. In such circumstances, the arrest is non-custodial, which is made on probable cause but involves only a temporary detention of the suspect pending issuance of the notice or summons.

A search incident to a custodial arrest is quite broad and need not be limited to a mere pat-down of the arrestee's outer clothing but may extend to pockets and other containers, open or closed, found on the person of the arrestee or within his or her immediate reach. A search incident to a non-custodial arrest is limited to (1) a pat-down for weapons and (2) a search for instrumentalities or evidence of the specific crime for which the officer had probable cause to make the arrest.

Example – Custodial Arrest

Triantos was arrested for possession of drug paraphernalia, a class 2 petty offense. Following the arrest officers conducted a full search of his person incident to the arrest and discovered a bag of methamphetamine in his pocket. A statute provided that persons arrested for class 2 petty offenses may either be given a penalty assessment notice and release or "taken before a judge of the county court" if the officer believed he or she would not comply with the terms of the penalty assessment notice. The Colorado Supreme Court held that the statute provided the officer with the choice of conducting either a custodial or a non-custodial arrest, and the officer's decision to conduct a custodial arrest in these circumstances empowered him to conduct a full search incident to that arrest. *People v. Triantos,* 55 P.3d 131 (Colo. 2002).

Example – Non-Custodial Arrest

Bland was arrested for possession of less than one ounce of marijuana. Pursuant to the statute, the officer was required to issue Bland a summons to appear in court, but could not subject him to a full custodial arrest. Incident to the arrest, the officer conducted a full search of Bland's person and discovered a bag of cocaine taped to his leg. The Colorado Supreme Court concluded that, in the context of a non-custodial arrest, officers were entitled to make a limited search including a pat-down search for weapons and a search for evidence of the specific crime for which there was probable cause to make the arrest, which in this case included the right to search Bland's clothing. *People v. Bland,* 884 P.2d 312 (Colo. 1994).

Requires Lawful Arrest

A search incident to arrest presupposes that the arrest was lawful in the first instance. If probable cause to arrest does not exist, any search incident to that arrest will be inadmissible.

Examples:

Officers responding to a convenience store robbery obtained a vague description of the suspect from the victim but did not locate a suspect upon arriving on the scene. An officer decided to check out a nearby motel and, from a distance of 50-feet observed a man generally matching the description in one of the motel rooms talking to a woman who was outside the room. When the woman saw the officer she closed the door to the room. The officer then demanded entry into the room, where he found four men who all generally matched the descriptions. The men were all removed from the room and Lewis was arrested. The officer then searched the room and found a gun. The Colorado Supreme Court held that the officer lacked probable cause to believe that Lewis was the robber or that evidence of the robbery was inside the motel room. Lacking probable cause to arrest, the discovery of the gun could not be justified as a search incident to a lawful arrest. *People v. Lewis,* 975 P.2d 160 (Colo. 1999).

While investigating the defendant for illegal drug activity, the police discovered two active warrants for the defendant's arrest. Several officers entered the defendant's home to arrest him on the warrants. While there, the officers saw evidence of a methamphetamine laboratory in plain view, which was later used to secure a search warrant for the home. The Colorado Court of Appeals held that the officers were lawfully on the premises pursuant to the warrants, and their subjective intentions had no bearing on the validity of the plain view search incident to his arrest. *People v. Miller*, 94 P.3d 1197 (Colo. App. 2004).

4. Where the Officer May Search

An officer may search for evidence within the arrestee's "immediate control," including those areas where the arrestee is permitted to move around the house. An officer may also seize evidence beyond the "immediate control" of the arrestee at the time of the arrest when the evidence is in plain view and the incriminating nature of the evidence is immediately apparent.

a. Searches of Closed Containers

An officer may search closed containers incident to arrest if the officer can prove that the suspect could have obtained access into the closed container at the time of the arrest.

Example:

Officers arrested Casias at his home. In a search incident to the arrest the officers discovered a small tin-foil package in Casias's pocket. The officers opened the package and discovered heroin. The court ruled that the package could be searched incident to the arrest, and it was therefore admissible. *People v. Casias,* 563 P.2d 926 (Colo. 1977).

Officers were let into Hufnagel's residence to arrest him on a warrant. They found Hufnagel lying on the couch and told him he was under arrest for selling cocaine. The officers handcuffed him with his hands behind his back. In the meantime, the sheriff searched the immediate area around Hufnagel for weapons. Concerned by a glance Hufnagel gave towards an end table, the sheriff opened the drawer in the table and found several baggies containing cocaine. The Colorado Supreme Court upheld the search as incident to arrest, noting that handcuffing an arrestee does not completely eliminate his ability to reach for and grab weapons or other items. The court also noted that the search was contemporaneous with the arrest and was limited to the area immediately around the suspect in an area where he could have lunged for a hidden weapon. *People v. Hufnagel,* 745 P.2d 242 (Colo. 1987).

b. Plain View Seizures

An officer may seize crime-related evidence which is where the suspect is arrested if the officer sees the evidence from the place where the suspect is arrested. For example, if an officer with an arrest warrant lawfully arrests the suspect in the suspect's living room and then observes marijuana and scales on a table in the kitchen, it is then lawful for the officer to enter the kitchen and seize the contraband.

c. Movable Areas of Control

An officer may not move an arrestee around to "create" a larger area where he or she may then search incident to arrest. *United States v. Griffin,* 537 F.2d 900 (7th Cir. 1976). If, however, an arrestee wishes to move (and the officer permits the movement) an officer may search the areas where the arrestee moves.

Example:

An officer arrested a college student, Overdahl, for underage possession of alcohol. The student asked the officer for permission to return to his room to obtain identification. The officer agreed, and as he escorted Overdahl to his dormitory room he observed marijuana in plain view. The United States Supreme Court held that an officer has the routine power "to monitor the movements of an arrested person, as his judgment dictates, following the arrest." Therefore, the evidence was admissible. *Washington v. Chrisman,* 455 U.S. 1 (1982).

d. Body Searches

An officer may under limited circumstances conduct a "body search" of an arrestee incident to arrest. Such searches are normally limited to searches for and seizures of evidence which can be seen upon inspection of the outer body of the arrestee. *See, e.g., Cupp v. Murphy,* 455 U.S. 1 (1982)(fingernail scrapings obtained from suspect incident to an arrest on probable cause was proper). However, it is highly advisable to obtain court approval for such body searches by obtaining a court order pursuant to Crim. P. 41.1 in advance of any sort of intrusive body search.

5. Arrests Outside the Home

When an officer arrests a suspect outside a home he may not then enter the home and conduct a search incident to the arrest. *Vale v. Louisiana,* 399 U.S. 30 (1970).

Note: The officer may in extreme circumstances enter the home if he or she can convince the court that there was a reasonable basis to believe that armed suspects were in the house who might endanger the officer's safety during the arrest. *See* Section III(B)(1)(b), Protective Sweeps.

6. Suggested Techniques

You should consider the following suggestions when you arrest a suspect on premises:

a. Always search "unsealed" containers on the arrestee's person or within the arrestee's reach.

b. Never search incident to arrest after the arrestee has been removed from the arrest scene.

c. Never "arrange" the arrest to permit a more broad or better search incident to the arrest.

d. Never move the arrestee around just to broaden the search incident to arrest.

D. Plain View Seizures

An officer may seize evidence which is observed in "plain view" if:

1. the officer is lawfully present on the premises and in the area where the evidence is seen;

2. the officer has probable cause to believe the evidence is crime-related (or the incriminating nature of the evidence is immediately apparent); and

3. the officer has a lawful right of access to the object.

There is no requirement, however, that the discovery of the evidence be "inadvertent."

1. Lawful Presence

An officer must be lawfully present (lawful entry) in the home for a plain view seizure to be constitutional. Furthermore, the officer must be lawfully present in the particular area of the home where the evidence is discovered.

a. Lawful Entry

If the legal theory for the officer's entry is insufficient, the plain view seizure is unconstitutional. This means that the evidence will

be suppressed if (1) the warrant is ruled defective; (2) the consent is ruled invalid; or (3) the exigency did not exist.

(1) Defective Warrant

If an officer enters a residence under the authority of a defective warrant, normally all crime-related evidence, including evidence discovered in plain view, is inadmissible in court.

(2) Invalid Consent

If an officer enters a residence with consent and the consent is ruled invalid, normally all crime-related evidence, including that evidence discovered in plain view, is inadmissible in court.

(3) No Exigency

If an officer enters a home under the emergency exception and a court rules that no emergency existed, normally all crime-related evidence, including the evidence discovered in plain view, is inadmissible in court. In addition, plain view seizures that occur after the emergency has been resolved are unconstitutional.

Example:

Officers had probable cause to believe the residents of a certain residence were manufacturing methamphetamine. Allison, a "known and convicted methamphetamine trafficker" left the residence and was arrested. Officers then entered the premises and, while securing the premises, saw crime-related evidence. The court ruled that there was no exigency and the officers' entry of the premises was unconstitutional. Therefore, the evidence discovered in plain view during the impoundment was suppressed. *People v. Turner,* 660 P.2d 1284 (Colo. 1983).

(4) Failure to Knock, Announce and Wait

If an officer enters a home without knocking, announcing their presence, and waiting (except under exceptional circumstances), evidence discovered in plain view will be suppressed.

Example:

Officers searched a suspect's home with a search warrant and found crime-related evidence. The officers asked the suspect's parents where the suspect was, and the parents stated that he might be at "The Hilton" (a private residence). When the officers arrived at the residence they found the front door ajar, so they entered and knocked on the living room door from the foyer. A resident said "come in." The officers then saw a different suspect with marijuana in her hand, and they arrested her. The court ruled that the officers unlawfully entered the house because they failed to knock and announce their presence at the front door before "forcibly" entering the house. Therefore, the evidence observed was suppressed. *People v. Godinas,* 490 P.2d 945 (Colo. 1971).

b. Lawful Presence in a Particular Area

Not only must the initial entry be valid, but an officer must also be able to show the legal reason why he or she was in the particular area where the plain view seizure was made.

(1) Warrants

The Fourth Amendment specifically states that a search warrant must describe "the place to be searched." If an officer searches areas not described in the warrant or in areas described in the warrant which could not contain the crime-related evidence, the evidence seized in those places will be inadmissible in court. For example, if an officer has a warrant to search for a television and looks into a drawer and sees narcotics, the court will suppress the plain view seizure of the narcotics because the evidence could not possibly be in the area searched.

Examples:

While investigating a homicide officers obtained a search warrant to search Cummings's premises for, among other things, evidence of "blood stains." They entered Cummings's bedroom and seized a jar of bullets sitting on the dresser next to the bed, and

entered a garage and seized a rifle which was wrapped in black mesh material. The court ruled that the officers were in areas authorized by the warrant, so the observations and seizures of the evidence were lawful. *People v. Cummings,* 706 P.2d 766 (Colo. 1985).

While conducting a search for firearms and ammunition pursuant to a warrant, officers discovered drugs and drug paraphernalia in a pair of pants found in the home, and in the kitchen cabinets. The Colorado Supreme Court held that these items were lawfully seized under the plain view exception. The court reasoned that a gun or bullet could have been found in the defendant's kitchen cabinets or pants pockets. Therefore, the search of those areas was proper and the drug items located in plain view were validly seized. *People v. Koehn*, 178 P.3d 536 (Colo. 2008).

(2) Consent

Even when an officer obtains consent to lawfully enter a home, the officer must stay within the "scope" of the consent. This means that the officer must ask for and obtain consent to search the areas of the home where he or she goes.

Examples:

Based on a tip officers went to a motel and asked Dumas if she would consent to a search of her motel room for drugs, contraband, and weapons. She agreed, and officers discovered a shoe box containing over $1,000 in postage stamps. The officers also found a checkbook under a mattress in the name of Anita Foxworth, and inside the checkbook the officers found sales receipts for the stamps. Dumas later admitted to purchasing the stamps with the invalid checks. The Colorado Supreme Court held that it was objectively reasonable for the officers to conclude that the scope of Dumas's consent included all items likely to contain drugs, weapons or contraband, and the checkbook was one such item. The receipts for the stamps, found in plain view, were therefore discovered within the scope of Dumas's consent. *People v. Dumas,* 955 P.2d 60 (Colo. 1998).

Police were admitted into Trusty's aunt's apartment by an apartment manager who had reason to believe unauthorized persons were inside. The aunt had asked the manager to call police if any unauthorized persons entered the apartment. While investigating the trespass complaint officers found Trusty in the shower. Trusty asked if he could get dressed and pointed to a bedroom where his clothing would be found. An officer went to the bedroom, found a pair of pants that appeared to belong to Trusty, and then felt them for the presence of any weapons. In the process of checking for weapons the officer could see into a pocket and observed crack cocaine. The Colorado Court of Appeals held that, under these circumstances, the evidence was legitimately discovered in plain view in a proper pat-down search of Trusty's pants. *People v. Trusty,* 53 P.3d 668 (Colo. App. 2002).

Zamora allowed police inside his apartment after they told him they were investigating a domestic dispute next door and they wanted to look at the layout of his apartment. While in Zamora's apartment, officers observed through an open bedroom door an unfilled waterbed frame which had been described by a sexual assault victim. The Colorado Court of Appeals held that, although a consensual search maybe limited, officers who were lawfully on the premises, albeit by somewhat deceptive means, could consider the incriminating waterbed frame because it was in plain view. *People v. Zamora,* 940 P.2d 939 (Colo. App. 1996).

Billington was writing a script for the victim and forged checks on the victim's account. An officer went to Billington's hotel room where Billington gave written consent "to enter my room . . . and recover srip [sic] and papers that belong to [the victim] pertaining to show [sic] we are producing." The officer seized a bundle of papers which appeared to belong to the victim, among which were three check stubs for the forged checks. The court ruled that while looking through the papers "the officer was not required to close his eyes to the incriminating evidence plainly visible to him." The stubs were therefore admissible at trial. *People v. Billington,* 552 P2d 500 (Colo. 1976).

Officers responded to a motel based upon a complaint of suspicious drug activity in a room registered to defendant. The defendant consented to the officers' entry, and while inside, they observed a man place something in the nightstand drawer and partially close the drawer, leaving an opening of about an inch and a half. The officer walked to the nightstand, and, without moving anything, looked into the drawer and saw a syringe with clear liquid in it, which was later identified as liquid amphetamine. The Court of Appeals held that the seizure of the syringe was valid because the officer was entitled to move about the room during the conversation, and the syringe was observed without moving anything. *People v. Bostic*, 148 P.3d 250 (Colo. App. 2006).

(3) Exigencies/Emergencies

An officer who enters a home under exigent circumstances should not search for or seize evidence unless it is immediately necessary to use the evidence either (a) to catch the suspect; (b) to prevent the destruction of the evidence, or (c) to protect the officer or others. It is far better when an officer sees evidence in plain view to impound the premises and obtain a warrant before seizing the evidence.

Examples:

Officers entered Kluhsman's residence after learning that he was "acting crazy," were told by him that he had killed several people and that people were in the house, and observing blood and injuries on Kluhsman's body. The officers entered the residence to look for injured people and then observed bomb-making materials in plain view. The officers then conducted a thorough search of the residence and found bombs, guns, and additional bomb-making materials. The Colorado Supreme Court held the officers were justified in initially entering the residence to look for injured people, and following that entry the officers discovered evidence in plain view which created a second colorable claim of emergency (i.e., the possibility of volatile explosives) which provided justification to search any area in the house where explosives could be located. *People v. Kluhsman,* 980 P.2d 529 (Colo. 1999).

The fire department was called to a fire at Harper's trailer home. Firefighters entered through the front door and extinguished the fire in Harper's bedroom. The smoldering mattress and box spring were removed and, in removing it, firefighters discovered a bucket of marijuana. The Colorado Supreme Court reversed the trial court's suppression order, holding that the entry was justified by the emergency doctrine and the marijuana was discovered in plain view. *People v. Harper,* 902 P.2d 842 (Colo. 1995).

2. Apparently Crime-Related

In addition to being "lawfully present," an officer must have probable cause to believe the evidence is crime-related in order to seize it. If the officer has reasonable suspicion but less than probable cause, the evidence may be inspected more closely. However, in doing this the officer must remain in areas where he or she is "lawfully present," and he or she must not move any items to enable closer inspection.

a. Probable Cause

"Justification for a warrantless seizure is nothing more and nothing less than probable cause to believe that the article to be seized is connected with criminal behavior." *People v. Franklin,* 640 P.2d 226 (Colo. 1982).

Examples:

Based on a tip officers went to a motel and asked Dumas if she would consent to a search of her motel room for drugs, contraband, and weapons. She agreed, and officers discovered a shoe box containing over $1,000 in postage stamps. The officers also found a checkbook under a mattress in the name of Anita Foxworth, and inside the checkbook the officers found sales receipts for the stamps. Dumas later admitted to purchasing the stamps with the invalid checks. The Colorado Supreme Court held that the seizure of the postal receipts was justified by the plain view doctrine because, given the officers' discoveries the incriminating nature of the receipts was immediately apparent. *People v. Dumas,* 955 P.2d 60 (Colo. 1998).

Narcotics officers introduced a drug-sniffing dog to the luggage compartment of a bus that had arrived at a routine

stop, and the dog "alerted" to a bag with a uniquely numbered claim tag denoting a Las Vegas, Nevada origin and Detroit, Michigan destination. Although Najjar was the only passenger destined to Detroit, Michigan, he (and all other passengers) denied that the bag was his, so the officer opened it and discovered narcotics. Najjar then consented to a search of his person and his zip-up hip bag, where the officers found and seized a claim ticket that matched the tag affixed to the bag containing narcotics. The Colorado Supreme Court concluded under the circumstances the incriminating nature of the claim ticket was immediately apparent to the officers and was properly seized under the plain view doctrine. *People v. Najjar,* 984 P.2d 592 (Colo. 1999).

Police officers investigating a murder contacted White's girlfriend at her home. During the course of the conversation the girlfriend began talking about the handcrafted furniture in the house, and then invited the officers to her bedroom to see more such furniture. When the police entered the bedroom they saw a pair of tennis shoes on the floor, one of which was lying on its side. An officer noticed that the shoes had blood on them and observed that the sole pattern appeared to match the shoeprints left at the scene of the murder. The girlfriend stated that the shoes belonged to White. The shoes were seized, and forensic testing later revealed that the blood on White's shoes matched the victim's blood. The Court of Appeals held that the officers observed the shoes after a lawful entry into the bedroom (they were invited in) and the incriminating character of the shoes was immediately apparent to the officer. Moreover, the incriminating character of the shoes were apparent without the necessity of the officers picking them up and inspecting them more closely. The plain view seizure was therefore upheld. *People v. White,* 64 P.3d 864 (Colo. App. 2002).

Officers obtained a search warrant for Bustam's condominium in order to search for narcotics. In the course of the search they found $10,779.00 in cash. An officer later testified that in his experience individuals who deal in narcotics "often carry large sums of cash for the purpose of making change in transactions involving narcotics." The court ruled that the officer's testimony was sufficient to show that the money was crime-related. *People v. Bustam,* 641 P.2d 968 (Colo. 1982).

An officer serving a warrant for stolen property looked into a crockpot and found a "United Bank of Boulder" bag. The officer discovered and seized a gold watch, a silver watch, three rings and $46 inside the bag. Franklin was later charged with insurance fraud with respect to a claim he made for the gold watch. The court ruled that an "officer must have present knowledge of facts which establish a reasonable nexus between the article to be seized . . . and criminal behavior." Because that nexus existed in this case, the evidence was admissible. *People v. Franklin,* 640 P.2d 226 (Colo. 1982).

While conducting a search pursuant to a warrant authorizing the seizure of evidence of child pornography, the officers observed numerous items relating to narcotics use. The Colorado Supreme Court held that although the warrant did not establish probable cause to search for narcotics, the narcotics and narcotics equipment were plainly visible to the officers during the course of their valid search for pornography, and it was immediately apparent that those items were associated with criminal activity. *People v. Alameno,* 193 P.3d 830 (Colo. 2008).

In executing a search warrant to uncover possible evidence of drug activity at the defendant's house, police came across a photograph that depicted two young females engaged in sexually explicit conduct. The police seized the photograph and subsequently determined that one person depicted in the photograph was a fifteen-year-old girl. The Colorado Court of Appeals held that the seizure of the photograph was lawful under the plain view exception. The court concluded that it was "immediately apparent" that the photograph depicted a minor and therefore illegal activity because one of the females had a very youthful face, underdeveloped breasts, and a lack of pubic hair. *People v. Campbell,* 94 P.3d 1186 (Colo. App. 2004).

Compare with:

While executing a search warrant which authorized a search for narcotics, paraphernalia, and indicia of ownership or occupancy of the apartment, officers found checks, a social security card, and other items of identification in names other than the individuals known to be living in the apartment. Although the officers could not determine whether any of the items were stolen, they were nonetheless seized as evidence.

Pitts was later charged with robbery based on a series of purse snatchings, based in part on the items recovered from his apartment. The Colorado Supreme Court upheld the trial court's finding that there was no showing of a reasonable belief that the items were incriminating when initially discovered and seized. The items were therefore inadmissible. *People v. Pitts,* 13 P.2d 1218 (Colo. 2000).

Officers obtained consent to search Thiret's home and during the search they seized a photograph of a home and two rolls of film that were in plain view. One reason the court expressed for suppressing the evidence was that there was no "reasonable nexus between these articles and criminal activity." *People v. Thiret,* 685 P.2d 193 (Colo. 1984).

b. Reasonable Suspicion

Sometimes an officer may see an item in plain view which he or she reasonably suspects, but has less than probable cause to believe, is crime-related. In this situation, the officer may take a closer look. However, the officer is restricted to observations that can be made from the places he or she otherwise had a lawful right to be. Moreover, the officer may not undertake any "search" in an effort to establish probable cause regarding the suspicious item. This means the officer may not pick up or move the object to inspect it more closely. *See Arizona v. Hicks*, 480 U.S. 321 (1987)(seizure in plain view appropriate where police have probable cause to believe object is incriminating; a police officer's act of moving stereo equipment to reveal serial numbers did not fall within the plain view exception to the warrant requirement).

3. Inadvertence

Inadvertence means "by accident." While older cases suggest that an object seized under the plain view doctrine must have initially been observed inadvertently, this is no longer the rule. *People v. Najjar,* 984 P.2d 592 (Colo. 1999).

4. Suggested Techniques

a. You may look into homes and observe crime-related evidence if you can see the evidence from a position where the public would stand (although you need a warrant in order to enter and seize the evidence).

b. If you have entered the home under the authority of a valid warrant, consent or emergency you may seize crime-related evidence as long as you do not exceed the scope of the warrant, consent or emergency.

c. Never touch, move, or seize evidence unless and until you can show why you are convinced it is connected to a crime.

E. Consent

Consent to enter premises occurs when an occupant voluntarily waives his or her Fourth Amendment rights to the area to be searched. An officer should almost always seek consent to enter premises no mater how sure he or she is that another valid theory for the invasion of privacy exists. It can never hurt and may help a great deal if the other theory is ruled invalid by the courts. *See People v. Brazzel,* 18 P.3d 1285 (Colo. 2001)(trial court erroneously suppressed evidence on grounds that since it would have been "easy" for officers to obtain a warrant they should have obtained one rather than seeking voluntary consent to search).

1. Purpose of the Search

An officer seeks consent to enter a home in order to search either for persons, evidence or both. There is a slight difference, as discussed below, depending upon whether the officer is looking for persons or for evidence.

a. Entries to Search for Persons

An officer should always seek consent to enter a residence to search for persons, whether the officer intends to arrest or just to locate or talk to someone inside. However, an officer should usually not rely on consent alone, but should have another legal theory for entry in addition to consent.

Example:

Officers told McCall's parents that they wanted to talk to McCall as a witness when in fact the officers planned to arrest McCall. McCall's parents gave the officers consent to enter the home. The court ruled that the officers' "preconceived deception as to the purpose" rendered the consent involuntary. As a result of the illegal entry, the evidence was suppressed. *People v. McCall,* 623 P.2d 397 (Colo. 1981).

Note: An arrest warrant would have saved this case.

Whenever there is no exigency or emergency, officers who want to enter in order to arrest should get an arrest warrant (and a search warrant if it is not the suspect's house) in addition to consent.

b. Entries to Search for Evidence

Officers should always seek consent to search for evidence even when the officer has other theories for the search. An officer should rarely, if ever, seek consent to search instead of a warrant. The reason is that if the resident refuses, an officer may not be allowed to impound the premises while seeking a warrant to search the residence as the officer "created his own emergency."

Note: The United States Supreme Court has held, however, that it may be reasonable to detain an occupant while a warrant is being obtained if the officers act reasonably and promptly. *Illinois v. McArthur,* 531 U.S. 326 (2001).

2. Legality of Consent

In order to be valid, consent must be given (1) voluntarily and (2) by a person with authority to consent.

a. Voluntariness

In order for a consent search to be valid the consent must be voluntarily given. A consensual search is voluntary if it is the product of an essentially free and unconstrained choice by its maker and not the result of circumstances which overbear the consenting party's will and critically impair his or her capacity for self-determination. A consensual search is involuntary if it is the result of duress or coercion, express or implied, or any other forms such as undue influence, promises, threats or intrusive police conduct. Courts are required to examine the "totality of the circumstances" in determining whether consent has been provided voluntarily. This involves considering the individual circumstances of the consenting party (e.g., age, education, perceptions, etc.), the circumstances of the search (e.g., location, duration, etc.), and the conduct of the officers.

Note: The Colorado Court of Appeals recently stated that where there was "no credible objective evidence of coercive police conduct, there was no need to consider

the particular characteristics" of the consenting party. *People v. Miller*, 94 P.3d 1197 (Colo. App. 2004).

The following are some factors which tend to show a consent search to be voluntary or involuntary. Bear in mind, however, that no single factor will or will not determine whether consent is voluntary; the circumstances must be examined in their totality. In addition, "the essential consideration in determining voluntariness of a consent to search is the impact of overbearing, coercive, or deceptive police conduct on a person with the knowledge and particular characteristics of the defendant. *People v. Magallanes-Aragon,* 948 P.2d 528 (Colo. 1997) .

(1) Factors that Tend to Show Voluntariness

The following are factors which tend to suggest that consent was given voluntarily:

(a) Officer is Courteous and Respectful

Example:

Officer's conducting a "knock-and-talk" knocked on the door to the defendant's motel room. The defendant answered it and started to step outside the room to talk. When asked by the officer whether they could speak with her inside, she stepped back, held the door open, said "sure," and allowed the officers into the room. The Colorado Court of Appeals held that the defendant's consent was voluntary under these circumstances. *People v. Bostic*, 148 P.3d 250 (Colo. App. 2006).

(b) Fourth Amendment Warnings and Waiver

Even if the consenting party is in custody an officer does not have warn the suspect that he or she can refuse consent. *Ohio v. Robinette,* 519 U.S. 33 (1996)(Fourth Amendment does not require that a lawfully seized defendant be advised that he is "free to go" before consent to search will be recognized as voluntary). However, if an officer does tell the consenting party of the right to refuse, that will be a strong factor establishing voluntariness of the consent.

(c) Signed Written Consent

When a person signs a written "consent to search" form it is a very strong indication of voluntariness. Conversely, the consenting party's refusal to sign such a written consent form is a factor that tends to show the consent was involuntary.

(d) Fifth Amendment Warnings and Waiver

An officer is not required to give a suspect a *Miranda* warning before seeking consent, even if the suspect is in custody. In addition, a suspect who asserts his Fifth Amendment rights may still provide a valid consent to search. *People v. Phillips,* 594 P.2d 1053 (Colo. 1979). However, when a suspect has been advised of his *Miranda* rights and then consents to a search, this tends to indicate that the consent was voluntary. The inference is even stronger if the suspect waives his Fifth Amendment rights before consenting to a search.

(e) Consenting Party Admits Guilt Before Consent Given

A suspect who confesses to the crime and then gives consent is more likely to have given voluntary consent to search, unless there are indications that the confession was not voluntary. *See People v. Benson,* 124 P.3d 851 (Colo. App. 2005) (during a phone conversation with the police officers, the defendant had stated that he and the officers "both knew there was marihuana going on at that residence").

(f) Consenting Party Aids in the Search

When a person consents to the search of his or her premises and then helps the officers in the search the courts are more likely to rule that the consent was given voluntarily. *See People v. Benson,* 124 P.3d 851 (Colo. App. 2005) (defendant led the officers to the hidden room containing the marihuana plants and the freezer containing the marihuana buds).

Note: If an officer asks the person to perform the task, this fact tends to show the consent is involuntary: "Would you mind opening the

trunk?" sounds more like a command than a request to many courts.

(g) Consenting Party is Intelligent or Sophisticated

An officer who can prove that the consent was given by an intelligent or "criminally sophisticated" person is more likely to convince a court that the consent was given voluntarily. *See United States v. Price,* 599 F.2d 494 (2nd Cir. 1979)(college education); *United States v. Wasserteil,* 641 F.2d 704 (9th Cir. 1981)(sophisticated businessman)

Examples:

Immediately after Drake's arrest outside his motel room, officers asked him if they could search his room. Drake gave verbal consent. Officers then conducted a quick protective search but did not look for evidence. After Drake was taken to the police station he gave his written consent for his room to again be searched, and evidence was then obtained. The court found that the totality of the circumstances surrounding Drake's consent indicated no element of coercion, duress, or false promise and the consent to search was freely and voluntarily given. *People v. Drake,* 785 P.2d 1257 (Colo. 1990).

Uniformed officers knocked at Milton's door and, after introductions, asked if they could come inside to discuss an incident that had happened earlier that evening. Milton said, "Sure," and stated that he knew what their inquiry regarded. The officers did not threaten or use force against Milton, nor did they conceal the true nature of their visit. There was no evidence that Milton was impaired, and after considering the totality of the circumstances the Colorado Supreme Court found that Milton's consent was freely and voluntarily given. *People v. Milton,* 826 P.2d 1282 (Colo. 1992).

Officers obtained a warrant to search Gillis's residence for stolen property but, during an initial protective search, they realized that the address on

the warrant was incorrect. The search was terminated, and Gillis refused to consent to a search. The officers then told Gillis that he must wait outside while the warrant was amended. A few minutes later Gillis told the officers to "go ahead and search." The court of appeals held that the police did not use improper or coercive procedures after learning that the address on the warrant was incorrect. The search was not invalidated by the officers having informed Gillis that they would obtain a corrected warrant if he did not give them permission to search or by telling him that he would have to wait outside while the amended warrant was obtained. *People v. Gillis,* 883 P.2d 554 (Colo. App. 1994).

(3) Factors Which Tend to Show Involuntariness

(a) Force, Threats, Weapons

If the evidence tends to show any coercion before or during the seeking of consent, the court will usually rule that the consent was involuntary. *E.g., United States v. Jones,* 641 F.2d 425 (6th Cir. 1981)(large number of officers with guns drawn).

Any threats used by an officer in order to get the person to consent will also tend to show that the consent is involuntary. However, the courts have tended to find that an officer's statement that a search warrant will be obtained if consent is not given does not necessarily render consent involuntary, especially if probable cause to search exists. *See People v. Hancock, 525 P.2d 435* (Colo. 1974) (evidence demonstrated that defendant's wife consented to search of their home and did so freely and voluntarily, even though told that a search warrant would be sought if she did not consent).

(b) Custody

"Custody alone has never been enough in itself to demonstrate a coerced . . . consent to search." *United States v. Watson,* 423 U.S. 411 (1976). Custody, however, can be an important factor in a court's determination of voluntariness.

(c) Promises, Deception

Promises made to a person in order to obtain consent may result in involuntariness. In addition, deception by officers, particularly when the deception involves the purpose of the search, will usually result in the court's ruling the consent was involuntary.

i. Deception as to Identity

An undercover officer may usually obtain voluntary consent to enter by concealing his or her identity only if the consenting party invites the officer into the premises to commit a crime (e.g., narcotics deals; buying or selling stolen property).

The Colorado Supreme Court has not discussed whether officers may enter premises by deception just to look around for crime-relate evidence. The following are a series of situations decided by other courts:

a. Officer posing as an apartment manager seeking entrance to inspect the premises (surely involuntary).

b. Officer poses as a potential home buyer seeking entrance to buy the suspect's home. *State v. Poland,* 645 P.2d 784 (Ariz. 1982) (close case but involuntary)

c. Officer seeks employment as a chauffeur, handyman, etc. *United States v. Baldwin,* 621 F.2d 251 (6th Cir. 1980)(close case but probably voluntary)

d. Officer seeks entry to premises where a party is going on. *State v. Goeller,* 264 N.W.2d 472 (1978)(voluntary).

Note: It is extremely risky to obtain consent to enter premises on a ruse as to the officer's identity; do not be surprised if the court later finds the consent to be involuntary.

ii. Purpose

The Colorado Supreme Court has ruled that when an officer deceives a person as to his or her purpose for entry the consent is involuntary because a person cannot give knowledgeable consent when the purpose for the entry and search are unknown. *See People v. McCall,* 623 P.2d 397 (Colo. 1981)(officers told suspect's parents they wished to speak to suspect as a witness when in fact the officers came to arrest him; consent involuntary); *People v. Coghlan,* 537 P.2d 745 (Colo. 1975)(officers told suspect they wanted to speak to her about a crime committed against her when in fact they entered to question her about her own involvement in a crime; consent involuntary).

iii. Where the Officers May Search

Even when the court rules that the consent by deception was voluntary the officer must remain within the scope of the consent given.

(d) Initial Refusal to Consent

When a person initially refuses to consent the officer has a more difficult time establishing that consent given at a later time was voluntary.

(e) Refusal to Sign Written Consent Form

(f) Suspect Hampers the Search

When a suspect gives consent but then does something to hamper the search the courts tend to wonder whether the suspect really voluntarily consented in the first instance. In such instances, it is advisable for the officers to reaffirm the suspect's decision by obtaining written consent.

(g) Consenting Party's Condition

If the consenting party is very intoxicated, drugged, ignorant, old, tired, etc., the courts will take that fact

into consideration when determining the voluntariness of the consent.

(h) Asking the Suspect to Perform the Act

When an officer asks a person to perform the act required to conduct the search this factor tends to suggest the consent is not being given voluntarily.

Examples:

Officers who were on friendly terms with Cleburn conducted a custodial interrogation of him in his home without first giving him *Miranda* warnings. The officers, who were investigating a menacing incident involving a rifle, asked Cleburn about the guns he owned and Cleburn left the room to get a hunting rifle from a bedroom. The officers followed him into the bedroom and, in response to further questioning, Cleburn produced the rifle reportedly used in the incident. Cleburn then permitted officers to search the bedroom closet for additional weapons. The court suppressed the rifle because under the totality of the circumstances (i.e., presence of the armed, uniformed officers in the suspect's home, the prior relationship between the officers and the suspect, and the thirty-minute custodial interrogation absent *Miranda* warnings) free and voluntary consent was not established. *People v. Cleburn,* 782 P.2d 784 (Colo. 1989).

After receiving consent from the babysitter, officers searched Walter's bedroom and found marijuana and paraphernalia. When Walter arrived home, he was taken into his bedroom where the marijuana and other items were clearly visible and was advised of his *Miranda* rights and questioned whether he knew the implications of the items discovered. He was then asked for permission to conduct a search, and he signed a consent form. Walter testified that he consented to a search because the police had already found all of the contraband and he felt it would be futile to refuse. The Colorado Court of Appeals held that Walter's consent was involuntary because the evidence was discovered in an illegal search and

Walter was confronted with the evidence when officers had firm control over his home and family. *People v. Walter,* 890 P.2d 240 (Colo. App. 1995).

3. Authority to Consent

In order for a consensual search to be valid the person giving the consent must have at least joint access or joint control over the premises to be searched.

a. Spouses

Spouses normally have authority to consent to the search of the other's property as long as the consenting spouse has joint access to the place searched.

Example:

Payne was accused of sexually assaulting his estranged wife in the marital home they jointly owned. She gave officers permission to enter and search the home the day following the assault. Officers seized evidence relating to the assault and took photographs of the crime scene. Although the wife had removed herself and the children from the house several weeks before the assault, the Colorado Court of Appeals held that she still maintained common authority over the premises and that her consent rendered the officers' search valid. The court considered the following facts: (1) there was no court order granting temporary use of the home to either spouse; (2) she was in the home with Payne's permission at the time of the assault for the purpose of collecting some of her personal belongings; (3) her additional personal possessions were still within the home; and (4) they were joint owners of the house with equal rights of possession to the property. *People v. Payne,* 839 P.2d 468 (Colo. App. 1992).

The defendant's wife pried the lock off of a door the defendant had padlocked three days earlier. She called the police to the home, and then consented to the officer's search of the room. The wife explained to the officer that the defendant had no right to exclude her from any portion of the house. The court held that the wife validly consented to a

search of the room. *People v. Shover*, 2009 WL399727 (Colo. App. 2009).

A spouse's consent to a search of the marital residence will not be considered valid, however, when the other spouse is present and has *expressly refused* to consent to a search. *Georgia v. Randolph*, 547 U.S. 103 (2006); *People v. Miller*, 143 P.3d 1195 (Colo. App. 2006).

b. Parents-Children

A parent may normally consent to the search of a child's room for property.

Examples:

Lucero lived in his mother's home. Although she never (for her own reasons) went into Luerco's room, she did make the rules as to what areas of the house were to be used by whom and who could enter what areas of the house. Officers obtained consent from the mother to search Lucero's room. The court found that Lucero's mother shared joint control over the room and so could validly consent to the search. The court noted that there was no evidence that Lucero's mother ever relinquished control over the area nor was there evidence that Lucero ever asserted any right to an exclusive use of the area. *People v. Lucero,* 720 P.2d 604 (Colo. App. 1985).

While investigating Mickens on charges of sexual assault and kidnapping detectives went to his home to talk to his mother, with whom he was living. The court subsequently held that Mickens's mother could consent to show the detectives Mickens's shower cap in his bedroom. *People v. Mickens,* 734 P.2d 646 (Colo. App. 1986).

An officer should hesitate to base a search on the third-party consent of a parent in the following situations:

a. The parents do not enter the child's room and the child locks the door, especially from the outside.

b. The child's closed container is locked and he has the only key.

c. The child is no longer a minor, pays rent and has "staked a claim" on the room (the parents do not enter it).

Children and juveniles may also have authority to consent to the entry of officers into a home and to search areas they use. In a non-custodial setting, the voluntariness of a juvenile's consent and production of inculpatory evidence is determined by the same standard of voluntariness applicable to an adult. The court may consider the juvenile's age and the absence of his parents as factors in the weighting process, but these factors are not determinative. *People in the Interest of R.A.*, 937 P.2d 731 (Colo. 1997).

c. Roommates

Normally an officer may search "common areas" of premises based on the third party consent of a roommate, but may not search the bedroom or bathroom of the suspect unless the consenting party uses those areas as well.

Examples:

Police received a report from Rodriguez's girlfriend that he had assaulted her and that he was presently at "their" apartment. Although the girlfriend had moved out a month earlier, she represented that she was still a co-tenant, gave consent for officers to enter and search the apartment, and admitted them with her own key. Once inside, the officers discovered illegal drugs in plain view. The United States Supreme Court held that, although the girlfriend had no authority to give police consent to search the apartment, the officers' warrantless arrest was nonetheless permissible when they reasonably believed that she was a co-tenant who shared authority over the premises. *Illinois v. Rodriguez,* 497 U.S. 177 (1990).

Police officers investigating a murder contacted White's girlfriend in her home. The girlfriend in fact had rented the home and paid the bills, but White stayed there frequently and kept some clothes there. The girlfriend initially allowed the officers into the home and later invited them back to her bedroom to look at some handcrafted furniture that she possessed. While in the bedroom an officer observed a bloody pair of tennis shoes with a sole pattern that matched shoeprints at the scene of the murder. The girlfriend told the

officer that the shoes belonged to White, and she subsequently signed a consent to search in which officers discovered other incriminating evidence. The Colorado Court of Appeals held that authority to consent is not based simply upon property ownership but "rests on mutual use of the property by persons generally having joint access or control for most purposes." The court concluded that the girlfriend here had common authority to invite the police into her home and into her bedroom, and that, under the plain view doctrine, the subsequent seizure of the shoes was lawful. *People v. White,* 64 P.3d 864 (Colo. App. 2002).

Sanders and his girlfriend shared a trailer home. The girlfriend called the police to report that he had assaulted her and she signed a consent form authorizing a complete search of the trailer. Sanders opened the door of the trailer, and he was arrested after a scuffle. Officers then searched the trailer and seized items related to the assault. The Colorado Supreme Court held that officers validly searched the trailer pursuant to the co-occupant's consent. *People v. Sanders,* 904 P.2d 1311 (Colo. 1995).

Officers arrested Kellum at the mobile home he owned and shared with his brother. Each separately occupied his own bedroom, but Kellum's brother regularly cleaned Kellum's bedroom. Officers then asked Kellum's brother for consent to search the home, and he gave them his consent to search the entire residence. Officers found bindles of cocaine beneath the mattress of Kellum's waterbed. The Colorado Court of Appeals affirmed the trial court's ruling that Kellum's brother's consent was valid because the authorization for cleaning purposes included access to the space under the mattress. *People v. Kellum,* 907 P.2d 712 (Colo. App. 1995).

d. Host-Guest

A host may consent to the search of the area where the guest is staying, but not to the guest's personal property. Under certain circumstances, a guest may also have authority to consent to police entry and search of particular areas of a residence.

Example:

While investigating a murder officers contacted White, who was residing in his father's house. Officers knocked on the

door to the residence and a family friend, who was an overnight guest, answered and invited the officers inside. The officers then waited in the living room area while the family friend went to the back of the house to find White and his father. The Colorado Court of Appeals held that under these circumstances the police acted reasonably in entering the residence inasmuch it was reasonable for them to believe they had authority to enter based on the family friend's invitation. *People v. White,* 64 P.3d 864 (Colo. App. 2002).

e. Landlord-Tenant

Normally, a landlord or other third party does not have the authority to grant consent to the search of a tenant's premises. *Chapman v. United States,* 356 U.S. 610 (1961). However, under certain circumstances the tenant may have given a third party the power to consent.

Examples:

Officers were told by the manager of the self-storage business that Upshur was behind on his rent and had been locked out of his storage locker. The manager gave consent to search the storage unit. The Colorado Court of Appeals upheld the search based upon the officer's objectively reasonable belief that the manager had authority to consent to the search. *People v. Upshur,* 923 P.2d 40 (Colo. App. 1996).

Tenants Berow and Lane were going on vacation and asked the security maintenance manager to watch the apartment and to "arrest" any intruders. About a week later a witness noticed the door to Berow's apartment had been pried open. The manager thought he saw movement in the apartment and called the police. The officer obtained the manager's consent to enter and, while inside, observed marijuana. The court ruled that the manager had authority to consent to the search. *People v. Berow,* 688 P.2d 1123 (Colo. 1984).

Note: Another legal justification for the search was, of course, exigent circumstances.

Trusty's aunt, who was serving a jail sentence, asked her apartment manager to watch her apartment in her absence and call the police if any unauthorized persons were inside the apartment. The manager later saw people going in and out of the apartment, so she contacted the police and admitted them into the apartment with a

key. Officer's found Trusty inside and, during a pat-down search of his pants for weapons, they discovered illegal drugs. The Colorado Court of Appeals concluded that the police had an objectively reasonable basis for believing that they were authorized by both the aunt and the apartment manager to enter the apartment. *People v. Trusty,* 53 P.3d 668 (Colo. App. 2002).

Rivers and his wife lived in a mobile home trailer park. On two occasions when they had left town they had given the trailer park owners the key to their trailer with instructions to use the key in case of fire or other emergency. On the second occasion Rivers did not retrieve the key. Some time later neighbors complained about offensive odors coming from Rivers's trailer. One of the owners called the police and let officers into the trailer using the key, where the officers found Rivers's wife, dead. The court of appeals held that the park owners had authority to consent to a search because Rivers had explicitly granted them the authority to enter in case of emergency. The court noted that "the required emergency need not be an exigency sufficient by itself to waive the warrant requirement. Any event understood by the park owners to be so unusual as to require investigation suffices." *People v. Rivers,* 727 P.2d 394 (Colo. App. 1986).

f. Motel Manager-Boarder

The manager or owner of a hotel or motel room does not have the power to consent to the search of the boarder's room, *Stoner v. California,* 376 U.S. 483 (1964), unless the boarder has remained beyond the established check-out time and the hotel or motel management has not tolerated late payment or overtime stays.

Example:

A motel employee assigned to clean vacant rooms found Montoya asleep inside a room that should have been vacated earlier at the posted check-out time. The employee was unable to wake Montoya, as was the motel manager. The police were summoned and Montoya was aroused to a groggy state. The officer noticed cocaine in plain view beside the bed. The court of appeals held that Montoya lacked standing to challenge the search because the rental period had expired. *People v. Montoya,* 914 P.2d 491 (Colo. App. 1995).

g. Employer-Employee

An employer may consent to the search of the area where the employee works, but normally does not have authority to consent to the search of the employee's desk, file cabinets or closed containers. *People v. Crawford,* 632 P.2d 626 (Colo. App. 1981). An employee does not usually have authority to consent to a search of his or her employer's office but may consent to the search of "common areas" and papers which he or she has ordinary access to. *United States v. Antonelli Fireworks Company,* 155 F.2d 799 (2nd Cir. 1946).

Example:

Officers asked for and accepted Peterson's caretaker's consent to enter and search Peterson's property. However, the caretaker did not live on the property and his limited duties did not involve the locked outbuilding which contained marijuana. The Colorado Supreme Court held that the apparent authority doctrine could not excuse the officers' mistaken belief that the caretaker could validly consent on behalf of the absent owner. *Peterson v. People,* 939 P.2d 824 (Colo. 1997).

h. Babysitter

Normally a babysitter does not have authority to consent to enter and search the premises of the individuals who have retained the babysitter, particularly as to areas in which the babysitter would normally not have access to.

Example:

A 15-year old babysitter was hired by Walter and his wife to watch their children during the day. One child showed the babysitter marijuana in Walter's bedroom. The babysitter called her mother who came to the residence and called the police. Officers were allowed into the residence by the babysitter's mother and taken upstairs to Walter's bedroom by the babysitter and her mother. The Colorado Court of Appeals concluded that there was no evidence to support a determination that Walter or his wife had given the babysitter or her mother authority to enter the bedroom and the officer was unaware of any facts indicating that the babysitter or her mother had such authority. Thus, there was no valid third-

party consent. *People v. Walter,* 890 P.2d 240 (Colo. App. 1995).

i. Joint Property Owners

Examples:

Police noticed a car parked at an unoccupied cabin and stopped to investigate. The defendant came out of the cabin, identified himself, and stated that the owner had given him permission to use the cabin. Police checked and found outstanding warrants for the defendant. A neighbor volunteered that he was a partial owner of the cabin, had a key and granted permission for the officers to search the cabin. The police then found drugs and stolen property inside the cabin. The Colorado Supreme Court held that police should make reasonable inquiries when they find themselves in ambiguous situations regarding the authority of third parties to consent to a search. A warrantless search based upon third-party consent cannot be upheld solely on the basis that the person giving consent believed he was legally empowered to consent. Instead, the test focuses on whether the police officer's belief that the third-party had authority to consent to the search is objectively reasonable. *People v. McKinstrey,* 852 P.2d 467 (Colo. 1993).

A search warrant was obtained for property on which the defendant was growing marijuana. The property was owned by the defendant's father, but the defendant lived there in a separate house. The father signed a written consent form authorizing officers to search all property owned by him. The father never went to the areas on the property where his son was growing marijuana. The Colorado Supreme Court stated that when third persons have broad rights to access and use of one's property, one assumes the risk that they may consent to a search of those areas even if they never actually access or use the property. Here, the father had unlimited access to the areas in question and, thus, had common authority to consent to the search of the grounds. *People v. Breidenbach,* 875 P.2d 879 (Colo. 1994).

j. Fifth Amendment Warnings

An officer's failure to give a suspect his or her Fifth Amendment *Miranda* warnings will not cause the suppression of evidence obtained by consent. Even a person in custody who asserts his

Fifth Amendment rights can nevertheless give voluntary consent to search. *See People v. Phillips,* 594 P.2d 1053 (Colo. 1979). However, if an officer learns about evidence to seize as a result of a Fifth Amendment violation, the evidence will be suppressed as "fruit of the poisonous tree."

Examples:

Officers responded to a domestic disturbance and found a heavily intoxicated man yelling and knocking on the door where the disturbance had been reported. The officers placed the intoxicated man in one of the police cars and then knocked on the door to inquire about the reported disturbance. Garcia stepped approximately ten feet outside the residence and, upon questioning, denied any disturbance. While speaking to Garcia, the officers observed a crack pipe laying on the ground near him. The officers placed Garcia in the back seat of a different police car from where the intoxicated man was sitting due to officer safety because they "didn't know what was happening inside . . . ." Later, the officer's obtained Garcia's written consent to search his residence, and additional contraband was discovered. The Colorado Supreme Court held that since Garcia cooperated with the officers, signed a written consent to search form, and understood the nature of the document he signed the consent to search was voluntary. The court also recognized that even though Garcia was in custody the consent to search was still voluntary, and "although a consensual search may produce incriminating physical evidence, the consent itself is not self-incriminating in the *Miranda* sense." *People v. Garcia,* 11 P.3d 449 (Colo. 2000).

3. Where the Officer May Search

Officers are strictly limited in their search by where the consenting party says they can search and what they can search for.

Examples:

Officers investigating the abduction of a little girl began to focus their attention on Thiret. They went to Thiret's home and asked him if they could "look around." Thiret said, "go ahead." Four officers then searched Thiret's home for 45 minutes during which they seized potential evidence. The court ruled that a "look around" in these circumstances meant a "casual observation of the premises." Because the search exceeded the scope of the consent,

the evidence was suppressed. *People v. Thiret,* 685 P.2d 193 (Colo. 1984).

Officers were invited into Hills's house and told to stay in the den. Hills left the room and an officer went to the kitchen, from where he could see Hills get marijuana from under the living room couch near Monahan. The Wisconsin court ruled that, because the officer did not have consent to go to the kitchen, any testimony about his observations from the kitchen must be suppressed. *State v. Monahan,* 251 N.W.2d 421 (Wis. 1977)

The problem usually arises in situations where the officer asks to look for certain evidence, and then searches in areas where the evidence could not possibly be located. In such cases, the search exceeds the scope of the consent, and evidence discovered is subject to suppression.

4. Withdrawal of Consent

A suspect may limit the scope of consent and may subsequently choose to withdraw that consent. In such a case, the officer must immediately stop the search, and he or she should then attempt to find out the reasons why the consent has been withdrawn. If the person continues to refuse consent, the officer should not search further unless there is another legal theory to justify the search. If the person gives consent again, the officer should try to obtain a signed consent form.

5. Suggested Techniques

a. Avoid using consent alone to enter premises.

b. Your demeanor can be very important in the establishment of voluntariness of the consent; be courteous.

c. Try to establish as many voluntariness factors and as few involuntariness factors as possible.

d. Always ask the consenting party what his or her relationship is to the area to be searched.

e. Never search areas where consent has not been specifically authorized.

E. Standing

A person normally does not have "standing" in court to contest an alleged unconstitutional search or seizure unless the person has a reasonable expectation of privacy in the area searched or the evidence seized. The courts normally state that a person must have a "sufficient relationship" with the premises in order to have standing to object to searches conducted there.

1. Standing In Another Person's Home

A person must have a "sufficient relationship" to another person's home to object to a search.

Examples:

After Fox was arrested and while he was being held in jail, his wife moved into a motel room because she was unable to maintain their home without his income. A search of the motel room related to a separate crime led to the discovery of a briefcase containing incriminating letters from Fox to his wife. The Colorado Court of Appeals concluded that Fox's wife's interest in the motel room was an interest which Fox shared, even during his absence and, consequently, Fox had standing to object to the search of the motel room. *People v. Fox,* 862 P.2d 1000 (Colo. App. 1993).

While executing a search warrant the officers heard a knock at the door. When the officers answered the door they saw the visitor, Little, with a travel bag over his shoulder. They then saw baggies of marijuana protruding from one of the open compartments of the travel bag. The Colorado Supreme Court held that Little did not have standing to challenge the search warrant since he had no significant connection to the premises being searched. *People v. Little,* 598 P.2d 140 (Colo. 1979).

A person's expectation of privacy in his or her room does not extend to a locked container in the room when the locked container is owned by someone else.

Example:

While investigating a sexual assault in which a shotgun was used, officers arrested Whisler and went to the apartment where he lived with his girlfriend. The girlfriend let them enter and search the apartment. In a bedroom closet officers found a locked suitcase which belonged to the girlfriend. She initially refused to produce the key, but eventually did produce it, and the officers found the

sawed-off shotgun inside. The court recognized that the girlfriend, and not Whisler, had standing to challenge the validity of the consent to search. *People v. Whisler,* 724 P.2d 648 (Colo. 1986).

2. Abandonment

When a person abandons his or her premises any expectation of privacy is likewise abandoned. Therefore, he or she has no standing to object to an alleged unconstitutional search or seizure of the premises. It is almost impossible for an officer to prove that a person has abandoned premises which he or she owns.

Examples:

A landlady called her tenants (the Brewers) but the phone had been disconnected, and when she called their relatives she was informed that the Brewers had moved out. The Brewers had not paid their last month's rent on a month-to-month lease. The landlady went the house and found it in disarray with most of the property gone but many boxes remained. Debbie Brewer arrived and agreed that she would move out during the next week and they would meet the next morning so the landlady could store certain property at the house. The next morning the landlady entered the house and, when the Brewers did not arrive on time, began to look around. She found a shoe box full of marijuana and then called police, who entered the premises and seized the marijuana. The court ruled that the Brewers still had a reasonable expectation of privacy in their premises, and the police could therefore not enter the premises without a warrant or the Brewer's consent. *People v. Brewer,* 690 P.2d 860 (Colo. 1984).

Note: Of course, the landlady's initial discovery of the marijuana was a "private" intrusion that was not covered by the Fourth Amendment.

Morrison moved into an apartment, paid one-half of the first month's rent and gave a security deposit. Officers learned that Morrison was last seen with the murder victim and went to Morrison's apartment. The manager told the officers that Morrison had moved in a week earlier but that Morrison had not been around for several days. The officer found a several-day-old advertising packet on Morrison's door. Concerned about Morrison's safety, the officers asked the manager to open Morrison's door. All of Morrison's belongings had been removed, and only containers of trash remained. Later, officers conducted a search of the trash and found a pill bottle which led to the arrest of

Morrison. The court ruled that Morrison "left the apartment with no intention of returning" and, therefore, he had no reasonable expectation of privacy in the premises. Therefore, the evidence discovered in the apartment was admissible. *People v. Morrison,* 583 P.2d 924 (Colo. 1978).

Note: Normally an officer must wait until the rental period expires before entering. If the renter is behind in the rent but remains on the premises the landlord should obtain a writ of restitution before he has authority to consent.

3. Trash

When a person puts trash out for collection he or she abandons that property and, therefore, loses the expectation of privacy in the property. If, however, the trash remains upon the suspect's premises, the courts normally rule that the trash has not yet been abandoned and it "takes on" the privacy expectations of the premises. Therefore, it may not be taken without a warrant.

Examples:

Greenwood put opaque plastic bags of garbage on the curb in front of his house for collection. As requested by an officer, the trash collector turned the bags over to the officer, who then searched the bags and found enough evidence to obtain a warrant to search the house. The United States Supreme Court held that Greenwood had no reasonable expectation of privacy in the garbage bags after placing them outside the "curtilage." *California v. Greenwood,* 486 U.S. 35 (1988).

Hillman left five trash bags at his curb for collection. The bags were seized at night by an officer, who took them to headquarters and searched them. The officer found striped marijuana plants, peat seedling cups, and a substantial amount of marijuana. This discovery lead to the execution of a search warrant for Hillman's residence and the discovery of additional contraband. The Colorado Supreme Court held that Hillman had no legitimate expectation of privacy in garbage bags that were placed outside the curtilage of his residence when those bags were readily accessible to the public. *People v. Hillman,* 834 P.2d 1271 (Colo. 1992).

After receiving a tip from a confidential informant that the defendant was manufacturing methamphetamine in his house, a detective arranged to have an empty trash truck pick up

defendant's trash so that the detective could inspect its contents. On the date when trash was scheduled for regular pickup, the defendant's roommate deposited the trash at the curb for collection. The trash was collected and placed in the empty truck. The police then inspected the trash and discovered many items that are commonly used to manufacture methamphetamine. The Colorado Court of Appeals concluded that the defendant did not have a reasonable expectation of privacy in his trash once he placed it at the curb for collection. *People v. Laurent*, 194 P.3d 1053 (Colo. App. 2008).

4. Trespassers

A defendant who does not reside on the premises, has no right to be on the premises, and does not have a possessory interest in the premises is not an aggrieved person and cannot complain of the unlawfulness of a search. *People v. Juarez,* 770 P.2d 1286 (Colo. 1989).

Example:

A convenience store was robbed and the robber fled on foot. Police were informed that a "transient" was camping in a tent in the area where the robber fled, and the police located the tent on privately owned but publicly accessible land. Schafer, who owned the tent and articles contained inside, was not present when the officers arrived. The officers found the flaps of the tent closed and the entrance was zippered shut and, without a warrant, they unzipped and entered it and recovered items. Schafer was later arrested for the robbery and sought suppression of items recovered from his tent that were incriminating. The Colorado Supreme Court held that "one who enters or remains upon unimproved and apparently unused land, which is neither fenced nor otherwise enclosed in a manner designed to exclude intruders, does so with license and privilege in the absence of personal or posted notice." Since there was no notice that Shafer was trespassing on private land he had a "license and privilege" to enter, and therefore had standing to contest the search. *People v. Schafer,* 946 P.2d 938 (Colo. 1997).

G. Searches by Private Citizens

The Fourth Amendment is intended to protect persons from searches and seizures by the government, and not private citizens. The actions of a private citizen will not violate another person's Fourth Amendment rights unless the citizen is an agent of the police or is working in cooperation with the police.

1. Private Searches

If the "search" or seizure was conducted solely by a private citizen, the "search" or "seizure" will not be a violation of the suspect's rights.

Examples:

Benson told a maid not to clean his room. She did anyway and discovered marijuana. The court ruled that the "search" did not violate Benson's rights and the evidence was admissible. *People v. Benson,* 490 P.2d 1287 (Colo. 1971).

Beasley's landlord illegally entered Beasley's home and discovered a briefcase which contained heroin. The court ruled that the search was private and the evidence was therefore admissible. *United States v Beasley,* 485 F.2d 60 (10th Cir. 1973).

2. Agency Relationships

A private actor is not an agent of the government if he has his own purpose for conducting the search separate from assisting law enforcement and if he is not acting at the direction or behest of the government. However, if an officer encourages or aids the private person in any way the person becomes an agent of the state and is then subject to the same Fourth Amendment restrictions as the officer. Even if an officer (knowing the private person is going to search or seize) simply stands idly by and willingly awaits the fruits of the search or seizure, the private person is viewed as working jointly with the officer and is subject to the Fourth Amendment's restrictions. If, however, the private person disobeys or disregards an officer's instructions, the search will usually be private.

Examples:

An anonymous caller reported to the sheriff that she had been in a house where marijuana was being grown. After corroborating the information, officers obtained a search warrant. Siegl filed motions and affidavits alleging that he had never told anyone he was growing marijuana, had never allowed anyone into the house, or given anyone permission to enter the house, thus asserting that the informant must have entered the house illegally. The Colorado Court of Appeals concluded that such an allegation, even if true, would not make any difference because a wrongful search and seizure by a private individual does not violate the Fourth Amendment absent a showing the individual is an agent of the police. *People v. Siegl,* 914 P.2d 511 (Colo. App. 1996).

Following a fire at a liquor store, an investigator from the insurance company searched the premises and uncovered evidence of arson. The Colorado Supreme Court held that the Fourth Amendment was not implicated because the insurance investigator was not acting as an agent of the state. The court stated that in general, insurance investigators have a motive to investigate an accident scene that is entirely separate from law enforcement's aims, and that there was no evidence in this case that the investigator's search of the liquor store was motivated by anything other than the need to serve the insurance company. The court also noted that there was no evidence suggesting that the investigator was directed by the government authorities when conducting his investigation. *People v. Pilkington*, 156 P.3d 477 (Colo. 2007).

3. Cooperative Searches

Occasionally an officer permits a private citizen to accompany the officer during a search of premises. For example, an officer might request a crime victim to accompany him or her during the execution of a search warrant in order to locate stolen property. In such circumstances the officer must control the citizen's conduct because the citizen is under the same Fourth Amendment restrictions as the officer.

4. Suggested Techniques

a. Never tell a person to search another person's premises unless you or the private person have the right to search the premises.

b. If a private person has already trespassed upon a suspect's premises, obtain a warrant to seize the evidence if it is still on the suspect's premises.

c. If the private person has illegally seized a "closed container" which contains crime-related evidence, you should obtain a warrant to open it.

IV. FORCIBLE ENTRY OF PREMISES

An officer may forcibly enter a residence in order to search or arrest under certain limited circumstances. These circumstances are basically the same whether the search or arrest is with or without a warrant.

A. Forcible - Definition

A forcible entry is any entry of a residence without consent. This entry can be as violent as the use of a sledge hammer or as non-violent as "pushing in" a partially opened door. However, no forced entry occurs when a police officer in possession of a valid search warrant, rings the doorbell and merely steps across the threshold of a house in a nonviolent and nonforceful manner before identifying himself and his purpose of executing a warrant. Further, police officers, in possession of a valid arrest warrant, who peacefully open a door and enter a house in response to an invitation from within, do not effectuate a forced entry. *See People v. Miller*, 94 P.3d 1197 (Colo. App. 2004).

B. Requirements for Forcible Entry

An officer must normally knock, announce his purpose and authority, and wait a reasonable time before forcibly entering premises.

Example:

Officers, executing a search warrant, went to Gifford's house and told three unidentified persons near the front porch that they were going to search the premises. Without knocking, the officers opened the unlocked front door and entered the house. In executing the search, officers encountered Gifford's wife inside the home, and found that Gifford was not on the premises. The Colorado Supreme Court held that the officers' actions in admitting themselves through the unlocked door constituted a forcible entry which required the officers to first "knock and announce." Because the officers failed to verify that the three persons on the porch exercised control over the premises, and the three people in fact had no interest or contact with the property, the "knock and announce" requirement was not satisfied. The unlawful entry thus required suppression of the evidence. *People v. Gifford,* 782 P.2d 795 (Colo. 1989).

When law enforcement officers went to Banks's apartment to execute a search warrant, they called out "police search warrant" and knocked on the front door hard enough to be heard by officers at the back door. They waited for 15 to 20 seconds with no response, and then broke open the door. The United States Supreme Court held that 15-20 seconds was a reasonable period of time to wait before forcibly entering the home because the circumstances established reasonable grounds to expect that an exigency, such as evidence destruction, would arise instantly upon knocking. *United States v. Banks*, 540 U.S. 31 (2003).

C. Purpose of the Requirements

The purpose of the knock, announce, and wait requirements are:

1. They reduce the potential for violence to both the police officers and the occupants of the house.

2. They guard against the needless destruction of private property.

3 They symbolize the respect for individual privacy summarized in the adage that "a man's home is his castle."

D. Exceptions to the Requirements

The courts have permitted officers to ignore the knock-announce-wait requirements under certain circumstances.

1. Exceptions to the Knock and Announce Requirement

Officers must first identify themselves and make their purpose known unless:

a. The warrant expressly authorizes forcible entry without prior announcement. In this case the reasons must be stated in the affidavit when the warrant is obtained; the affidavit must state specific explainable reasons why the officer cannot knock and announce; OR

b. The circumstances known to the officer at the time of the entry (but, in the case of a warrant, unknown at the time the warrant was applied for) give the officer probable cause to believe that:

   1. Notice is likely to result in the evidence being easily and quickly destroyed or disposed of; or

   2. Notice is likely to endanger the life or safety of the officer or other person; or

   3. Notice is likely to enable the party to escape; or

   4. Notice would be a "useless gesture" (i.e., those inside the premises know the officers are there and what their purpose is and will not respond to a knock, or the officers know that no one is home).

See People v. Lujan, 484 P.2d 1238 (Colo. 1971); *Wilson v. Arkansas,* 514 U.S. 927 (1995)(threat of physical harm to police, the fact that an officer is pursuing a recently escaped arrestee, and the existence of reason to believe that evidence would likely be destroyed if advance notice were given are law enforcement interests which may establish the reasonableness of an unannounced entry).

Note: It is normally very difficult for an officer to convince a court that these exceptional circumstances existed.

2. Exceptions to the Wait Requirement

Generally, officers must wait a reasonable time after knocking and announcing before forcibly entering premises. If, however, officers can show one of the following, the officer may enter without waiting a reasonable time:

a. A resident is delaying responding to the knock in order to destroy evidence.

b. A resident is refusing to "answer" the door.

E. Suggested Techniques

1. You should almost always knock, announce, and wait before forcibly entering premises whether you are entering under authority of a warrant or emergency circumstances.

2. If you obtain a warrant and have specific reasons to believe the suspect will try to injure you or destroy the property, get the judge to authorize a no-knock warrant.

3. If you forcibly enter a home under the emergency theory and do not knock, announce, and wait, you must be prepared to explain the specific reasons why.

Chapter 4

SEARCH AND SEIZURE – VEHICLES

CONSTITUTION OF THE UNITED STATES
FOURTH AMENDMENT

"The right of the people to be secure in their persons, homes, 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."

I. INTRODUCTION

The authors of the Constitution could never, of course, foresee the importance of vehicles in our society. Therefore, vehicles (unlike homes) were not expressly protected by the Fourth Amendment. The courts, however, have ruled that a person does have a reasonable expectation of privacy in his or her vehicle. That is, a person's vehicle is protected against unreasonable searches and seizures. This chapter discusses the extent of Fourth Amendment protection and what an officer must do to search or seize evidence or persons in vehicles.

Note: Although this chapter discusses all of the legal theories related to the search of vehicles, an officer should **always** obtain a **warrant** to search vehicles if possible.

The following are charts which summarize the materials in this chapter:

SEIZURE OF OCCUPANTS

	Evidence Required	Officer's Powers	Suspect's Rights
Contact; Field Interview	None	None (vehicle must already be parked)	Free to walk or drive away; may ignore officer
Stop/Detention	Traffic offense; or reasonable, explainable suspicion that occupant committed crime	Move driver to curb; ask question; "frisk" with reasonable, explainable fear	Free to leave after reasonable time if no probable cause; cannot be "significantly restrained" unless exigency
Arrest/Custody	Probable cause that occupant committed crime	Search incident to arrest; handcuff; book	Make phone call; see attorney; appear before judge

SEARCH OF VEHICLE

Legal Theory	Requirements	Where May Search
Plain View	Lawful presence; probable cause to believe evidence is crime-related	Is not a search; may enter vehicle to seize
Reasonable Suspicion	Reasonable explainable suspicion vehicle is stolen	Check VIN
	reasonable explainable suspicion evidence in plain view is crime-related	May not search; may ask questions; may seek consent
Search Incident to Detention	Specific, explainable fear for safety, explainable reason to believe weapon is in a particular area of a vehicle where detainee could get to it	Areas where detainee could reach to get a weapon
Probable Cause	Probable cause to believe evidence is in vehicle; warrant or exigency	Areas authorized by warrant; areas where evidence fall within exigency
Automobile Exception	Probable cause and mobility	Entire vehicle where evidence could be located

Search Incident to Arrest	Valid custodial arrest	Passenger compartment
Consent	Valid consent from person with "joint access" to vehicle	Anywhere consenter allows
Inventory	Lawful custody	Anywhere in vehicle except sealed containers

II. REASONABLE EXPECTATION OF PRIVACY

Although persons have a reasonable expectation of privacy in their vehicle, it is less than in their homes or closed containers. The main difference is related to searches based on probable cause and plain view seizures. The following is a discussion of these issues as they relate to reasonable expectations of privacy in homes, closed containers and vehicles.

A. Probable Cause Searches – Exigent Circumstances

In order to search a car or a home without a warrant or probable cause, an officer must be able to show exigent circumstances. The exigency which must be proven, however, is different to search a vehicle without a warrant than to warrantlessly search a home or closed container.

To warrantlessly search a vehicle on probable cause an officer usually must prove only that the vehicle was mobile or the evidence was subject to removal or destruction. The reasons for this difference are that (1) a person has a **lower expectation of privacy** in his or her vehicle and (2) a vehicle can be **easily moved** during the time the officer leaves to get a warrant.

The United States Supreme Court has ruled that a mobile home is more like a vehicle than a home for Fourth Amendment purposes (however, consider getting a warrant for "private areas" in the home).

Example:

Officers were investigating a report that someone in a mobile home was exchanging marijuana for sex. Their suspicions were confirmed when they spoke to a youth who left the mobile home. The officers then entered the mobile home without a warrant and saw marijuana in plain view. The United States Supreme Court ruled that a person has a lower expectation of privacy in a mobile home than in a fixed residence. Also, because the home was mobile, there were exigent circumstances. Therefore, the evidence was admissible. *California v. Carney,* 471 U.S. 207 (1985).

B. Plain View Seizures v. Open View Observations

When an officer sees crime-related evidence in a vehicle while lawfully standing outside the vehicle, the officer may seize the evidence. An officer who sees crime-related in a house while standing outside the house may not enter and seize the evidence on probable cause alone. The reason is that persons have a greater expectation of privacy in their house than in their car.

Example:

An officer saw a car speeding, and when the driver pulled into a gas station he approached to give the driver a ticket. During his contact with the driver the officer noticed chrome lug nuts in the open glove compartment and believed they were the fruits of a theft of motor vehicle parts which had occurred a few minutes earlier. The officer then realized that the occupants of the vehicle matched the description of the thieves. The officer arrested the suspects and seized the lug nuts and some wrenches. Although the Colorado Supreme Court ruled that the officer should have obtained a warrant before seizing the evidence, the United States Supreme Court reversed, holding that when officers look into an automobile and see crime-related evidence, they may immediately seize the evidence. *Colorado v. Bannister,* 449 U.S. 1 (1980).

III. CONTACTS/CONSENSUAL ENCOUNTERS

It is difficult for an officer to contact an occupant of a vehicle because normally an officer must stop the occupant's car before talking to him or her. Usually, the only way an officer can consensually contact a person in a vehicle is if the vehicle is stopped or parked, but not at the direction of an officer.

A. Permissible Conduct

An officer may approach and talk to an occupant of a vehicle without "seizing" the occupant. The officer, of course, has no powers during the conversation but may ask non-accusatory questions and look into the passenger compartment. If an officer has any question that a person may think that he or she is being detained, the officer should make clear to the person that he or she is not being detained or is free to leave.

Examples:

An officer saw a car parked in a parking lot occupied by two men who appeared to be bent over something in the front seat. As he approached,

the officer shined his flashlight into the vehicle and noticed that both men had cash in their hands and that one of them was holding a plastic bag containing a powdery substance. The Colorado Supreme Court concluded that the officer's action of approaching the car and using his flashlight to illuminate its interior was not a "search" and did not implicate Fourth Amendment protections. *People v. Dickinson,* 928 P.2d 1309 (Colo. 1996). *See also People v. Shriver,* 528 P.2d 242 (Colo. 1974)(officer approaching a parked car and shining a light inside the car thereby observing marijuana and roach clips raised no constitutional issues).

As officers approached a car parked in a parking lot occupied by three men, one of the men made a rapid motion as if to conceal something. When asked what he had put underneath the driver's sear the man replied, "nothing." The Colorado Supreme Court concluded that the initial encounter here was a consensual interview which did not implicate Fourth Amendment protections. *People v. Hill,* 934 P.2d 821 (Colo. 1996).

Deputies approached a van illegally parked on a mountain road. The occupants of the van were approached and warned that parking and camping were not permitted. During the encounter a deputy asked the men if they had any weapons and then requested and received permission to search the van. The Colorado Supreme Court held that the encounter between the deputies and the two men was a consensual interview. *People v. Cascio,* 932 P.2d 1381 (Colo. 1997).

An officer saw a car parked in a service station lot occupied by four people. The officer approached the car because the station was closed and he thought the occupants might be having car trouble. The officer asked the driver for his license and, after determining the driver's name, learned from the dispatcher that the driver had a pending warrant. The court of appeals ruled that "contacts not based on suspicion of criminal activity are permissible where there is an articulable (explainable) reason for the encounter." The court further ruled that "when an officer is performing his duty to aid a motorist he has the right to ascertain that individual's name and to ascertain ownership of the car." Therefore, asking for a license and taking Davis' name was proper under the circumstances. *People v. Davis,* 565 P.2d 1347 (Colo. App. 1977).

An officer observed a car parked on a public street near several residences with the lights off and two occupants inside. The officer turned on his side spotlight for illumination (but did not activate his siren or other lights), approached the car, and asked the occupants what they were doing. Neither occupant appeared to be in need of any assistance. The officer then asked both occupants for identification, told the occupants that he would "be back in a minute," and then returned to

his patrol car to check the names on the computer. Within a minute the officer learned that the passenger, Paynter, was wanted on an outstanding warrant. The passenger was then arrested on the warrant and a subsequent search incident to the arrest revealed illegal drugs. The Colorado Supreme Court held that the officer's initial contact with Paynter was a consensual encounter and not a "seizure" because the officer was non-threatening, he did not display any weapon or other authority, Paynter was not required to move or do anything (he voluntarily provided identification) and the officer's demeanor would not have led a reasonable person to believe that he or she would not be free to terminate the encounter. The court also stated that the officer's *request* for identification alone did not turn the consensual contact into a stop or seizure. *People v. Paynter,* 955 P.2d 68 (Colo. 1998).

Note: Although the court in *Paynter* concluded that the officer's initial contact was a consensual encounter and not a stop, the court emphasized that the sequence of events after the suspect voluntarily provided his identification (e.g. retaining the driver's license) could convert the contact into a stop. The case was therefore returned to the trial court to make this determination. [*See People v. Jackson,* 39 P.3d 1174 (Colo. 2002)(officer's request for passenger's identification escalated from a consensual encounter to a seizure when the officer retained the license, told the passenger to remain in the car and, without asking, returned to his patrol car with the license).] This analysis could therefore change the result in cases such as *Davis,* where a request for identifying information is followed by *retaining* identifying documents for further investigation.

B. Incidental Detentions

A traffic stop of a driver necessarily involves a "detention" of any passengers in the vehicle at the time of the stop. Colorado courts have held that a routine stop of a driver for a traffic violation does not implicate the Fourth Amendment rights of the passengers. *People v. Jackson,* 39 P.3d. 1174 (Colo. 2002). However, the United States Supreme Court has now held that a traffic stop of a driver constitutes a seizure of the passengers as well, and thereby implicates their Fourth Amendment rights. *Brendlin v. California,* 551 U.S. 249 (2007); *Arizona v. Johnson,* 129 S.Ct. 781 (2009).

Compare with:

An officer observed Taylor driving and recognized his passenger, whom the officer knew to be wanted on an outstanding arrest warrant. The officer observed no traffic violations by Taylor but stopped Taylor's car solely to

arrest the passenger. The passenger was removed from the car, handcuffed, and placed into a patrol car. The officer then contacted Taylor, requested and retained his driver's license, and advised him that he was going to search the car incident to the passenger's arrest. Taylor was escorted to the rear of the car and surrounded by several officers while the search took place, and was physically restrained on one occasion when Taylor attempted to move toward the car. During the search officers discovered a small black case that contained cocaine, which Taylor identified as belonging to him. The Colorado Supreme Court held that although Taylor was clearly "seized" due to the traffic stop, that seizure was reasonable because the probable cause to arrest the passenger constituted an objectively measurable reason for stopping Taylor's car. The court also recognized that the officers were authorized to search the car incident to the arrest of the passenger, and "the time while [Taylor] waited while the officers conducted a search of his vehicle incident to the arrest of his passenger constitutes only an incidental delay, not a seizure, and therefore itself has no constitutional significance." *People v. Taylor,* 41 P.3d 681 (Colo. 2002).

Note: The detention of the driver in this case is "incidental" and raises no Fourth Amendment issues only as long as the officers take no action other than preventing him from interfering with the valid search incident to arrest. As will be discussed below, the officer's later questioning of the driver regarding the cocaine raises "custody" issues for purposes of the Fifth Amendment.

C. Indication of Seizures

When an officer seizes (stops or detains) a person without reasonable suspicion all evidence gather thereafter is inadmissible in court. Therefore, an officer must be very careful during a contact to avoid any indication that the person being question is being detained. A court is required to look at all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter. Some of those circumstances include:

1. whether there is a display of authority or control over the suspect by activating the siren or any patrol car overhead lights;

2. the number of officers present;

3. whether the officer approaches in a non-threatening manner;

4. whether the officer displays a weapon;

5. whether the officer requests or demands information;

6. whether the officer's tone of voice is conversational or whether it indicates that compliance with the request for information might be compelled;

7. whether the officer physically touches the person of the citizen;

8. whether an officer's show of authority or exercise of control over an individual impedes that individual's ability to terminate the encounter;

9. the duration of the encounter;

10. whether the officer retains the citizen's identification or travel documents.

D. Suggested Techniques

1. If you are going to contact a suspect in a vehicle (i.e. you do not have reasonable suspicion for a "stop") you must wait until the suspect stops and parks of his own accord, unless there is something about the passenger that provides reasonable suspicion or probable cause.

2. Be friendly and non-accusatory.

3. If at all possible, tell the person he or she is free to leave.

4. Do not do anything physical (even by body language) which would make the person believe he or she is not free to leave.

5. Do not take anything from the person (e.g. a driver's license or identification card), as the person cannot leave if you have some of his or her property.

IV. STOPS OF VEHICLES

Any time an officer "stops" an vehicle the officer has "seized" it and its occupants. The Fourth Amendment must then be considered. Normally, a stop occurs when an officer causes a driver to deviate from his or her chosen route, such as when an officer activates emergency lights or a siren to stop a suspect in a vehicle. A stop of a vehicle is unreasonable under the constitution unless the driver has committed a traffic offense or there is at least "reasonable suspicion" to believe that an occupant has committed or is about to commit a crime.

A. Traffic Stops

When an officer stops a vehicle for a traffic offense the seizure is reasonable for constitutional purposes. An officer may not, however, stop a vehicle just to determine whether a suspect is guilty of a "traffic-type" offense.

Example:

An officer stopped a vehicle to determine whether the driver had a valid driver's license and registration. As the officer approached the car he smelled marijuana, then saw marijuana in plain view in the car. The United States Supreme Court ruled that it is unreasonable under the Fourth Amendment to stop a car solely to check for license and registration. The court reasoned that, even though a license and registration check is a very minor intrusion, it is too great an intrusion to stop a car just to find out if a person has a license or registration. *Delaware v. Prouse,* 440 U.S. 648 (1979).

Note: An officer may stop a vehicle if he or she has knowledge that the driver does not have a license or registration. For example, if the officer has stopped a driver in the very recent past and discovered that the driver's license was revoked or otherwise invalid, the officer may have a valid reason to stop the driver to investigate further.

If an officer makes a stop on reasonable suspicion, conducts a brief investigation, and then determines that there is no basis upon which to issue a citation or pursue criminal charges, the officer must then terminate the detention. However, the officer's subjective decision not to issue a citation does not prevent the officer from conducting an otherwise valid investigation.

Example:

An officer pulled over Redinger's vehicle because he did not see a license plate or temporary sticker on the vehicle. However, as he neared the vehicle the officer observed a valid temporary registration properly displayed in the rear window. The officer continued walking to the driver's side of the vehicle and asked Redinger to produce a driver's license, registration, and proof of insurance. As Redinger removed his wallet from a pocket, a bag of cocaine fell out. The officer seized the bag and arrested Redinger for possession of a controlled substance. The Colorado Supreme Court held that, although the stop was initially justified by reasonable suspicion, the basis of that reasonable suspicion dissipated when the officer realized that Redinger was not in

violation of the law. The officer therefore unjustifiably required Redinger to produce information and the drugs that were found while obtaining that information were inadmissible. *People v. Redinger,* 906 P.2d 81 (Colo. 1995).

Compare with:

State troopers stopped Altman's car because the rear of the car was covered with dirt and obstructed the rear license plate to the extent the troopers could not determine whether the registration tags on the plate were current. As the troopers approached the car they discerned that the registration tags were in fact current. However, one trooper approached and requested Altman's driver's license and registration, while the other trooper approached the passenger's side and observed a bag of pills and a jar with a substance in it by Altman's legs. The troopers returned to their police car, observed some furtive movements by Altman and, concerned for their safety, then returned to the car and patted him down. In looking under Altman's seat they discovered illegal drugs. The Colorado Supreme Court held that, although the troopers were able to ascertain that registration tags on the car were current, the purpose of the investigatory stop had not dissipated when Altman was contacted because the fact remained that the rear license plate was obstructed (a traffic violation), providing grounds for the troopers to continue the investigatory stop. *People v. Altman,* 938 P.2d 142 (Colo. 1997).

A state trooper observed a van weave over a white line separating a traffic lane from the shoulder in a single time. He stopped the car, explained the reason for the stop to the driver, Rodriguez, and accepted Rodriguez' explanation that the reason his car weaved was because Rodriguez was tired (the officer observed no indicia of intoxication). The officer then asked for Rodriguez's driver's license and registration. Discrepancies in the registration led to a detention of Rodriguez and, ultimately, to the discovery of heroin in the van. The Colorado Supreme Court held that when an officer possess reasonable suspicion that a traffic offense has been committed and the officer has subjectively decided not to give the driver a ticket for the traffic offense, the officer may nevertheless request identifying information from the driver. *People v. Rodriguez,* 945 P.2d 1351 (Colo. 1997).

Note: An officer who has stopped a car on reasonable suspicion for a traffic offense and who has subjectively decided not to issue a traffic citation, may nevertheless request and check identifying information even if the officer

communicates his or her intention not to issue a citation to the driver: "Neither remaining silent about the decision not to issue a citation nor communicating the decision bears on the objective reasonableness of the officer's suspicion that an offense has been committed." *People v. Ramos*, 13 P.3d 295 (Colo. 2000).

1. Seizures of Persons

An officer's authority relating to the seizure of traffic offenders are controlled by the Fourth Amendment as follows:

a. Officer's Powers

An officer who stops a person for a traffic violation "seizes" the person under the Constitution. During a valid traffic stop an officer may request a driver's license, vehicle registration and proof of insurance. An officer may also run a computer check for outstanding warrants so long as this procedure does not unreasonably extend the duration of the temporary detention. Once a driver produces a valid license and proof that he or she is entitled to operate the vehicle, the driver must be allowed to proceed without being subject to further delay. During the course of such traffic stops, officers have certain other limited powers:

(1) Power to Move an Offender

An officer's powers over a traffic offender are limited by the Fourth Amendment. The courts have ruled that it is reasonable for an officer to order (but it is better to request) a traffic offender out of his or her vehicle and over to the curb for the officer's protection. The reason this power is reasonable is that many officers are killed or injured by traffic offenders and an offender has less of a chance of getting a weapon if he or she is outside the vehicle.

Examples:

An officer stopped Mimms on a traffic offense. After asking Mimms to step out of the car the officer noticed a budge in Mimms' coat. The officer patted the area and discovered a gun. The United States Supreme Court ruled that it was reasonable under the Fourth Amendment for an officer to order a traffic offender out of the car during an investigatory stop. *Pennsylvania v. Mimms*, 434 U.S. 106 (1977).

An officer stopped Carlson's car because he saw it weaving. When he first spoke with Carlson the officer noticed that Carlson's eyes were red and his breath smelled of alcohol. The officer then ordered Carlson out of the car, and as he walked to the rear of the car the officer noticed that Carlson was unsteady in his balance. Carlson was later arrested for driving under the influence of alcohol. Although the trial court ruled that the order to exit the car was a "seizure" the Colorado Supreme Court held that the seizure was reasonable. The officer's observations during Carlson's movement were therefore admissible. *People v. Carlson,* 677 P.2d 310 (Colo. 1984).

2) Power to Move Passengers

An officer is permitted to order passengers of a vehicle stopped for a traffic violation out of the car pending completion of the traffic stop. *Maryland v. Wilson,* 519 U.S. 408 (1997). However, there are limitations on the extent in which the officer may forcibly detain a passenger for the duration of the stop. [These circumstances are discussed in detail below in Section D, **Searches and Seizures of Passengers.**]

(3) Power to Arrest Offender

Subject to the limitation of individual departments' guidelines, officers may arrest an offender for traffic violations designated by state statute as felonies, misdemeanors, and misdemeanor traffic offenses. An officer ordinarily may not arrest for "traffic infractions" unless specifically authorized to do so by statute, or in situations in which the offender refuses to follow the penalty assessment notice procedures. Also, many ordinance violations do not authorize arrest.

Note: The United States Supreme Court had recognized that an arrest which violates a state statute does not violate the Fourth Amendment, so long as there was probable cause to believe that the defendant committed a crime. *Virginia v. Moore*, 553 U.S. 164 (2008).

b. Time Limitations

A traffic offender should not be detained longer than is necessary to talk to the offender, check identification, and issue a citation or warning. An officer's inquiry into matters unrelated to the justification for a traffic stop does not convert the encounter into something other than a lawful seizure, so long as any such inquiry does not measurably extend the duration of the stop. If, during this time, an officer obtains information that the offender has committed a crime (reasonable suspicion) the officer may, of course, detain the suspect longer to investigate the crime. An officer may also prolong an investigation if the driver voluntarily consents and/or the contact becomes a consensual encounter.

Example:

An officer stopped a car because it had a cracked windshield and two objects appeared to obstruct the driver's vision. The officer obtained the driver's license and registration and determined the driver had no proof of insurance. The officer issued a citation for the insurance violation, warned the driver about the cracked windshield, and then began asking the driver about his travel plans. The driver later consented to a search of his car, which revealed nothing, and a drug-sniffing dog was then brought to the scene which ultimately led to the discovery of illegal drugs. Under these facts the Colorado Supreme Court returned the case to the trial court to determine whether the initial traffic stop had terminated and the continuing interaction between the officer and driver became a mere consensual encounter. *People v. Cervantes-Arredondo,* 17 P.3d 141 (Colo. 2001).

Compare People v. Brandon, 140 P.3d 15 (Colo. App. 2005). A motorist was stopped for a traffic violation and provided her identification card. After brief questioning about the driver's travel plans, and after the driver's out-of-state driver's license was verified, the officer handed the driver's paperwork back to her and told her to "have a safe trip." However, "within a second or so," the officer told the driver he had concerns about her "story," and he continued to question her, asking whether she had anything illegal in the car. The officer asked for consent to search the car, and after the driver initially questioned the request, she said "sure." The Court of Appeals held that once the driver's paperwork was returned to her, there was no basis for the continued detention of the vehicle or its passengers; she and her

passengers should have been allowed to go on their way. The court concluded that the officer's actions following that point constituted a seizure, which was not justified by reasonable suspicion of criminal activity, and therefore evidence obtained after that point was inadmissible.

2. Searches of Persons

An officer may frisk a traffic offender if there is reason to believe the offender is armed. The officer may search incident to arrest if the offender is to be taken into custody for the offense.

a. Searches Incident to Detentions

An officer may conduct a protective frisk for weapons by patting-down the offender or entering the offender's car only if the officer has a specific reason to believe the suspect is armed.

Examples:

An officer stopped Mimms for a traffic offense. After asking Mimms to step out of the car the officer noticed a bulge in Mimms' coat. Because the officer feared for his safety the officer patted the bulge and discovered a gun. The United States Supreme Court held that the frisk was reasonable, and the gun discovered during the frisk was therefore admissible. *Pennsylvania v. Mimms,* 434 U.S. 106 (1977).

An officer stopped Long for speeding. During the subsequent contact the officer saw a knife on the floorboard of the car and, therefore, entered the car and found other weapons after a superficial search. The United States Supreme Court ruled that the officer had a specific reason to protect himself by looking into the passenger compartment and the subsequent entry to recover the knife and check for other potential weapons was reasonable. *Michigan v. Long,* 463 U.S. 1032 (1971).

b. Searches Incident to Arrest

An officer may search a traffic offender incident to arrest, so long as the offender has actually been arrested. This includes those "penalty assessment notice" offenses where the officer is permitted to effect a custodial arrest (as opposed to non-custodial arrests where the officer's authority is more limited). In conducting a search incident to arrest, the officer may search the person and any closed containers found on the person. [These rules are discussed

in detail below in section VI, **SEARCHES INCIDENT TO ARREST**.]

3. Search of Vehicles

Normally, an officer may not search the vehicle of a traffic offender. However, it is important to remember that merely looking into the passenger compartment of a vehicle from a position outside the vehicle where a person has a lawful right to be does not constitute a "search." This is true even if the officer shines a flashlight inside the car to get a better look. If the officer then sees evidence which provides him or her with probable cause that it is crime-related, the officer may then enter the vehicle and seize the evidence.

Example:

An officer properly stopped Brown's car, shined his flashlight into the car and observed a green balloon knotted near the tip. He then entered the car, seized the balloon, and later opened it The United States Supreme Court ruled that the officer had probable cause to believe the balloon contained narcotics, and the officer's seizure of it was therefore permissible. *Texas v. Brown,* 460 U.S. 730 (1983).

[For additional examples, see the discussion of **Open View Observations** in Section I(B), above].

a. Searches on Probable Cause

The commission of a traffic offense does not by itself create probable cause to believe crime-related evidence is in the vehicle. Therefore, an officer may not search a vehicle solely on the basis of a traffic stop.

Examples:

An officer stopped Haley's car for following the truck in front of it too closely. After obtaining Haley's driver's license and rental agreement for the vehicle, the officer decided not to issue a citation but immediately began asking Haley and the two other occupants in the car questions about their travel plans. The officer noted that all three occupants appeared nervous. Although Haley consented to a dog-sniff search of his luggage, he did not consent to the dog sniffing his car. The officer nevertheless permitted the dog to sniff the car, the dog "alerted," and a subsequent search of the car revealed illegal drugs. The Colorado Supreme Court held

that neither Haley's nervousness nor his refusal to consent to the search of his car constituted grounds for the subsequent search of the car, and the drugs found during the search were inadmissible *People v. Haley,* 41 P.3d 666 (Colo. 2001).

Goessl was stopped for driving 40 mph in a 30 mph zone. After the stop Goessl walked in an "abrupt manner" back to the officer's car and appeared nervous. When Goessl went to get his registration the officer saw a pipe and pouch, which Goessl tried to hide. The officer seized the pouch, searched it, and found illegal drugs. The Colorado Supreme Court ruled that the officer's observations did not give him probable cause to search the search, and the drugs were therefore not admissible. *People v. Goessl,* 526 P.2d 664 (Colo. 1974).

An officer stopped the car Cowdin was in for speeding. The officer saw Cowdin place something under the seat and, since the officer had previously arrested Cowdin for marijuana, the officer looked under the seat. The court ruled that the evidence was not sufficient to support probable cause to search, and the drugs found under the seat were suppressed. *Cowdin v. People,* 491 P2d 569 (Colo. 1971).

b. Searches Incident to Detention

If an officer has a reasonable belief based on specific and articulable facts that an occupant of a vehicle stopped for a traffic violation is dangerous and may gain immediate control of a weapon, the officer may search those areas of a vehicle's passenger compartment in which a weapon may be placed or hidden.

Example:

Altman was stopped because his rear license plate was obstructed. After obtaining his license and registration and upon returning to the police car to verify the information, officers noticed Altman bending over in his seat and making motions toward the bottom of his seat while seated inside the car. The officers removed Altman from the car, patted him down, and then looked under the seat, where they recovered illegal drugs. The Colorado Supreme Court held that, when viewed objectively, Altman's "furtive action" provided a reasonable and articulable belief that Altman was potentially

armed and dangerous, thereby justifying the protective search of the car. *People v. Altman,* 938 P.2d 142 (Colo. 1997).

Officers were investigating a burglary when they observed the defendant parked in the middle of the street with a man on a bicycle standing next to the car. Upon making contact with the defendant, the man on the bicycle became verbally aggressive. In addition, the defendant ducked down in her vehicle out of sight of the contacting officer for a period of time while the officer was in her patrol car running a license and registration check. The Court of Appeals held that it was reasonable, for officer safety reasons, for the officer to have the defendant to exit the vehicle and search the front seat of the car. *People v. McDaniel,* 160 P.3d 247 (Colo. 2007).

c. Searches Incident to Arrest

Officers may search the passenger compartment and closed containers found in the passenger compartment of a vehicle incident to the arrest of a traffic offender or a passenger in the vehicle. As noted in Chapter 2, Section VI above, vehicle search incident to arrest can only occur if the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search, or if there is reason to believe the vehicle contains evidence relevant to the crime of arrest.

B. Stops on Reasonable Suspicion

Reasonable suspicion is information known to an officer which amounts to more than a hunch or mere suspicion but is less than probable cause to arrest. Officers must be able to explain (both in reports and perhaps later in court) the specific facts that gave rise to their reasonable suspicion.

Examples – Reasonable Suspicion Found to Exist:

Police received a call from an unnamed Burger King employee reporting that a white, service-type van and a small white vehicle had been parked in the same area of the parking lot for about 30 minutes, and that an employee had observed the occupants passing a marijuana pipe back and forth. Officers arrived at the Burger King within minutes and they observed a white service van and a smaller vehicle parked in the lot within inches of the van's passenger side. An officer approached the service van and could see that no one was in the driver's seat, but several people were communicating and engaging in some activity in the back of the van. The defendant was summoned from the car, frisked, and illegal drugs were discovered. The Colorado Supreme Court concluded

that the information provided by the citizen-informant, coupled with the officer's observations, provided reasonable suspicion to justify the detention of the defendant. *People v. Polander,* 41 P.3d 698 (Colo. 2001).

Officers stopped a vehicle for a burned-out license plate light and for failing to signal before making a turn. The driver could not produce a valid registration or proof of insurance, and the officer then asked the passengers their names and dates of birth. None of the passengers claimed ownership of the vehicle. All of the occupants were then removed from the car and a subsequent check revealed that one of the passengers had an outstanding warrant for his arrest. A search of the car incident to the arrest revealed a gun. The Colorado Supreme Court held that the observation of the traffic violation justified the initial stop of the car, and the driver's insufficient proof of registration papers provided reasonable suspicion that the car may be stolen which justified further investigation, including inquiring of the identities of the occupants in the car. *People v. H.J.,* 931 P.2d 1177 (Colo. 1997).

A state trooper observed a Thunderbird weaving on a state highway. The car had Florida license plates with the word "lease" on them. The officer stopped the car and asked the driver for a license and a car rental contract. The driver produced an unsigned rental contract for a Mustang. The driver then produced an unsigned rental contract for the Thunderbird which contained a clause stating the car could not be taken outside of Arizona or Nevada. There were no outstanding warrants for either person in the car and the vehicle had not been reported stolen. The Colorado Supreme Court nevertheless held that the officer had sufficient reasonable suspicion that the car may be stolen to temporarily seize it (and the occupants) and investigate further. *People v. Litchfield,* 918 P.2d 1099 (Colo. 1996).

An officer observed a man acting suspiciously in a convenience store. Suspecting that the man had stolen something, he followed the man out of the store where he recognized one of the passengers from a previous contact involving a suspicion of drug activity. The officer noticed that the car lacked a visible rear license plate and decided to follow the car until it pulled into a parking lot. Once in the parking lot the man jumped out of the car and rapidly approached the patrol car. The Colorado Supreme Court concluded that the investigatory stop subsequently initiated by the officer was properly based on reasonable suspicion of criminal activity. *People v. Sutherland,* 886 P.2d 681 (Colo. 1994).

See also: *People v. Huynh,* 98 P.3d 907 (Colo. App. 2004) (reasonable suspicion existed to stop defendant's car as it was the same color and make, and it had the same peculiar tire feature, as the car used by

suspects in a homicide, and the car had a cracked windshield and an item dangling from the rearview mirror); *People v. Roth*, 85 P.3d 571 (Colo. App. 2003) (officer's observation that a passenger had thrown an object from the defendant's car constituted reasonable suspicion to stop the car, even though the object was apparently thrown in response to signs alerting drivers to a drug checkpoint which did not actually exist).

Examples – Reasonable Suspicion Found Not to Exist

An anonymous caller reported a possible altercation between two vehicles in a parking lot. When officers arrived one minute later, they observed a van leaving the lot. The Colorado Supreme Court held that officers lacked an articulable and specific basis from the informant's uncorroborated report to support reasonable suspicion of criminal conduct to justify an investigatory stop. *People v. George,* 914 P.2d 367 (Colo. 1996).

An anonymous caller reported that a person by the name of Manual Ramon Diaz would, at a certain time, leave an apartment area and drive away in a car which was parked in a nearby alley. The call described the car and said that cocaine would be found under its hood. The police located a car in the alley which matched the description and license plate given by the caller. When they saw Garcia and a woman enter the car near the predicted time the officers intercepted the vehicle and asked Garcia for permission to search it. Cocaine was found under the hood of the car. The Colorado Supreme Court noted that in some circumstances an anonymous tip with corroboration or verification of even innocent details could provide a specific and articulable basis in fact for believing an individual was engaged in criminal conduct. However, the court concluded that the information known to the officers in this case did not provide reasonable suspicion that criminal activity was afoot because the basis of the informant's knowledge was unknown and the only information corroborated by police (i.e. Garcia leaving the apartment and entering the car) were actions that are "inherently unsuspicious." *People v. Garcia,* 789 P.2d 190 (Colo. 1990).

An officer stopped Cerda's car for a cracked windshield. He did not ticket Cerda for an obstructed windshield, nor could he later recall the location or severity of the crack. However, while stopped the officer obtained Cerda's license, ran a computer check, and learned that the Cerda's driving privilege had been suspended. The Colorado Supreme Court held that the officer did not have reasonable suspicion to support the investigatory stop because the officer conceded that the cracked windshield, which did not impede the driver's vision, could not constitute a violation of the applicable traffic statute. *People v. Cerda,* 819 P.2d 502 (Colo. 1991).

An officer following the defendant's truck noticed an air freshener hanging approximately 5-6 inches from the rearview mirror. The officer described the air freshener as "large," but he did not verify the size of the air freshener, its angle of position, or whether the air freshener actually obstructed the driver's vision. The Colorado Supreme Court held that there was insufficient facts to support the stop because the officer did not establish that the obstructed vision statute was violated. *People v. Arias*, 159 P.3d 134 (Colo. 2007).

In a remote area in southern Colorado, a landowner reported hearing a gunshot outside her house A wildlife officer took the report and contacted a party of hunters he knew to be in the area. They told the officer that they had not been hunting themselves but they had observed a Chevy truck driving slowly in the area. The officer later observed a Toyota truck driving slowly down the road and instructed a fellow officer to stop it. The stop was made and the officer ultimately discovered a wild turkey that had recently been shot. The Colorado Supreme Court held that the wildlife officer's subjective hunch that a criminal act had occurred was insufficient to support the reasonable suspicion requirement, and the objective facts known by the officer (i.e. the report of a gunshot in the area coupled with the observation of the truck by the officer) did not establish reasonable suspicion. *People v. Coca,* 829 P.2d 385 (Colo. 1992).

Note: The determination of reasonable suspicion is based upon the existence (or absence thereof) of objective facts. The subjective intent of an officer in conducting an investigatory stop is therefore irrelevant if there are objective facts that establish reasonable suspicion.

Examples:

Robinette was clocked traveling 69 miles per hour in a 45 mile per hour location. Robinette had no previous violations and was issued a verbal warning. The officer then asked Robinette if he had any contraband, weapons or drugs, and Robinette said "no" and consented to a search. The United States Supreme Court held that the officer's subjective intentions did not make the continued detention of Robinette illegal. *Ohio v. Robinette,* 519 U.S. 33 (1996).

Vice officers patrolling a "high drug area" saw a car stopped at a stop sign for an unusually long time. When the police car made a U-turn to take a closer look, the car turned suddenly without signaling and accelerated at an unreasonable speed. The officers stopped the car and

observed bags of crack cocaine in a passenger's hands. The United States Supreme Court held that the officer's observations of the driving conduct provided reasonable suspicion to stop the car regardless of any other motivation the officers may have had (e.g. to investigate drug activity). *Whren v. United States,* 517 U.S. 806 (1996).

Police observed Sosbe in a car and speaking to three men near suspected "crack houses." Suspecting a drug deal, police attempted to locate the three men for questioning, but could not find them. The police then decided to contact Sosbe but before they could initiate the stop they observed him drive away at a speed they believed to exceed to posted speed limit. After stopping Sosbe for the traffic violation, police observed rock cocaine in his car. The Colorado Supreme Court concluded that the officers had a reasonable belief that Sosbe was speeding which provided a specific, articulable basis in fact for a traffic stop. Any subjective intent or "pretext" for conducting the stop was irrelevant once objective grounds for the stop were developed. *People v. Sosbe,* 789 P.2d 1113 (Colo. 1990).

1. Reasonable Suspicion v. Probable Cause

There is often a very "thin gray" line dividing reasonable suspicion and probable cause. If an officer has any question as to whether there is enough evidence to establish probable cause the officer should try to implement detention procedures until he or she is sure that probable cause exists. Often probable cause can be established just by questioning the suspect and obtaining admissions or inconsistencies about the behavior under investigation.

Examples:

Citizens told an officer that a person had been "walking around cars in the neighborhood" and had put some items in a trunk. While the citizens were speaking to the officer the suspect drove past them and the citizens said, "there goes the car now." The officer stopped the car. When the officer saw what looked like a Realistic tape player in the partially opened trunk the officer asked the suspect, Schreyer, about it. Schreyer said he "never owned a Realistic tape player." Schreyer was then arrested. The court ruled that, although there was reasonable suspicion to stop Schreyer, the officer had not obtained enough information to arrest him since he had no information that the stereo in question had been stolen. *People v. Schreyer,* 640 P.2d 1147 (Colo. 1982).

Brake stabbed a female pedestrian and stole her purse at abut 2:15 a.m. Witnesses, who apparently did not see the assault, said that they saw a light colored, early model Rambler with dark paneling in the vicinity of the assault. About an hour later officers stopped the Rambler near the scene of the assault. Because Brake matched the description of the perpetrator, the officers searched the car and found a bloody knife under the front seat. The court ruled that since the car matched the description of the witnesses there was reasonable suspicion for officers to stop it, and since Brake matched the description of the assailant there was probable cause to arrest him. *People v. Brake,* 191 Colo. 390, 533 P.2d 763 (1976).

Two police officers stopped the defendant and another person after recognizing their car from a previously received bulletin that depicted three people and a car connected to the use of the victim's credit cards. Other officers were called to the scene with copies of the bulletin, and the two men and their car were matched up with the photographs in the bulletin. The Court of Appeals held that probable cause to arrest arose when, shortly after the initial stop, the officers were able to compare the appearance of the suspects and their car to the individuals and car depicted in the bulletin. *People v. Huynh*, 98 P.3d 907 (Colo. App. 2004).

Note: Officers should get the witness to identify the suspect **before** searching a suspect's car if there is any question as to whether probable cause exists.

2. Seizures of Persons

When an officer has reasonable suspicion that an occupant of a vehicle is engaged in criminal behavior the officer may briefly seize that person in order to investigate the crime.

a. Officer's Powers During Detentions

An officer's powers during the detention of an occupant of a vehicle are the same as his or her powers during the detention of a pedestrian. That is, the officer may "freeze" the detainee but may not handcuff or move the detainee except under emergency circumstances. [The kinds of actions an officer may and may not employ during an investigator stop are discussed in detail in Chapter 2, Section III(D).] If an officer exceeds his or her powers during the course of the stop the "detention" may escalate into an "arrest."

Examples:

An officer responded to the scene of a serious one-car accident. Roybal's car was present but Roybal had left the scene. He soon returned, however, and officers noticed an odor of alcohol on his breath. There was no other indications of intoxication and no information available to the officers as to how the accident occurred. Upon discerning the odor of alcohol the officers placed Roybal in the police car and advised him of his *Miranda* rights. The Colorado Supreme Court ruled that by placing Roybal in the police car he was in custody (i.e. arrested) without probable cause, and all evidence obtained after the arrest was inadmissible. *People v. Roybal,* 655 P.2d 410 (Colo. 1982).

An officer stopped Gutierrez' truck because it appeared as though he was chasing another vehicle. Gutierrez told the officer that four occupants of the car had broken the windshield of his truck. The officer then ordered Gutierrez to stand beside the patrol car and took his driver's license. The officer later learned over the police radio that four men had reported to police that they had been fired upon. The officer then questioned Gutierrez about the shooting and Guiterrez admitted firing two shots at the four men. The court ruled that Gutierrez could reasonably believe that he was in custody rather than under detention during the questioning because the officer had taken his license and had ordered him to stand next to the patrol car The statement given as a result of this custodial interrogation (without *Miranda* warnings) was therefore inadmissible. *People v. Gutierrez,* 596 P.2d 759 (1979).

b. Time Limitations

An officer may detain a suspect on reasonable suspicion for only a limited period of time (usually about 20 minutes) in order to conduct a brief investigation. If an officer extends the time of the stop by pursing actions that exceed the purpose of the stop the detention escalates into an arrest. In determining whether the parameters of an investigatory stop have been exceeded the court will consider at least four circumstances:

1. The length of the detention;

2. Whether the officer diligently pursued the investigation during the detention;

3. whether the suspect was required to move from one location to another;

4. whether there were alternative, less intrusive means available and whether the police acted unreasonably in failing to recognize or to pursue them.

Example:

A state trooper stopped a van for a traffic infraction, and upon examining the driver's license and vehicle documentation discovered discrepancies on the vehicle's license and registration. In an effort to resolve the discrepancies the trooper decided to conduct further investigation at the state patrol headquarters which was located 10 miles away in the opposite direction in which the van had been traveling. When the driver indicated he did not wish to follow the trooper to headquarters, the trooper advised him that he would disable and impound the van unless the driver complied with his request. The driver complied, followed the trooper to headquarters, and ultimately consented to a search of the van which disclosed illegal drugs. Under these circumstances, the Colorado Supreme Court held that the traffic stop escalated into an arrest. The court found that the detention was prolonged (nearly 90 minutes); the officer did not diligently pursue the investigation; the driver was required to move 10 miles to the state patrol office; and the officer failed to consider alternatives such as conducting the investigation closer to the location of the initial stop. *People v. Rodriguez,* 945 P.2d 1351 (Colo. 1997).

c. Emergencies

Ordinarily coercive conduct such as placing a detainee in a police car, using handcuffs, or restraining with weapons indicate that the suspect has been placed in "custody" rather than simply "detained." However, use of such physical restraint does not necessarily convert an investigatory stop into an arrest. The courts recognize that the use of physical restraint such as handcuffs and weapons during the stop is justified only when the circumstances indicate that such force constitutes a reasonable precaution for the protection of the safety of the officers.

Example:

An officer stopped a car for a traffic violation at 2:50 a.m. After obtaining the driver's license and registration, the officer returned to his car, ran a computer check on the license and registration, and the ran a computer on the VIN which revealed that the car had been reported as stolen. As the officer was conducting the computer check he saw the driver make a call from her car on a cellular phone, and shortly thereafter a car with tinted windows pulled up behind the officer's patrol car. The officer could not see into the car behind him and, fearing an ambush, called for backup. A second officer responded within two minutes. Both officers then approached the second vehicle with guns drawn and ordered the driver out of the car. The driver was ordered to lay face down, where he was handcuffed. A search of his car then revealed a handgun and illegal drugs. The Colorado Supreme Court held that, while the degree of force used by the officers was significant, it was not disproportionate to the circumstances in which they found themselves, and did not escalate the investigatory stop into an arrest. *People v. Smith,* 13 P.3d 300 (Colo. 2000).

3. Searches Incident to Detentions

An officer may frisk a detainee or search the detainee's effects or vehicle for weapons only if the officer can specifically state why he or she thought the detainee had a weapon.

a. Searches of Persons (Frisk)

An officer may pat-down or "frisk" a detainee if there is reasonable suspicion that he or she is armed, or that he or she has just committed a violent crime. [For a detailed discussion and examples, *see* Chapter 2, Section IV – **SEARCH AND SEIZURE - PERSONS.**]

b. Searches of Vehicles

It is more difficult for an officer to justify the search of a detainee's vehicle for weapons. If, however an officer has a specific and explainable reason to believe the detainee is armed, the officer may be permitted to conduct a limited **protective search** of the vehicle.

Example:

Altman was stopped because his rear license plate was obstructed. After obtaining his license and registration and upon returning to the police car to verify the information, officers noticed Altman bending over in his seat and making motions toward the bottom of his while seated inside the car. The officers removed Altman from the car, patted him down, and then looked under the seat, where they recovered illegal drugs. The Colorado Supreme Court held that, when viewed objectively, Altman's "furtive action" provided a reasonable and articulable belief that Altman was potentially armed and dangerous, thereby justifying the protective search of the car. *People v. Altman,* 938 P.2d 142 (Colo. 1997).

Based on the report of a possible burglary of a car, officers made an investigatory stop and temporarily detained Melgosa, the driver. After seeing a passenger (Rivero) place something under the seat, an officer looked under the seat and removed from the car an AM-FM stereo unit and related parts, as well as a pair of wire cutters and other tools. Officers confirmed that a stereo had been stolen from a nearby vehicle and arrested Melgosa and Rivero. Although the trial court suppressed the objects found in the car the Colorado Supreme Court held that the investigatory stop and detention was justified and that the officer was further justified in searching the passenger compartment of the car for weapons after seeing Rivero reaching under the seat. *People v. Melgosa,* 753 P.2d 221 (Colo. 1988).

Officers were advised by radio of three suspects in a brown car involved in a possible stabbing. An officer spotted a brown car six to eight blocks from the scene and stopped the car. The officer asked the occupants to exit the vehicle and conducted a pat-down search for weapons The officer searched the vehicle for weapons and, in a map pocket on the driver's side door, found drugs in plastic baggies. The Colorado Supreme Court held that a protective search of the vehicle is limited to the areas in which weapons may be hidden. Here, the search of the map pocket was permissible as it was large enough for a person to place a hand inside. The court also stated that an officer can make a cursory examination of any objects in the car in order to ascertain whether or not they are dangerous. Unlike a closed container, an open or transparent container supports no reasonable expectation of privacy and its contents can be said

to be in plain view. *People v. Weston,* 869 P.2d 1293 (Colo. 1994).

Compare with:

A state trooper observed a Thunderbird weaving on a state highway. The car had Florida license plates with the word "lease" on them. The officer stopped the car and asked the driver for a license and a car rental contract. The driver produced an unsigned rental contract for a Mustang. The driver then produced an unsigned rental contract for the Thunderbird which contained a clause stating the car could not be taken outside of Arizona or Nevada. There were no outstanding warrants for either person in the car and the vehicle had not been reported stolen. Nonetheless, the trooper decided to seize the car. During a search of the car the trooper discovered a bale of marijuana in the trunk. The Colorado Supreme Court held that although the officer had sufficient reasonable suspicion that the car may be stolen to temporarily seize it there was no justification for the search of the trunk as a protective search because it was not reasonably related to the purpose of protecting the officer from harm. *People v. Litchfield,* 918 P.2d 1099 (Colo. 1996).

Corpany was a passenger in a vehicle stopped by officers for a traffic violation. During the course of the stop the officers saw Corpany place something under the front seat. After ordering all passengers out of the vehicle the officers searched the area under the seat and found a fanny pack. The officers searched inside the pack and found illegal drugs. The Colorado Supreme Court held that while the search under the seat was a permissible protective search the officers exceeded the scope of that search by examining the contents of the pack after their pat-down failed to detect any weapons inside the pack. *People v. Corpany,* 859 P.2d 865 (Colo. 1993).

Officers responded to a call of a domestic disturbance and arrived to find Simmons seated in his car parked outside the residence. Although no one wished to press criminal charges, the officers decided to place Simmons in civil protective custody. In doing so, the officers removed Simmons from his car, handcuffed him, and then placed him into the police car. The officers then searched Simmons' car and discovered a knife that was later used in prosecuting Simmons for felony menacing. The court of appeals held

that since the search took place after the officers decided not to file criminal charges and after Simmons had been restrained in the police car, the search could not be justified as necessary to protect the safety of either Simmons or the officers. *People v. Simmons,* 973 P.2d 627 (Colo. App. 1998).

C. Miranda Warnings

An officer ordinarily does not have warn a person stopped for a traffic offense of that person's Fifth Amendment rights (i.e. *Miranda* rights). There may be circumstances, however, when a suspect must be advised when he or she is being detained based on reasonable suspicion.

1. Traffic Offenses

An officer must advise a suspect of his or her *Miranda* rights when the suspect is in "custody" and subjected to "custodial interrogation." As a general rule, routine traffic stops do not constitute "custody" for *Miranda* purposes unless the driver's freedom is curtailed to a degree associated with a formal arrest.

Examples:

Redderson was observed driving by an officer who had recently determined that Redderson's license plates were expired. After Redderson parked his car the officer contacted Redderson, who admitted that his license plates were expired. The officer obtained Redderson's driver's license and, while waiting for the dispatcher to respond and without advising Redderson of his *Miranda* rights, asked him if he possessed any illegal drugs. Redderson responded with an incriminating statement, and a subsequent search by the officer revealed illegal drugs. The Colorado Supreme Court held that the non-coercive nature of the officer's interaction with Redderson demonstrated that the encounter was simply a routine traffic stop which did not constitute "custody" for *Miranda* purposes. *People v. Redderson,* 992 P.2d 1176 (Colo. 2000).

An officer stopped Clements' car because the license plate was illegible. As the officer approached the car he determined that the plate was valid, but nevertheless asked Clements for his license and registration. Clements replied that he had left his license at home and that his name was Alan Clements. Upon checking with the dispatcher the officer learned that Clements' license was under revocation. The court ruled that *Miranda* warnings are not required in routine traffic stops, and Clements' statements were

therefore admissible. *People v. Clements,* 665 P.2d 624 (Colo. 1983).

2. Reasonable Suspicion Stops

Officers who have stopped a vehicle and detained an occupant based upon reasonable suspicion usually do not need to warn the suspect of his or her *Miranda* rights, even if the questions relate to the reason for the investigation (e.g. an officer who suspects a driver is intoxicated need not warn the suspect of his or her *Miranda* rights even if the questions relate to the matter of the driver's intoxication). *People v. Archuleta,* 719 P.2d 1091 (Colo. 1986).However, once the officer obtains probable cause to arrest or otherwise significantly restrains the suspect, the officer then must warn the suspect of his or her *Miranda* rights or any subsequent statements will be inadmissible.

Examples:

An officer stopped a vehicle because he observed a traffic violation and because there was reasonable suspicion that occupants just committed a burglary. The officer asked the occupants a number of questions without advising them per *Miranda.* The court ruled that there is no requirement that an officer provide a *Miranda* advisement to a person stopped on reasonable suspicion because there is no "custody" within the meaning of the Fifth Amendment. *People v. Thornton,* 547 P.2d 1278 (Colo. 1976).

An officer approached Stephenson's parked car, and noticed that his appearance and behavior were consistent with the use of a stimulant like methamphetamine. The officer asked Stephenson for his license and registration, and Stephenson complied. After the officer attempted to verify the proper ownership of the vehicle, he then asked Stephenson if he would consent to a search of the vehicle. The Court of Appeals held that *Miranda* warnings were not required, as there was nothing in the officers actions or demeanor which would have suggested to Stephenson that he was being restrained to the degree associated with a formal arrest. *People v. Stephenson,* 159 P.3d 617 (Colo. 2007).

Compare with:

An officer observed Taylor driving and recognized his passenger, whom the officer knew to be wanted on an outstanding arrest warrant. The officer observed no traffic violations by Taylor but stopped Taylor's car solely to arrest the passenger. The passenger was removed from the car, handcuffed, and placed into a patrol

car. The officer then contacted Taylor, requested and retained his driver's license, and advised him that he was going to search the car incident to the passenger's arrest. Taylor was escorted to the rear of the car and surrounded by several officers while the search took place, and was physically restrained on one occasion when Taylor attempted to move toward the car. During the search officers discovered a small black case that contained cocaine, which Taylor identified as belonging to him. The Colorado Supreme Court held that Taylor was not seized within the meaning the Fourth Amendment because the detention was only incidental to the lawful search incident to arrest of his passenger. However, due to the long duration of the detention and the significant restraint placed upon Taylor by police during the detention, the court concluded that Taylor was in "custody" for purposes of the Fifth Amendment and his admissions, which were not preceded with appropriate *Miranda* warnings, were inadmissible. *People v. Taylor,* 41 P.3d 681 (Colo. 2002).

D. Searches and Seizures of Passengers

When an officer stops a vehicle that detention necessarily impacts the liberty of the driver as well as any passengers in the car. While the officer must have grounds at least amounting to reasonable suspicion to stop and detain the driver, the officer does not initially need to have a reasonable suspicion as to passengers. Thus, in a traffic-stop setting, it is lawful for police to detain an automobile and its occupants pending inquiry into a vehicular violation.

1. Seizures of Passengers

An officer who stops a vehicle for traffic violations or on reasonable suspicion may order passengers to get out of the car pending completion of the stop. It is unclear, however, to what extent the officer may then forcibly detain the passengers absent reasonable suspicion of a crime or probable cause to arrest.

Examples:

An officer stopped a vehicle for speeding and no license tags. The driver immediately exited the car to produce identification and the officer ordered him to return to his car. The officer noticed that the passenger, Wilson, was sweating and appeared nervous, so the officer ordered him out of the car. As Wilson exited the car a quantity of crack cocaine fell the ground. The United States Supreme Court reasoned that passengers are already stopped by virtue of the stop of the vehicle and the additional intrusion of ordering the passenger out of the car is minimal, particularly when

weighed against an officer's legitimate safety concerns. The officer's conduct in requiring the passenger to exit the car was therefore permissible and the evidence discovered during this process was admissible. *Maryland v. Wilson,* 519 U.S. 408 (1997).

Compare with:

An undercover Officer was conducting surveillance on a house suspected as being the site of illegal narcotics sales, based upon an anonymous tip. After watching the house for approximately twenty minutes and not seeing anyone enter or exit, he observed a car pull up in front of the house and park. The undercover officer saw Dixon get out the car, enter the house for about one minute, and then return to the car. Dixon got in the back seat of the car and the vehicle pulled away. The undercover officer followed the car, saw the driver commit traffic violations, and directed a patrol officer to stop the car as it pulled up and parked in front of a house. Dixon then got out of the car on the passenger side and began to walk towards a nearby house. The patrol officer ordered Dixon to return to the vehicle and, when Dixon refused to comply, he caught up with Dixon and arrested him for disobeying a police officer. The Colorado Court of Appeals held that in some circumstances there may be circumstances where officer safety concerns arise that would justify the exercise of some degree of control over a passenger. However, such circumstances did not exist in this case where Dixon made no furtive gestures, did not lead the officer to believe he was armed, and did nothing to implicate himself with the traffic violation or any other criminal activity. *People v. Dixon,* 21 P.3d 440 (Colo. App. 2000).

2. Searches of Passengers

If an officer is permitted to order a passenger out of the vehicle incident to an investigatory stop, it follows that the officer would be permitted to conducted a protective frisk for weapons if the officer has specific and articulable reasons to believe the passenger is armed and dangerous.

Example:

An officer conducted a traffic stop of a car occupied by the driver and three passengers. As she approached, the officer noticed that Johnson, a passenger, was looking back and keeping his eyes on the officers. She also observed that Johnson was wearing clothing consistent with gang membership. Finally, she saw that Johnson had a police scanner in his pocket. In response to the officer's questions, Johnson provided his name and date of birth but said he

had no identification. Johnson also admitted that he had served time in prison for burglary. The officer asked Johnson to get out of the car, and patted him down for officer safety. The United States Supreme Court reiterated that during a lawful investigatory stop, the police may detain an automobile and its occupants pending inquiry into a vehicular violation. The Court concluded that the patdown of the passenger was lawful in this case because the facts known to the officer created a reasonable suspicion that Johnson was armed and dangerous. *Arizona v. Johnson*, 129 S.Ct. 781 (2009).

V. SEARCHES AND SEIZURES ON PROBABLE CAUSE

Normally, in order to search on probable cause without a warrant, an officer must be able to show that exigent circumstances existed at the time of the search. However, an established exception to the warrant requirement is the "automobile exception," which permits police to conduct a warrantless search of an automobile if the police have probable cause to believe the automobile contains evidence of a crime. Under this exception the police are not required to establish a separate exigency: "If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment . . . permits the police to search the vehicle without more." *Maryland v. Dyson,* 527 U.S. 465 (1999).

Examples:

North Metro Task Force members arranged a controlled purchase of cocaine using a confidential informant. The officers observed the informant make contact with Reyes at a specified location, and then watched as Reyes drove away from that location ostensibly to contact a supplier. Officers stopped Reyes' vehicle and a narcotics dog circled the vehicle twice, both times indicating the presence of a controlled substance by the passenger-side door. The officers then searched the car and discovered illegal drugs. The Colorado Supreme Court accepted the trial court's finding that the officers possessed reasonable suspicion to initially stop the car which, when combined with the narcotics detection dog's two alerts to the vehicle, elevated the information known to the police to the status of probable cause to believe the vehicle contained narcotics. Since the vehicle remained mobile (i.e. it was stopped on a public street) and given the existence of probable cause, the automobile exception then authorized the officers' search of the vehicle. *People v. Reyes,* 956 P.2d 1254 (Colo. 1998).

After an officer stopped Hill's vehicle for a traffic offense and gave Hill a warning, he asked Hill if there were any drugs in the car. Hill replied that there were not, but produced a marijuana cigareete from behind his ear. The Colorado Supreme Court Hheld that this fact, along with the officer's

knowledge that the occupants of the care were suspected of drug activity, gave him a reasonable basis for believing that contraband or evidence of a crime would be found in the vehicle. *People v. Moore*, 900 P.2d 66 (Colo. 1995).

Officers stopped Naranjo for a traffic violation. After the stop an officer saw a television set in the car and, using his flashlight, saw the words "Center of Denver" on the television. An officer called the Center and learned that the television had just been stolen. The officer then entered the car and seized the television. The court ruled that the seizure was lawful under the automobile exception to the warrant requirement, and the evidence was therefore admissible. *People v. Naranjo,* 686 P.2d 1343 (Colo. 1984).

A. Probable Cause – Evidentiary Issues

To conduct a search of a vehicle, an officer must be able to show that there is probable cause to believe there is crime-related evidence inside. In order to establish probable cause, the officer must prove that there is "enough" information and that the information is sufficiently reliable. Although probable cause is discussed in detail in Chapter 7, **PROBABLE CAUSE**, it is discussed briefly here as it relates to vehicles.

1. Amount of Evidence Necessary to Establish Probable Cause

In order to search a vehicle an officer must have "factual" probable cause to search. Factual probable cause is information known to an officer that gives the officer enough evidence to arrest and/or search.

Examples:

An officer who observed a male selling narcotics from a van to a police informant conducted an investigatory stop of the van when he noted the driver's physical characteristics matched the informant's description. During the stop, the officer saw a bag that reportedly contained cocaine, and the officer then arrested the driver. The Colorado Supreme Court found that the officer's cumulative observations of the suspect's physical characteristics and the paper bag, combined with the informant's information, constituted probable cause to arrest. *People v. Lagrutta,* 775 P.2d 576 (Colo. 1989).

After the defendant's car was stopped based on reasonable suspicion of littering, the officers learned that the thrown object was a marijuana pipe. The Colorado Court of Appeals held that this information provided probable cause to believe the car contained evidence of a crime, and thus, the search of the car and

its contents were justified. *People v. Roth*, 85 P.3d 571 (Colo. App. 2003).

Compare with:

While executing a search warrant an officer answered the telephone. The caller was Dauphinee, who asked the officer if he could borrow some scales. The officer invited Dauphinee over, and when he arrived the officer conversed with him about the proposed use of the scales (i.e. to weigh cocaine). A loose arrangement was made for the officer to buy cocaine and Dauphinee drove off. After Dauphinee drove away officers stopped him, searched a knapsack in the car, and discovered drugs. The court ruled that, although there may have been reasonable suspicion to stop the car, there was not enough crime-related information known to the police to search the car. Therefore, the evidence was suppressed. *People v. Dauphinee,* 554 P.2d 1103 (Colo. 1976).

2. Probable Cause Based on Informants

Where any of the information an officer uses to establish probable cause is based on "hearsay" an officer must satisfy certain legal requirements before conducting a search based on probable cause.

a. Reliability of the Informant

In many circumstances an officer will have no problem establishing the reliability of an informant. For example, court's generally presume that "citizen-witness" are reliable unless circumstances suggest that the witness is interested or has an untoward motive in providing information. In other circumstances, such in cases of unnamed or anonymous informants, an officer will be required to obtain independent corroboration of the information before probable cause may be established. [These circumstances, as well as examples of what does and does not constitute sufficient corroboration, are discussed in detail in Chapter 2, **SEARCH AND SEIZURES – PERSONS**]

(1) Personal Knowledge

In order to establish probable cause to search a vehicle an officer must make sure that the informant, whether named or anonymous, is not just repeating conclusions or rumors. An officer should always ascertain or verify how the informant

got his or her information and make sure the information is based upon the informant's personal knowledge.

Example:

An informant, proven to be reliable in the past, made a controlled purchase of drugs in Higbee's vehicle while under police surveillance. The informant reported seeing a toggle switch on Higbee's dashboard with red tubes attached to wires coming from it. Higbee told the informant that this was dynamite. Officers then conducted a warrantless search of the car but found no explosives. The court nevertheless concluded that the information from the informant was sufficiently reliable when the officer who initiated the search verified the presence of an extra toggle switch on the dashboard when he looked into the car. *People v. Higbee,* 802 P.2d 1085 (Colo. 1990).

b. Staleness

Even when the informant is reliable and speaks from first-hand knowledge an officer may not search a vehicle unless there is probable cause to believe the crime-related evidence is still present in the vehicle. There is no specific time limit, however; each case is evaluated based on its individual facts. The courts will focus on two particular issues:

1. How long did the informant wait before relaying the information? Just because an informant says he or she saw crime-related evidence in a car on one occasion does not mean that the evidence is still there. Unless the informant can state a reason for believing the evidence is still in the vehicle the officer must obtain some corroboration prior to a search.

2. How long did the officer wait after receiving the information? If the officer delays too long after receiving information from an informant the evidence becomes "stale" and cannot be relied upon in establishing probable cause.

B. When an Officer May Search

1. Vehicles Removed to the Impound Lot

The United States Supreme Court has ruled that if there is probable cause to search the vehicle when it was "mobile" it is proper to warrantlessly search it after it has been removed to the impound lot. *Chambers v. Maroney,* 399 U.S. 42 (1970). The problem with this rule is that if the lot is secure, it is difficult to understand why the officers cannot obtain a warrant. *See People v. Martinez,* 32 P.3d 520 (Colo. App. 2001)(under the automobile exception, if there is probable cause to believe the vehicle contains crime-related evidence "the vehicle may be searched immediately or seized for a later search *after a warrant is obtained"* [emphasis supplied]).

Although it is always best to obtain a warrant once the vehicle has been secured in the impound lot, if officers do decide to warrantlessly search a vehicle on probable cause the officers should consider two factors:

1. The longer officers wait to search the vehicle the more likely it is that they will need to obtain a warrant.

2. If probable cause to search develops after the impoundment, the officers must obtain a warrant.

2. Emergencies

In an emergency involving immediate danger to persons, an officer may enter and search a vehicle.

Examples:

Officers saw a disoriented man, Haley, in a semi-conscious state by a car. The officers then searched the man and the car to find a medical alert card or identification that might assist the man, and in so doing the officers discovered crime-related evidence. The court held that the evidence discovered was admissible. *United States v. Haley,* 581 F.2d 723 (8th Cir. 1978).

An officer rode his bicycle past a car and smelled the odor of ether. The officer discovered that Clements owned the car and, after Clements refused consent to search the car, the officer opened the trunk because he knew ether to be volatile. The Colorado Supreme Court upheld the search because it was a "legitimate response to a public safety emergency." Therefore, the evidence observed when

the officer opened the trunk was admissible. *People v. Clements,* 661 P.2d 267 (Colo. 1983).

An armored car guard was robbed and the suspects escaped by car. Officers located the car in the parking lot of an apartment complex and searched it without first obtaining a warrant. The court of appeals concluded that exigent circumstances existed to search the car without a warrant because the officers were pursuing fleeing armed robbery suspects, there was a possibility that the suspects posed a threat to residents of the apartment complex, and that evidence of the suspects' identity could be obtained from the vehicle. *People v. McCoy,* 944 P.2d 577 (Colo. App. 1996).

C. Where An Officer May Search

If the officer has probable cause to search a vehicle, the officer may search any part of the vehicle where the evidence may be located, even if these areas are locked.

Examples:

A reliable informant told officers that he had just seen Ross selling narcotics out of the trunk of his vehicle at a certain location. Officers went to the location and searched Ross' trunk. They found a sack and a leather pouch, which they searched and found narcotics and money. The United States Supreme Court ruled that since the officers had probable cause to search the entire trunk it was proper to search any containers where the evidence might be located. *United States v. Ross,* 456 U.S. 798 (1982).

Acevedo arrived at the apartment of a suspected drug dealer and stayed for ten minutes. Officers observed him leaving with a brown paper bag that he placed in the trunk of his car. The officers stopped him a few blocks away and, without a warrant, located and opened the bag. Inside the bag the officers discovered marijuana. The United States Supreme Court held that officers may search a vehicle and the containers within it which they have probable cause to believe contain contraband. *California v. Acevedo,* 500 U.S. 565 (1991).

An officer pulled over a car for failure to signal a right-hand turn. The officer asked the driver if there were any drugs in the car. The driver responded "no" but produced a marijuana cigarette from behind his ear. Upon searching the car, the officer found a black wallet belonging to Moore, the passenger, which contained two packages of cocaine. The Colorado Supreme Court held that the officer had probable cause to search the car based upon knowledge that the occupants were involved

in drug activity, and having probable cause to search the car, the officer could also properly search containers in the car which might contain drugs. *People v. Moore,* 900 P.2d 66 (Colo. 1995).

Officers stopped a vehicle which they had probable cause to believe was involved in a burglary and contained a weapon used in that burglary. Without a warrant, they searched the car's passenger compartment and locked trunk and found a stolen television set and a cassette deck. The Colorado Supreme Court held that the search was justified under the automobile exception and the search of the entire car was justified because there was probable cause to believe the car contained evidence of criminal activity. *People v. Edwards,* 836 P 2d 468 (Colo. 1992).

VI. SEARCHES INCIDENT TO ARREST

Officers may search the arrestee, the passenger compartment, and closed containers incident to the lawful custodial arrest of an occupant or recent occupant of a vehicle. An officer may search a vehicle incident to a lawful arrest of a recent occupant only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search, or when it is reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle. *Arizona v. Gant,* 129 S.Ct. 1710 (2009). Note that this is a drastic change from previous practice, based on many court decisions. Based on those earlier decisions, police officers have long searched a vehicle, including the passenger compartment, incident to the arrest of a recent occupant, even when the arrestee had been out of the vehicle for as much as 30 minutes, and even when there was no reason to believe that evidence of the crime of arrest may be found in the vehicle.

Example:

Gant was arrested for driving on a suspended license, handcuffed, and locked in a patrol car. Officers then searched his car and found cocaine in a jacket pocket. The United States Supreme Court ruled that the search was unreasonable because police could not reasonably have believed either that Gant could have accessed his car at the time of the search or that evidence of the offense for which he was arrested might have been found. *Arizona v. Gant,* 129 S.Ct. 1710 (2009).

In deciding *Gant,* the Supreme Court acknowledged that a vehicle search incident to arrest will rarely be justified on officer safety grounds, stating: "Because officers have many means of ensuring the safe arrest of vehicle occupants, it will be the rare case in which an officer is unable to fully effectuate an arrest so that a real possibility of access to the arrestee's vehicle remains."

A. Reason for the Law

The rule which permits officers to search incident to arrest is much older than the Constitution. The purposes justifying a warrantless search incident to a lawful arrest are: (1) to ensure the safety of the arresting officer; and (2) to preserve easily concealed or destructible evidence. Historically courts were required to decide the parameters of a vehicle search incident to arrest on a case-by-case basis, which often led to confusion and uncertainty as to when and where an officer could lawfully search incident to arrest. Therefore, the United States Supreme Court established a clear "bright line rule" which would apply in every case. That rule defined the passenger compartment of an automobile as being within the hypothetical immediate control of an occupant or recent occupant of a vehicle. *New York v. Belton,* 453 U.S. 81 (1981).

In 2009, the United States Supreme Court decided *Arizona v. Gant*, which effectively overruled *Belton*, finding that the "lower courts had come to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception justified by the twin rationales of [officer safety and evidence preservation]." Now, a vehicle search incident to arrest is only permissible in two scenarios. First, if the arrestee remains unsecured and within reaching distance of the passenger compartment of the vehicle. Even the Supreme Court acknowledged that this situation would be rare.

Second, even if the arrestee is secured, *Gant* permits a warrantless search of the vehicle compartment if there is reason to believe that the vehicle contains evidence relevant to the crime for which the arrestee has been arrested. For example, if the driver is arrested for DUI, before a search incident to arrest can occur, the officer must have reason to believe the vehicle contains evidence of the DUI. If the driver is arrested for driving under restraint, it is difficult to imagine what evidence the vehicle may contain relevant to that charge.

Note that the use of the phrase "reason to believe" almost certainly means something less than probable cause. Indeed, if there was probable cause to search the vehicle, the officer could rely on the general automobile exception rather than the search incident to arrest.

B. Contemporaneous Requirement

The courts have traditionally required that the search incident to arrest be conducted contemporaneously with (i.e. at the same time and place as) the arrest. In order not to blur the "bright line" rule of *Belton,* courts have allowed increasing latitude with respect to when the search can be conducted.

The contemporaneous requirement was clarified in *People v. Malloy,* 178 P.3d 1283 (Colo. App. 2008). The noted that factors to consider when deciding whether the search was contemporaneous with the arrest include whether the search took place as soon as it became practical, whether the arrestee remained at the scene of the arrest, and whether there were any intervening acts occurring before the search that were unrelated to the search. The ultimate question is whether the arrest and search were so separated in time or by intervening events that the latter cannot be said to have been incident to the former.

In light of the decision in *Gant*, a search incident to arrest of an unsecured individual who still has access to the vehicle compartment will necessarily be contemporaneous. However, where the officer is relying on the second type of vehicle search incident, where there is reason to believe there is evidence relevant to the offense of arrest, there still may be some question regarding how contemporaneous the search must be. The following examples of pre-*Gant* cases are included solely for their potential guidance on the issue of the contemporaneous requirement.

Example:

An officer went to an apartment complex looking for a particular suspect. As he entered the parking lot, he noticed two men seated in a truck and observed that they immediately exited the truck as the officer arrived. The officer approached the men and requested identification. Suspecting that the driver, Savedra, did not have a valid license the officer asked him if his license was under suspension and Savedra admitted that it was and that he had no insurance. A computer check also revealed that Savedra had an outstanding warrant for his arrest. The officer then arrested Savedra, searched the passenger compartment of the truck and fund baggies of cocaine under the driver's seat. The Colorado Supreme Court held that the search was a lawful contemporaneous search of the truck even though Savedra was not in the vehicle at the time he was arrested because he was a "recent occupant" of the vehicle: "*Belton* can include situations where the occupant of vehicle anticipates police contact and exits the vehicle immediately before that contact occurs." *People v. Savedra,* 907 P.2d 596 (Colo. 1995).

Before the officer could pull over defendant, the defendant parked and got out of his car. The officer then parked, contacted the defendant, and arrested him after finding drugs in his pocket. Incident to the arrest, the officer searched the defendant's car and found a handgun under the driver's seat. The United States Supreme Court held that an officer is

entitled to search a vehicle incident to the driver's arrest even when an officer does not make contact until the person arrested has left the vehicle.
Thornton v. U.S., 541 U.S. 615 (2004).

C. Where an Officer May Search

1. The Passenger Compartment

It is clear that an officer may look anywhere in the passenger compartment of the vehicle incident to a lawful arrest. This includes all areas of the interior including the cracks of seats and under rugs.

2. Closed Containers

An officer may search any closed container found in the passenger compartment incident to a lawful arrest unless the container is sealed or locked.

Note: It is important to establish the precise theory upon which a search is conducted because the areas an officer is permitted to search will vary depending upon that particular theory. *Compare People v. Corpany,* 859 P.2d 865 (Colo. 1993)*(protective search* of car revealing a fanny pack under the seat was proper; exploration into the fanny pack was improper because there was no reason to believe it contained a weapon) with *People v. McMillon,* 892 P.2d 879 (Colo. 1995)(search of the contents of a purse found in the passenger compartment of the vehicle *incident to arrest* of driver wanted on outstanding warrants was proper).

3. Glove Compartments

An officer is entitled to search a glove compartment, even if it is locked. *People v. Perez*, 2009 WL 261514 (Colo. App. 2009)

4. Trunks

An officer may not search the trunk incident to arrest unless it is accessible to the arrestee (e.g. trunk can be opened without a key and the arrestee is standing next to it). *See Robbins v. California,* 453 U.S. 420 (1981).

5. Open Bed of a Truck

The Colorado Court of Appeals has held that an officer may search in an open bed of a pick up truck incident to arrest if the particular facts indicate the arrestee is in the immediate vicinity such as would permit him or her to obtain either a weapon or evidence. *People v. Barrientos*, 956 P.2d 634 (Colo. App. 1997).

6. The Arrestee

Do not forget to search the arrestee and any closed containers found on his or her person at the time of the arrest (i.e. wallets, purses, etc). Anything the arrestee has on his or her person may be searched at the time of the arrest or later at the station as an inventory search (see below).

D. Suggested Techniques

1. Always search all closed containers found on the person of the arrestee.

2. It is advisable to seek consent to search, even if there are other legal theories that may justify the search.

3. Be sure to fill out an inventory sheet for anything seized if the car is towed.

VII. PLAIN VIEW SEIZURES

An officer may seize evidence in plain view in or around a vehicle as long as the officer is lawfully present and the evidence is apparently crime-related.

A. Lawful Presence

In order to seize crime-related evidence, an officer must be lawfully present in the spot from which he or she sees (or smells) the evidence.

1. Officer Standing Outside the Vehicle

Generally the courts will allow an officer to look into the passenger compartment of a vehicle and inspect the outside of a vehicle, because an officer does not violate a person's reasonable expectation of privacy by making these observations. The issue of an officer's lawful presence becomes problematic when (1) the vehicle is located on premises; and (2) the vehicle is stopped without reasonable suspicion.

The Vehicle is on Premises

A vehicle located on premises is given more Fourth Amendment protection than a vehicle parked on the streets. In order to be in a position to lawfully view the outside or passenger compartment of a vehicle on premises, an officer must have a valid and lawful reason for entering onto the premises.

a. Vehicle In Garage or Carport

The reasonable privacy expectation is much higher when a garage/carport is private (i.e. attached to an individual residence or on a single-family premises) than when the garage/carport is open to many people (such as the common carport of an apartment complex). Therefore, more is required before an officer can enter a private garage or carport.

(1) Garage or Carport is Private

When a garage or carport is on single-family premises or is attached to an individual residence, the reasonable privacy expectation is the same as for the home. therefore, in order to enter the garage/carport, the officer must have probable cause and either a warrant or exigent circumstances, or valid consent.

Example:

An officer who suspected that the suspect was involved in a crime looked in the suspect's car which was parked under a carport by the suspect's home. The officer then saw stolen property in the car. The court ruled that the suspect had a reasonable expectation of privacy in his carport and since the officer did not obtain a warrant or obtain consent he was not lawfully present when the observations were made. Therefore, the evidence was not admissible. *People v. Apodaca,* 561 P.2d 351 (Colo. App. 1976).

(2) Garage or Carport is Not Private

When a garage or carport is open to many people, as is often the case with apartment complexes and motels, the reasonable privacy expectation is much lower. As a general rule, an officer has the same right to access or inspection of vehicles in public garages and carports as would any ordinary

citizen. If the garage or carport, while not attached to private premises, nevertheless restricts public access in some fashion an officer typically needs reasonable suspicion in order to enter the garage or carport.

b. Vehicle Not in Garage or Carport

If a vehicle is on a suspect's premises but not in a garage or carport the officer may look at or into the vehicle if the officer has reasonable suspicion to believe there is crime-related evidence there or if the officer can convince a court that he or she was present for a legitimate reason other than merely an exploratory search.

Note: Although it *may* be constitutional to enter a vehicle and seize crime-related evidence, the more professional practice is to impound the vehicle and obtain a warrant unless exigent circumstances exist.

c. Vehicle is on the Road

A vehicle which is stopped or parked on the road may be viewed without violating the owner's or possessor's reasonable expectation of privacy.

Example:

Gurule robbed a store and was caught a few blocks away. Some of the stolen items were found next to Gurule's car near the store An officer investigating the crime looked into the car and saw .22 caliber cartridges on the front seat console. The court ruled that the observation of the cartridges through the window and in plain view was not a "search." Therefore, the evidence was admissible. *People v. Gurule,* 593 P.2d 319 (Colo. 1978).

The biggest problem with plain view observations of evidence in the passenger compartment occurs when the court rules that the officer unconstitutionally stopped the vehicle on the road. A vehicle is stopped constitutionally when the officer has reasonable suspicion to believe an occupant committed or is about to commit a crime, or the driver committed a traffic offense.

Another problem occurs when an officer lawfully stops a vehicle but "enters" the vehicle without a legal reason.

Example:

An officer claimed that he seized heroin from a car because he saw heroin in plain view on the floor in front of the driver's seat. On cross-examination, however, the officer admitted that he made his observation of the heroin either standing outside the car or just as he was "starting to lean into" the car. The Arizona court ruled that by leaning into the car the officer violated an area where the suspect had a reasonable expectation of privacy. Since there was no exigency or consent to enter the car, the observation was an unconstitutional search. *In Re: One 1969 Chevrolet 2-Door,* 591 P.2d 1309 (Ariz. 1979).

2. Officer Inside the Vehicle (Prior Lawful Entry)

If an officer is already lawfully in a vehicle when crime evidence is observed in plain view that evidence may be seized without a warrant. The possible legal reasons why the officer might be in the car include (1) probable cause plus a search warrant; (2) probable cause plus an exception to the warrant (automobile exception or exigent circumstances); (3) search incident to arrest; (4) seizing evidence observed in plain view from outside the vehicle; (5) protective search for weapons incident to detention; (6) consent; or (7) inventory.

If an officer is inside the vehicle under any of these circumstances and then observes crime-related evidence in plain view that evidence may be seized, so long as the officer did not exceed the purposes for which he or she was lawfully inside the vehicle.

Example:

Police stopped Conley's car for a traffic violation. Conley was unable to produce any identification, but consented to a search of the car in order to find a small case which purportedly contained his identification. The officer found the case underneath a turntable in the back seat and simultaneously noted the serial number. He then radioed in the serial number and learned that the turntable had been reported as stolen. The court of appeals held that if, during the consent search, the officer observed evidence he suspects but has no probable cause to believe is crime-related the officer may record that information which is in plain view. However, the officer is not permitted to move the equipment in order to gain a better view unless moving that object is within the scope of the consent to search. *People v. Conley,* 804 P.2d 240 (Colo. App. 1990).

B. Apparently Crime-Related

In order to seize evidence under the plain view theory the evidence must be apparently crime-related.

1. The Probable Cause Test

The Colorado Supreme Court has stated that this means "nothing more and nothing less than probable cause to believe that the article to be seized is connected with criminal behavior."

The following are examples of evidence which the courts have ruled were and were not apparently crime-related.

Examples:

Officers stopped a vehicle because it matched the general description of a vehicle reported involved moments before in a break-in of a car in a car lot. While performing a lawful protective weapons search officers found a stereo unit, knobs, a stereo plate, wire cutters and pliers, in front of and underneath the front passenger seat and behind the driver's seat. The court ruled there was probable cause to believe these items were crime-related due to the nature of the items and the apparent attempt to conceal them in the car. *People v. Melgosa,* 753 P.2d 221 (Colo. 1988).

An officer stopped Brown at a lawful roadblock to check his license and registration. While standing beside the car the officer saw a green balloon tied off at the top. He also saw in the glove compartment some vials, some loose white powder and a bag of balloons. The United States Supreme Court ruled that the officer had probable cause to believe the evidence was illegal narcotics based on the officer's training and experience. *Texas v. Brown,* 460 U.S. 730 (1983).

Compare with:

An officer saw Bloyd leaving a construction company lot in the early morning. The officer stopped Bloyd's car and, after looking into the passenger compartment, saw tools. The Michigan court ruled that, without more information, the officer's observations did not establish probable cause to believe the tools were crime-related. *People v. Bloyd,* 292 N.W.2d 546 (Mich. App. 1980).

An officer looked into an unlocked car, saw a bottle of pills, and seized them. After seizing the pills the officer determined that they

were contraband. The Louisiana court ruled that because the officer did not have probable cause to believe the bottle contained contraband when he seized it the evidence must be suppressed. *State v. Meichel,* 290 So. 2d 878 (La. 1974).

2. Reasonable Suspicion

It is unsettled whether an officer can enter and search a vehicle after he or she sees evidence from outside the car which provides reasonable suspicion that the evidence may be crime-related. Aside from the requirement that officers observe an item as a result of a prior lawful intrusion and legal right of access, the incriminating character of an item must be "immediately apparent" to the officer who observes it. *Arizona v. Hicks,* 480 U.S. 321 (1987)(seizure in plain view appropriate where police have probable cause to believe object is incriminating; a police officer's act of moving stereo equipment to reveal serial numbers did not fall within the plain view exception to the warrant requirement).

Therefore, an officer should proceed very carefully when he or she observes items in plain view that, while possibly being incriminating, are not immediately recognized as being incriminating. In such a situation the officer should employ detention procedures and ask questions in an effort to establish probable cause that the evidence is crime related (so it can be seized under the plain view exception) or that suspect committed a crime (so the officer can arrest the suspect and search the vehicle incident to the arrest). Of course, the officer may always seek consent to conduct the search.

C. Inadvertence

Inadvertence means "by accident." While older cases suggest that an object seized under the plain view doctrine must have initially been observed inadvertently, this is no longer the rule. *People v. Najjar,* 984 P.2d 592 (Colo. 1999).

D. Plain View Doctrine v. Open View Doctrine

The difference between "open view" and "plain view" is that under the open-view theory an officer sees crime-related evidence in a home while standing outside the home. The officer in such circumstances is not permitted to enter the home to seize the evidence unless the officer obtains a warrant, obtains consent or is faced with exigent circumstances. Traditionally, many courts ruled that the viewing of crime-related evidence in a vehicle while standing outside a car did not give the officer the power to enter and seize the evidence. These courts reasoned that, since an officer cannot enter a home in such circumstances, the officer should not be empowered to enter the vehicle.

However, Courts have now discarded the "open view" analysis in ruling on vehicle searches and seizures.

E. Suggested Techniques

1. It is normally lawful for you to warrantlesly look into the passenger compartment of a vehicle unless the vehicle is located where a person has an increased expectation of privacy (e.g. a garage).

2. You are legally empowered to use a flashlight to see into the passenger compartment.

3. If there is any question as to whether the evidence is crime-related, try to talk to the suspect about it. Admissions and inconsistencies will provide greater justification for the seizure.

4. Always ask at the outset for consent for your search.

5. If there is still no probable cause to seize the evidence, *ask* the suspect if you can hold the evidence for a few hours while you investigate further.

6. Never enter a vehicle to get a "plain-view look around" for evidence unless you have another legal theory for your entry.

VIII. CONSENT SEARCHES

A consent to search is a waiver of Fourth Amendment rights. An officer should always seek consent, in addition to other legal theories for a search. This issue is discussed extensively in Chapter 6, **SEARCH AND SEIZURE – MISCELLANEOUS.** It is discussed here as it relates to the search of vehicles.

A. Always Ask

An officer should always seek consent to search a vehicle *in addition* to pursuing other legal theories for the search. It can never hurt and may help a great deal if the other theories are ruled defective by the courts.

Example:

An officer believed that the victim had been murdered in Dugan's car. Although the officer felt he had probable cause to search the car, he asked and obtained Dugan's consent before the search. The Arizona court ruled that even though the officer may not have had probable cause the consent validated the search, and the evidence found in the course of

the search was therefore admissible. *State v. Dugan,* 555 P.2d 108 (Ariz. 1976).

B. Voluntariness

In order for a consent search to be valid the consent must be voluntarily given. Once a police officer has lawfully stopped a vehicle there is no level of suspicion required in order for the officer to request that the driver give voluntary consent for the search of the automobile. *People v. Olivas,* 859 P.2d 211 (Colo. 1993).

A consensual search is voluntary if it is the product of an essentially free and unconstrained choice by its maker and not the result of circumstances which overbear the consenting party's will and critically impair his or her capacity for self determination. A consensual search is involuntary if it is the result of duress or coercion, express or implied, or any other forms such as undue influence, promises, threats or intrusive police conduct. Courts are required to examine the "totality of the circumstances" in determining whether consent has been provided voluntarily. This involves considering the individual circumstances of the consenting party (e.g. age, education, perceptions, etc.), the circumstances of the search (e.g. location, duration, etc.), and the conduct of the officers.

Example:

Narcotics officers conducting a surveillance of a motel observed two men arrive in a car, check into the motel, and then retrieve a bag from the trunk of the car. The officers decided to contact the two men, who invited them into their motel room and consented to a search of the room and their car. In searching the trunk of the car the officers believed the spare tire looked unusually large and upon closer inspection they discovered marijuana inside the tire. The trial court suppressed the evidence based on its finding that, due to the lack of education and understanding of the owner of the car, the owner did not provide consent to search voluntarily. The Colorado Supreme Court reversed, holding that the trial court's evaluation of voluntariness focused solely on the characteristics and perceptions of the suspect and failed to adequately consider whether there was objective evidence of overbearing, intrusive, coercive or deceptive behavior by the police. *People v. Magallanes-Aragon,* 948 P.2d 528 (Colo. 1997).

During a traffic stop, Castro, who was the only passenger in the car who spoke any English, consented to a search of the car. The Colorado Supreme Court noted that while a language barrier may be relevant to evaluate a suspect's ability to act voluntarily, it was not determinative in this case, as Castro had responded appropriately to the officers'

questions presented in English. *People v. Castro*, 159 P.3d 597 (Colo. 2007).

The following are some factors which tend to show a consent search is voluntary or involuntary. Most of the factors are self-explanatory. Those which are not are followed by an example. Bear in mind, however, that, as the *Magallanes* case points out, no single factor will or will not determine whether consent is voluntary; the circumstances must be examined in their totality. In addition, "the essential consideration in determining voluntariness of a consent to search is the impact of overbearing, coercive, or deceptive police conduct on a person with the knowledge and particular characteristics of the defendant. *People v. Magallanes-Aragon,* 948 P.2d 528 (Colo. 1997).

1. Factors Which Tend to Show Voluntariness

a. Officer's Courtesy

b. Fourth Amendment Warnings and Waiver

Even if the consenting party is in custody an officer does not have warn the suspect that he or she can refuse consent. *Ohio v. Robinette,* 519 U.S. 33 (1996)(Fourth Amendment does not require that a lawfully seized defendant be advised that he is "free to go' before consent to search will be recognized as voluntary). However, if an officer does tell the consenting party of the right to refuse, that will be a strong factor establishing voluntariness of the consent.

c. Signed Written Consent

When a person signs a written "consent to search" form it is a very strong indication of voluntariness. Conversely, the consenting party's refusal to sign such a written consent form is a factor that tends to show the consent was involuntary.

d. Fifth Amendment Warnings and Waiver

An officer is not required to give a suspect a *Miranda* warning before seeking consent, even if the suspect is in custody. In addition, a suspect who asserts his Fifth Amendment rights may still provide a valid consent to search. *People v. Phillips,* 197 Colo. 546, 594 P.2d 1053 (1979). However, when a suspect has been advised of his *Miranda* rights and then consents to a search, this tends to indicate that the consent was voluntary. The inference

is even stronger if the suspect waives his Fifth Amendment rights before consenting to a search.

e. Consenter Admits Guilt Before Consent Given

A suspect who confesses to the crime and then gives consent is more likely to have given voluntary consent to search, unless there are indications that the confession was not voluntary.

f. Consenting Party Aids in the Search

When a person consents to the search of a vehicle and then helps the officers in the search (e.g. opening the trunk without being asked to do so) the courts are more likely to rule that the consent was given voluntarily.

Example:

Hayhurst hit the victim with a hammer and pushed the victim out of his van. Officers went to Hayhurst's residence and asked his father for permission to search the van because the van belonged to the father. The father told the suspect to open the van. The officers then saw blood, hair and the hammer in the van. The court ruled that the consent was voluntary in part because the father said he wanted to "get to the bottom of the matter" and then directed his son to open the van. *People v. Hayhurst,* 571 P.2d 721 (Colo. 1977).

Note: If an officer asks the person to perform the task, this fact tends to show the consent is involuntary: "Would you mind opening the trunk?" sounds more like a command than a request to many courts.

g. Consenting Party is Intelligent or Sophisticated

An officer who can prove that the consent was given by an intelligent or "criminally sophisticated" person is more likely to convince a court that the consent was given voluntarily. *See United States v. Price,* 599 F.2d 494 (2nd Cir. 1979)(college education); *United States v. Wasserteil,* 641 F.2d 704 (9th Cir. 1981)(sophisticated businessman)

2. Factors Which Tend to Show Involuntariness

a. Force, Threats, Weapons

If the evidence tends to show any coercion before or during the seeking of consent, the court will usually rule that the consent was involuntary. *E.g., United States v. Jones,* 641 F.2d 425 (6th Cir. 1981)(large number of officers with guns drawn).

Any threats used by an officer in order to get the person to consent will also tend to show that the consent is involuntary. However, the courts have tended to find that an officer's statement that a search warrant will be obtained if consent is not given does not necessarily render consent involuntary, especially if probable cause to search exists. *See People v. Hancock,* 525 P.2d 435 (Colo. 1974) (evidence demonstrated that defendant's wife consented to search of their home and did so freely and voluntarily, even though told that a search warrant would be sought if she did not consent).

b. Custody

"Custody alone has never been enough in itself to demonstrate a coerced . . . consent to search." *United States v. Watson,* 423 U.S. 411 (1976). Custody, however, can be an important factor in a court's determination of voluntariness.

Example:

A state trooper validly stopped a weaving car upon suspicion of drunk driving. Rodriguez said he was tired and did not appear drunk. The officer subsequently unlawfully detained Rodriguez because of discrepancies in the registration. Nearly 75 minutes after Rodriguez was stopped he was told he was free to go, but asked if he would consent to a search of his vehicle. Rodriguez then consented to a search and illegal drugs were discovered. The Colorado Supreme Court held that Rodriguez's consent was tainted by the police illegality because no intervening event had occurred between the illegal arrest and the consent to search demonstrating Rodriguez' action was an act of free will. *People v. Rodriguez,* 945 P.2d 1351 (Colo. 1997).

c. Promises, Deception

Promises made to a person in order to obtain consent may result in involuntariness. In addition, deception by officers, particularly

when the deception involves the purpose of the search, will usually result in the court's ruling the consent was involuntary.

Example:

Officers suspected that Peterson and Rogers had stolen power tools and that the tools were in Rogers' car trunk. However, the officers told Rogers that they wished to search for something the previous owner had left in the trunk. Rogers consented and officers found the tools in the trunk. The Arizona court ruled that the officer's deception rendered the consent involuntary and suppressed the evidence. *State v. Peterson,* 604 P.2d 267 (Ariz. 1979).

d. Initial Refusal to Consent

When a person initially refuses to consent the officer has a more difficult time establishing that consent given at a later time was voluntary.

e. Refusal to Sign Written Consent Form

f. Suspect Hampers the Search

When a suspect gives consent but then does something to hamper the search the courts tend to wonder whether the suspect really voluntarily consented in the first instance. In such instances, it is advisable for the officers to reaffirm the suspect's decision by obtaining written consent.

g. Consenting Party's Condition

If the consenting party is very intoxicated, drugged, ignorant, old, tired, etc., the courts will take that fact into consideration when determining the voluntariness of the consent.

h. Asking the Suspect to Perform the Act

When an officer asks a person to perform the act required to conduct the search this factor tends to suggest the consent is not being given voluntarily.

C. Authority to Consent

In order for a consensual search to be valid the person giving the consent must have at least joint access or joint control over the vehicle to be searched. Normally, a person who has the use of the car may consent to the search of it.

D. Where the Officer May Search – Limitations Upon Consent

An officer must be sure that the consent extends to the place or places where the officer actually searches. An officer who obtains consent to search the passenger compartment, for example, may not search the trunk. If the officer exceeds the scope of the consent, the evidence that is thereafter discovered is subject to suppression.

Examples:

Wiley was arrested for driving under suspension, told by the officer that her car was to be impounded, and asked by the officer whether she wanted her purse to remain in the car. She then asked the officer to bring the purse with him to the police station. At the station the officer advised Wiley of her *Miranda* rights and, after an hour of polite conversation, he asked her whether her purse contained any illegal items. Wiley responded "no," and then agreed to allow the officer to search it. The search revealed illegal drugs. The court of appeals found voluntary consent to search and concluded that a reasonable person in Wiley's position would have understood that granting the officer consent to search the purse for "illegal items" also authorized him to search all containers found inside the purse. *People v. Wiley,* 51 P.3d 361 (Colo. App. 2001).

An officer suspected Jimeno was selling illegal drugs, and during the course of his surveillance stopped Jimero after witnessing a traffic violation. The officer asked for permission to search Jimeno's car after informing him that he suspected there were drugs in it. Jimeno gave permission after responding that he had nothing to hide. The officer thereafter found cocaine in a paper bag on the floor of the front passenger area. The United States Supreme Court held that the search fell within the scope of the consent since Jimeno had been advised the officer was looking for drugs and Jimeno placed no express limitation on the scope of the search. The court found it objectively reasonable for the officer to conclude that the general consent to search the car included consent to search containers within that car which might contain drugs. *Florida v. Jimeno,* 500 U.S. 248 (1991).

After stopping a car for a traffic violation an officer asked the driver (who was the subject of a narcotics investigation) if there were any

drugs in the car. The driver said there were no drugs in the car but produced a marijuana cigarette from behind his ear. The driver then consented to a search of the car. During the search the officer found a black wallet belonging to Moore, the passenger, which contained two packages of cocaine. The Colorado Supreme Court noted that the driver knew that the officer was looking for evidence of drugs and had voluntarily consented to the search without limiting the scope of consent to exclude the wallet. Therefore, the officer properly assumed that he had permission to search the vehicle including any containers in it. *People v. Moore,* 900 P.2d 66 (Colo. 1995).

Olivas, who was stopped on a traffic violation, was asked whether he was carrying contraband or money. He replied he was not carrying such things and signed a form authorizing a "complete" search of his vehicle for drugs. The Colorado Supreme Court held that when a suspects signs a general form authorizing a complete search, it is reasonable for the police to believe they may search areas extending beyond the passenger compartment and into the trunk if they have a sufficient basis to believe contraband is hidden in such areas and the suspect fails to affirmatively limit the search away from these areas. Here, there was no express or implied attempt to limit or withdraw consent and the defendant knew that the object of the search was to find illegal drugs. *People v. Olivas,* 859 P.2d 211 (Colo. 1993).

E. Withdrawal of Consent

Old appellate cases suggest that once consent is given the consenting party cannot then withdraw that consent. However, those decisions are unreliable. If the consenting party withdraws his or her consent, the officer should stop the search and find out why. The officer should advise the party of his or her Fourth Amendment rights and then again seek consent. If the party again reconsiders and consents to a search, the officer should attempt to obtain a signed waiver. If the consent is not given, the officer should not search any further unless there is another legal theory to support continuing the search.

F. Consent – D.U.I.

There are two important consent issues which an officer should consider when the officer suspects that the driver of a vehicle is intoxicated.

1. Roadside Sobriety Tests

An officer must obtain the voluntary consent of the drive in order to conduct roadside sobriety tests.

Example:

An officer stopped Carlson for a traffic violation and upon contacting him noticed that Carlson's eyes were red and he smelled of alcohol. The officer also noticed that Carlson's balance seemed unsteady as he walked to the rear of the car. The officer told Carlson that he would like him "to do some road-side tests but that he did not have to if he didn't want to." Carlson then performed the tests and failed. The Colorado Supreme Court ruled that the sobriety test is a "search" to determine the "coordinative characteristics" of a suspect. These searches are unconstitutional without the voluntary consent of the suspect. The court then remanded the case to the trial court for a ruling on the voluntariness of the consent. *People v. Carlson,* 677 P.2d 310 (Colo. 1984).

2. Chemical Testing

A person who drives a vehicle upon a highway in Colorado gives his "consent" to have breath, blood, or urine tested in order to determine the alcoholic content of the person's blood if there is reasonable cause to believe the driver is under the influence of alcohol. If a driver refuses to take the test the driver's license may be revoked. Section 42-4-1301, C.R.S. (2008).

G. Suggested Techniques

Always politely seek consent to search a vehicle no matter how sure you are that another legal theory will justify the search.

IX. SEARCHES AND SEIZURES BY PRIVATE PERSONS

The Fourth Amendment prohibits unreasonable searches by the state. A private person cannot violate a suspect's constitutional rights unless the private person is acting as an agent for the state.

Example:

An airplane landed at an isolated airstrip. A citizen, suspicious about the plane, entered the plane, saw a load of marijuana, and contacted officers. The court ruled that the illegal entry by the citizen did not violate the suspect's Fourth Amendment rights. Therefore, the evidence discovered by the citizen was admissible. *State v. White,* 574 P2d 840 (Ariz. 1977)

A. Encouragement by Law Enforcement

If an officer encourages a private citizen, in any way, to search a vehicle, the citizen becomes an "agent" of the state. The citizen then is under the same restrictions as an officer for Fourth Amendment purposes.

B. Cooperative Searches

If an officer permits a citizen to help in an investigation the officer must be careful to control the citizen so that the citizen does not conduct an illegal search.

Example:

Officers and a representative of a credit card company went to Stapleton's home to arrest Stapleton for credit card fraud. After the arrest, the company representative obtained Stapleton's car keys, searched Stapleton's car and discovered crime related evidence. The court suppressed the evidence because the search was a "joint operation" between the officers and the company agent. *Stapleton v. Superior Court,* 447 P.2d 697 (Cal. 1968).

C. Suggested Techniques

1. Never tell or ask a private citizen to enter another person's vehicle unless the citizen has a right to be in the vehicle.

2. If a private citizen has already conducted an illegal search and asks you what to do tell him or her to do nothing. Take the information and obtain a warrant if the information establishes probable cause. Otherwise obtain corroboration to reach the point of probable cause, and then obtain a warrant.

X. INVENTORY SEARCHES

An officer may conduct an inventory search of a vehicle which is in the officer's lawful custody if the officer is searching pursuant to the officer's departmental policies.

A. Purposes of an Inventory Search

The Colorado Supreme Court, in *People v. Counterman,* 556 P.2d 481 (Colo. 1976), explained the purposes of an inventory search as follows:

1. Protection of an Owner's or Occupant's Property

If an officer's purpose is to look for crime-related evidence, the officer may not rely upon the inventory search theory.

Example:

Rutovic was stopped while driving his car and arrested on theft charges. Officers then impounded and inventoried Rutovic's car and found crime-related evidence in the zippered cover of the car's front seat arm rest. However, the Colorado Supreme Court held that, based on the officer's testimony, the real purpose for the "inventory" of the car was to search for fruits of the crime and the "inventory" rationale was a pretext for that search. The evidence was therefore found to be inadmissible. *People v. Rutovic,* 193 Colo. 397, 5676 P.2d 705 (1977).

2. Protection of the Public from Liability Based on Claims of Missing or Damaged Property

Officers are on the "horns of a dilemma" when deciding whether to conduct an inventory search. If they conduct an intensive search, they risk violating a person's constitutional rights. If they conduct only a brief superficial search or no search at all they risk accusations of theft and civil suits.

3. Protection of the Police From Dangerous Instrumentalities

If an officer has reason to believe the vehicle may contain a weapon the officer may lawfully inventory the vehicle to find it. *Cady v. Dombrowski,* 413 U.S. 433 (1973).

B. Requirements For an Inventory Search

In order to inventory a vehicle the vehicle must be in the officer's lawful custody. The courts often rule that if the vehicle is lawfully parked or there are reasonable alternatives to the inventory the officer may not inventory the vehicle.

1. Lawful Custody

An officer must have lawful custody of a vehicle in order to conduct an inventory search. A car which is legally parked at the time of the stop should normally not be inventoried unless the officers obtain consent to do so or there is a very good reason to believe the car will be vandalized or broken into.

Examples:

An officer noticed that Opperman's car was illegally parked and therefore issued a ticket. Later that day another officer noticed that the car was still illegally parked and had it towed to the impound lot. The officer then inventoried the car an discovered marijuana in the glove compartment. The United States Supreme Court ruled that, since the vehicle was in the officer's lawful custody the search was reasonable and the evidence recovered was admissible. *South Dakota v. Opperman,* 428 U.S. 364 (1976).

Officers stopped Moore in order to arrest him on an arrest warrant for sale of heroin. When Moore stopped his vehicle he parked in a lawful place and where it posed no safety hazards. After the arrest the officers inventoried the car and located heroin. The Arizona court ruled that the inventory search was unreasonable in these circumstances and therefore suppressed the evidence. *In Re: One 1969 Chevrolet 2-Door,* 591 P.2d 1309 (Ariz. 1979).

2. Reasonable Alternatives

An officer who has a reasonable alternative to the impoundment and inventory *may* be required to pursue that alternative rather than impound and inventory the vehicle. Under the federal constitution, the United States Supreme Court has held that the Fourth Amendment does not require an officer to pursue "reasonable alternatives." *Colorado v. Bertine,* 479 U.S. 367 (1987)(officer's choice of impounding and inventorying its contents was reasonable and cannot be attacked solely because other equally reasonable alternatives were available). However, the Colorado courts have not expressly adopted *Bertine* under the state constitution, and may look to factors, such as whether other alternatives were available, in deciding whether an officer acted reasonably in impounding and inventorying a vehicle.

Example:

State troopers stopped a truck for speeding and arrested the driver for driving while intoxicated. The troopers then called for a tow truck without offering the driver the option of leaving the truck by the side of the road. The officer then searched the interior of truck incident to the arrest and conducted an inventory search of the bed of the truck, including a locked toolbox attached to the truck. Inside the toolbox the officers found illegal drugs. In concluding that the inventory search was reasonable, the court of appeals noted that the officers were not only following standard procedures and departmental policies, but they also considered the other

factors in deciding to impound and inventory, such as the remote location of the stop and the risk of vandalism in that location if the truck were not towed. *People v. Gee,* 33 P.3d 1252 (Colo. App. 2001).

3. Departmental Rules

Officers are usually safe if they follow their department rules relating to inventory searches.

Examples:

The defendant was arrested at his ex-girlfriend's apartment, and the police learned that he had driven to the scene on a suspended license. The police towed his car and later conducted an inventory search. The police department policy, where, as here, a vehicle was driven illegally and the driver has been arrested, was to impound the vehicle, unless a passenger has a valid driver's license and is then allowed to drive the car away. The Colorado Court of Appeals held that the impound and inventory search of the car, which was done pursuant to departmental regulations, was lawful. *People v. Milligan*, 77 P.3d 771 (Colo. App. 2003).

Patnode was stopped for traffic violations and ultimately arrested for failure to provide proof of insurance. Patnode's car was impounded, and a subsequent inventory search produced methamphetamine and a record of drug transactions. Patnode conceded that the police had followed departmental rules in conducting the impound and inventory search; he argued, however, that the arrest was pretextual so the search was invalid. The Court of Appeals disagreed, holding that the validity of an inventory search turns on the scope of the law enforcement agency's policies, rules, or procedures, not on the subjective intent of the officer in stopping or arresting a defendant. *People v. Patnode*, 126 P.3d 249 (Colo. App. 2005).

According to departmental policy, it was routine procedure that every time the sole occupant of a car was arrested, and there was no alternative person to take the car, the car was to be impounded. At the time Grenier was taken into custody, there was no one else available to take the car. In addition, the car could not be left unattended because, considering the area of town, the car would likely not be there when Grenier returned. Given these factors, the Court of Appeals held that the decision to impound the vehicle was reasonable, in accordance with the applicable department

regulations, and necessary to provide for the security of the car. *People v. Grenier*, 200 P.3d 1062 (Colo. App. 2008).

However, when the rules are written too broadly to include searches not within the proper purpose or scope of a valid inventory search, a search pursuant to those rules may be unconstitutional even if the rules are followed to the letter.

Examples:

Officers had probable cause to arrest the occupants of a truck for a theft committed earlier that day. After the arrest an officer inventoried the truck according to departmental procedures that required the impoundment and inventory of all vehicles "on any arrest when a party and vehicle are separated." The court ruled that this regulation was too broad and authorized searches not simply to protect the suspect's property but also to search for crime-related evidence. *People v. Hicks,* 590 P.2d 967 (Colo. 1979).

Compare with:

State troopers stopped a truck for speeding and arrested the driver for driving while intoxicated. The troopers then called for a tow truck without offering the driver the option of leaving the truck by the side of the road. The officer then searched the interior of truck incident to the arrest and conducted an inventory search of the bed of the truck according to written and written state patrol policies. The Colorado Court of Appeals held that the written policies of the State Patrol were properly guided by concern for protecting the safety of the driving public and the safety of the suspect's vehicle. The court also found evidence establishing that unwritten procedures were routinely employed by state troopers when deciding whether to conduct an inventory search and the standards underlying those unwritten policies were reasonable. *People v. Gee,* 33 P.3d 1252 (Colo. App. 2001).

C. Where the Officer May Search

As a general rule an officer may search a vehicle but not closed containers during an inventory search.

1. The Vehicle

An officer may conduct an inventory search of any part of the vehicle where it is reasonable to believe valuables may be stored. This includes the floorboards, glove compartment and trunk (but not under wheel

covers or hood). Crime-related evidence discovered in a good-faith inventory search of these areas is normally admissible in court.

Examples:

A state trooper observed a Thunderbird weaving on a state highway. The car had Florida license plates with the word "lease" on them. The officer stopped the car and asked the driver for a license and a car rental contract. The driver produced an unsigned rental contract for a Mustang. The driver then produced an unsigned rental contract for the Thunderbird which contained a clause stating the car could not be taken outside of Arizona or Nevada. There were no outstanding warrants for either person in the car and the vehicle had not been reported stolen. Nonetheless, the trooper decided to seize the car and told the driver and the passenger that he would seize and inventory the car but they were free to leave. He subsequently found a bale of marijuana in the trunk. The Colorado Supreme Court held that although the officer had sufficient reasonable suspicion to temporarily seize the car, there was no justification for the search of the trunk as an inventory search because the temporary detention had not ripened into an impoundment. *People v. Litchfield,* 918 P.2d 1099 (Colo. 1996).

An officer properly arrested Trusty out of a vehicle. Trusty stated the vehicle belonged to Carpenter but he did not know where Carpenter was. The officer then inventoried the trunk according to departmental policy in order to determine whether the car contained a spare tire and jack. In addition to finding the tire and jack, the officer also found Carpenter's body. The court ruled that the inventory was reasonable, and the discovery of the body was therefore admissible. *People v. Trusty,* 516 P.2d 423 (Colo. 1973).

2. Closed Containers

a. Federal Constitutional Rule

Under the federal constitution an officer may search closed containers found inside a vehicle pursuant to an inventory conducted according to a departmental directive.

Example:

Bertine was stopped and arrested for driving while intoxicated. After Bertine was taken into custody and before the tow truck arrived to take his van to the impound lot one

officer inventoried the contents of his van. While doing this the officer opened a closed backpack and found controlled substances. The United States Supreme Court upheld the search of the backpack, rejecting any notion that police must consider the strength of an individual's privacy interests in containers in the car. *Colorado v. Bertine,* 479 U.S. 367 (1987).

Note: Be careful. Read the next section.

b. Possible Colorado Rule

Before *Bertine* was decided the Colorado Supreme Court had declared that officers normally may not search closed containers found during an inventory search of a vehicle. The court reasoned that the purposes of the inventory rule do not furnish the police an excuse for rummaging through closed suitcases or sealed packages. *People v. Counterman,* 556 P.2d 481 (Colo. 1976). When the United States Supreme Court rejected this approach in *Bertine* it remanded the case back to Colorado, and the Colorado Supreme Court then ordered arguments from the parties as to whether it is proper under Colorado's constitution to inventory closed containers discovered in a vehicle. However, before the court could resolve this issue, the case was settled.

This leaves a serious question of whether a department rule to search closed containers during vehicle inventories is lawful in Colorado. Until the question is answered officers should follow department rules and always try to have an alternative theory to search (e.g. warrant, consent, etc.).

c. Exceptions to the Possible Colorado Rule

Even under the more restrictive rule the Colorado Supreme Court followed before *Bertine* (and may continue to follow under the state constitution), there are some circumstances where the court allows officers to search closed containers during a vehicle inventory.

(1) Certain Types of Containers

If there is a specific good reason for inventory of the container the court will usually rule that the search was proper. These containers usually hold valuable property and the container shows what is in the container (e.g. gun case, camera case, etc.).

Example:

After stopping Roddy's car following a high speed chase officers observed and inventoried the car and discovered a bank bag. The officers opened the bag in order to count the money but instead found marijuana. The court ruled that the inventory was reasonable, and the evidence was admissible. *People v. Roddy,* 532 P.2d 958 (Colo. 1975).

(2) Containers Taken to Booking

If an arrestee takes a closed container with him to the jail the officer may inventory it. *See* Chapter 6, **SEARCH AND SEIZURE – MISCELLANEOUS.**

3. Property on the Arrestee

An officer may inventory (or search incident to arrest) any property on an arrestee's person (e.g. wallet) or closely associated with the arrestee (e.g. purse).

Example:

Harfmann was arrested for driving under the influence of alcohol. During the search incident to the arrest the officers found a package of cigarette papers. The officer waited thirty minutes to inventory the package. When he finally searched the package he found a bag of cocaine. The court ruled that the search was a proper search incident to arrest and inventory, and all of the evidence was therefore admissible. *People v. Harfmann,* 633 P.2d 500 (Colo. App. 1981).

D. Suggested Techniques

1. Never inventory a vehicle just because you have arrested the driver out of the vehicle. Rather, conduct a search incident to arrest of the passenger compartment.

2. Always try to obtain consent in addition to the inventory theory.

3. If you have serious questions about whether an inventory search is reasonable under the circumstances, ask the driver (or owner, etc.) what to do with the car. He the driver/owner wishes the car to be towed, an inventory search is more likely to be reasonable.

4. Ask the owner to sign a waiver of liability if the owner wants the car left at the scene. If he will not waive liability, strongly consider impoundment and inventory.

5. If you decide to inventory:

   a. Conduct the inventory in the presence of another officer and/or the owner, if possible.

   b. Fill out an inventory sheet and give a copy to the owner. Ask him or her if there is anything else of value in the vehicle.

   c. Be sure to secure the vehicle.

6. Be sure your department has written rules relating to the inventory search of vehicles. Know these departmental rules. If certain rules go "too far" or "not far enough" ask your legal advisor to get them changed.

7. If you cannot get consent and have probable cause to believe crime-related evidence is in a vehicle, always get a warrant. Do not rely on the inventory theory because the court will rule that your purpose in searching was to find crime-related evidence rather than protecting the suspect's property.

XI. THE VEHICLE AS EVIDENCE

Officers may seize a vehicle if they have probable cause to believe the vehicle itself is material evidence in a case. This legal theory arises most often in "hit and run" type cases.

Example:

Zamora struck his wife and her friend with his car and then ran into another car. Officers responded to Zamora's home and, after observing a paint transfer and damage to the car, had the car towed. Zamora was arrested but was released several days later without formal charges being filed so the officers could conduct additional investigation. Zamora's car was not returned to him at the time of his release from custody, and paint samples were obtained from the car the day following his release. The Colorado Supreme Court ruled that there was no necessity to release the car merely because Zamora had been released, because the officers had probable cause to believe the car itself was evidence of a crime. The seizure of the paint samples from the exterior was also constitutional. *People v. Zamora,* 695 P.2d 292 (Colo. 1985).

Officers may also temporarily seize a vehicle upon reasonable suspicion that the vehicle was involved in criminal activity. Such detention must be limited in terms of time and intrusiveness. To determine the nature and quality of the intrusion, the courts look to the following factors: 1) whether the police had a compelling reason for detaining the property; 2) how long the property was detained; 3) whether the police forced the defendant to relinquish the property; and 4) whether the property was moved a significant distance.

Example:

Officers investigating a report of suspicious activity observed a car matching the description of the car involved. Although they lost sight of the car, they soon observed the defendant nearby; the defendant fled upon seeing the police. After a chase, the police detained the defendant, obtained his keychain, and used his keyless remote device to locate the nearby car. They then seized the car until a warrant was obtained for a full search. The Colorado Supreme Court held that the temporary detention of the car was not unreasonable as the officers initially did not enter the car until further investigation into the defendant's activities was completed, and a warrant was uncovered for the defendant's arrest. The court also noted that the car was parked on a public street in plain view, was not forcibly removed from the defendant, and the defendant was not ordered to exit the car so that the officers could take possession of it. *People v. Tallent*, 174 P.3d 310 (Colo. 2008).

XII. STANDING

A person does not have standing to contest an alleged unconstitutional search or seizure unless the person has a reasonable expectation of privacy in the vehicle or property searched.

A. Abandonment

A person who abandons his or her vehicle loses a reasonable expectation of privacy with respect to that vehicle.

Example:

Hampton and his friends used Clark's car to commit an armed robbery. Officers interrupted the robbery and the suspects fled on foot and abandoned the vehicle. The officers searched the car and found crime related evidence. The court ruled that by leaving the vehicle behind, the suspects lost their reasonable expectation of privacy in it. Therefore, the

evidence recovered from the vehicle was admissible. *People v. Hampton,* 603 P.2d 133 (Colo. 1979).

Note: In cases where an officer believes a car has been abandoned but is aware that there has been a recent occupant it is strongly advised that the officer secure the car and obtain a warrant.

B. Stolen Vehicles

A suspect does not have a reasonable expectation of privacy in a vehicle which he or she has stolen. However, the suspect does have standing to object to the search of containers in the vehicle which belongs to him or her. It is always best to ask the suspect whether he or she owns an item or not. If the answer is yes, seek voluntary consent; if the answer is no the suspect usually loses standing to object to the object's admissibility.

C. No Possessory Interest In Articles

A person does not have standing to complain about the seizure of an item if he or she has no possessory interest in it, such as when the item is stolen. However, the suspect may be in a position to object to a search conducted to discover the item.

Examples:

An occupant of a car was "casing" a house for a burglary. After an officer stopped the car he asked the three male occupants about a purse on the floor. No one claimed any possessory interest in the purse, but a passenger said he "found" the purse. When the officer offered to return the purse to its lawful owner the passenger agreed to let him take it. The officer looked into the purse and found the victim's identification. Soon thereafter the victim reported the burglary of her home. The court ruled that the occupants had no standing to object to the introduction of the purse because they denied any possessory right to the purse and had no objection to the officer taking it. *People v. Cobb,* 690 P.2d 848 (Colo. 1984).

Suttles and his friends committed a number of armed robberies. A photograph taken during one of the robberies showed that Suttles had an earring and used a chrome-plated revolver. Officers later stopped a car with three occupants because they looked like the robbers. After the stop the suspects, including Suttles (who was a passenger), were arrested and the car was searched. During the search the officers found a chrome-plated gun and an earring. Suttles told the officers that he had found the gun. The court ruled that "finding" a piece of evidence does

not produce a reasonable expectation of privacy in it. Also, since Suttles was a passenger in the car he lacked standing to challenge the search. Therefore the evidence was admissible. *People v. Suttles,* 685 P.2d 183 (Colo. 1984).

Note: Always ask what the suspect's relationship is to the area searched and evidence seized.

D. Passengers

Normally, a passenger does not have standing to contest the search of a vehicle unless the passenger asserts a possessory right to the vehicle or the property seized within the vehicle.

Examples:

Officers stopped a vehicle because they thought the occupants had committed an armed robbery. In a search of the vehicle, the officers found evidence which linked the suspects to the crime. Rakas, a passenger in the car, moved in court to suppress the evidence alleging an illegal search and seizure. The United States Supreme Court ruled that Rakas did not have standing to contest the search or seizure because he did not allege that he had a possessory interest in the vehicle or the crime-related evidence seized. *Rakas v. Illinois,* 439 U.S. 128 (1978).

Henry assaulted the victim with a pool cue. Since the victim and the officers knew Henry they began to look for the car Henry was traveling in. The car, which belonged to and was being driven by Vallejos, was stopped soon after Henry was arrested and a gun was located in the back seat where Henry was sitting. The gun was later linked to a shooting. The court ruled that Henry had no standing to contest the search because he did not assert "a property interest in the [car] or the objects taken there from." Therefore, the gun was admissible in court. *People v. Henry,* 631 P.2d 1122 (Colo. 1981).

Note: It is absolutely critical that you ask passengers what possessory right they have in the vehicle or crime-related evidence discovered. the reason is that if you do not ask the suspect will be free to assert a possessory interest later at the suppression hearing.

E. Suggested Techniques

Normally there is no way an officer can affect a suspect's standing to contest a search or seizure.

1. The one way you can have an important impact on the suspect's standing is to ask the suspect what his relationship is to the place searched and evidence seized. Always ask.

2. If a suspect has abandoned a vehicle, always consider whether there is probable cause to get a warrant first.

3. Never, never stop and search a vehicle just because the passenger has no expectation of privacy in the vehicle. It can backfire and get you sued (e.g. by the driver).

Chapter 5

SEARCH AND SEIZURE – CLOSED CONTAINERS

CONSTITUTION OF THE UNITED STATES
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 of affirmation, and particularly describing the place to be searched and the persons or things to be seized."

I. INTRODUCTION

The search and seizure of closed containers is becoming as confusing and complex as the search and seizures of homes. If an officer is to understand when he or she may or may not search or seize a closed container, the officer absolutely must think about and understand the legal theories justifying the search or seizure.

Note: Although this chapter discusses all of the legal theories related to the search of container, officers should **always** obtain a **WARRANT** if at all possible.

II. DEFINITIONS – CLOSED CONTAINERS

A. Containers

A container is "any object capable of holding another object." *New York v. Belton,* 453 U.S. 454 (1981).

Note: Courts are inclined to define "containers" expansively, including non-traditional, technical containers such as computer hard drives. *See, e.g,. People v. Gall,* 30 P.3d 145 (Colo. 2001)(computers seized pursuant to a warrant were reasonably likely to serve as "containers" for writings or the functional equivalent of "written or printed material").

B. Closed

A container is "closed" if an officer cannot see into it without opening it.

Note: Court's sometimes make distinctions between "closed" containers and locked or "sealed" containers. While there are many instances when an officer may search a "closed" container without a warrant [as will be discussed in the following sections], courts are often more restrictive when searching locked or sealed containers absent a warrant. *See People v. Gall,* 30 P.3d 145 (Colo. 2001)(approving procedure of seizing "sealed" computers and subsequently obtaining a warrant for the search of the hard drives).

III. REASONABLE EXPECTATION OF PRIVACY

A person has a very high reasonable expectation of privacy in his or her closed containers.

A. The Area Inside a Closed Container

An officer must remember that the courts have ruled that a person can reasonably expect the same privacy in his or her closed containers as his or her bedroom.

1. Seeing Inside

An officer who looks inside a closed container conducts a "search." For example, an x-ray scan at the airport is considered to be a "search," although such a search is considered reasonable given the unique security concerns at airports. *United States v. Henry,* 615 F.2d 1223 (9th Cir. 1980).

2. Feeling Inside

An officer who feels inside a closed container conducts a search. The only time an officer may feel inside a closed container is under the following legal theories:

a. Search Incident to Detention (Frisk)

An officer may look or feel inside a closed container incident to a detention only if he or she has an objectively reasonable belief that a weapon or dangerous instrument is contained inside the container.

Examples:

Corpany was a passenger in a vehicle stopped by officers for a traffic violation. The officer observed Corpany place

something under the front seat as the vehicle was coming to a stop. After ordering all passengers out of the car, officers searched the area under the seat and found a fanny pack. An officer opened the fanny pack and found illegal drugs. The Colorado Supreme Court held that, although the search under the seat was proper, the exploration into the fanny pack after the officer was unable to detect weapons during the pat-down was unrelated to the sole justification for a protective search, and therefore exceeded constitutionally permissive grounds. *People v. Corpany,* 859 P.2d 865 (Colo. 1993).

While executing a search warrant for guns and drugs in a residence Martinez arrived and told officers that he was a resident. The officers conducted a pat-down search for weapons, discovered a pouch, and felt several small pointed objects protruding through the pouch. The officer opened the pouch and found two sheet metal screws and a bag of cocaine. While the court found the officer properly conducted the protective search, it held that the officer may not open the container unless there are specific and articulable facts supportive of a reasonable suspicion that the container poses a threat to the officer or others nearby. Here, no reasonable person could believe that the pouch contained a weapon, and searching it was therefore illegal. *People v. Martinez,* 801 P.2d 542 (Colo. 1990).

See also People v. Ratcliff, 778 P.2d 1371 (Colo. 1989)(search of "tic-tac" size vial during protective search was impermissible where the police have no reason to believe that its contents present a threat of danger).

b. Search Incident to Arrest

The container is on the person of or under the control of the arrestee.

c. Under Authority of a Warrant

d. With the Consent of an Owner or Possessor

e. Under Emergency Circumstances

The officer has probable cause to believe the container holds a dangerous instrument (like a bomb or a loaded weapon).

3. Smelling Inside

An officer who uses any means to get the smell out of a container has conducted a search.

Example:

An officer squeezed the sides of a suitcase together and smelled the odor or marijuana coming out. The Court ruled that the officer's conduct was a "search" (although justified by an exigency). *Hernandez v. United States,* 353 F.2d 624 (9th Cir. 1966).

B. The Area Surrounding a Closed Container

Generally, a person has a low expectation of privacy in the area surrounding a closed container. However, courts often make distinctions based upon where that particular container is located. For example, the United States Supreme Court has held that a "dog sniff" of a person's luggage at an airport does not implicate any reasonable expectation of privacy and, therefore, does not constitute a "search." Similarly, the Colorado Supreme Court has held that a "dog sniff" of luggage in transit on a Greyhound bus likewise did not constitute a search where the officer's actions in no way delayed the departure of the bus. *People v. Ortega,* 34 P.3d 986 (Colo. 2001). However, the Colorado Supreme Court has held that, while individuals have a reduced expectation of privacy in luggage or closed containers in public areas such as an airport, that reduced expectation of privacy does not apply to the home. Therefore, under the Colorado Constitution, using a narcotics detecting dog to sniff a locked safe in a person's basement constitutes a "search." *People v. Unruh,* 713 P.2d 370 (Colo. 1986).

C. Suggested Techniques

Because suspects have such a high expectation of privacy in their closed containers, officers should hesitate to enter containers unless they get a warrant or satisfy one of the other legal theories for a search (*see* below).

IV. LEGAL THEORIES FOR SEARCHES

An officer may search a closed container only if there is a legal reason for the search. The following is a discussion of the legal theories which justify the search of closed containers.

A. Probable Cause and the Warrant Requirement

Probable cause alone will not justify the warrantless search of a closed container any more than it will justify the warrantless search of a suspect's bedroom. The reason for this rule is the constitutional preference for warrants; officers must always obtain a warrant when possible. Once the container is in the sole possession of the officers, it is easy to secure it pending the issuance of a warrant by a judge or magistrate. Therefore, in order to search a closed container on probable cause:

The officer must have a warrant

OR

Emergency (or exigent) circumstances must exist

OR

Consent must be obtained.

1. Searches of Closed Containers on Persons

The search of a container on a person represents an unusual legal issue. Officers may not search the container on probable cause. They may, however, arrest the suspect and then search the container incident to the arrest (assuming they meet the requirements for a lawful arrest).

Example:

Rios was stopped by police officers who were investigating a report that two men had left a taxi without paying the fare. Rios was identified by the taxi driver as one of the two suspects and he was arrested for theft. The officers searched Rios and discovered a cookie tin that, when opened, contained marijuana, pills, syringes and a pipe. The Colorado Court of Appeals held that the police had probable cause to arrest Rios, and the search of the tin did not exceed the permissible scope of a search incident to a lawful custodial arrest. *People v. Rios,* 43 P.3d 726 (Colo. App. 2001).

2. Searches of Closed Containers in Premises

Once an officer has obtained a search warrant (or consent) to search a certain area for certain property the officer may search any closed container which could hold the property described in the warrant.

Examples:

Officers investigating a conspiracy to murder two of Gall's supervisors obtained a warrant to search Gall's residence for writings, journals, and other information involving the use of explosives reflecting the thoughts of Gall or otherwise referencing a plan to execute the conspiracy. The officers seized hundreds of written documents, as well as two desktop and five laptop computers. The officers then obtained a second warrant to search the hard drives of the computers, and found crime-related evidence. The Colorado Supreme Court held that since the computers were reasonably likely to serve as containers for writings, or the functional equivalent of written or printed matter of a type enumerated in the warrant, the were properly seized under the warrant. [The court also approved of the procedure of obtaining a second warrant for the search of the computer hard drives]. *People v. Gall,* 30 P.3d 145 (Colo. 2001).

A search warrant authorized officers to search an apartment for marijuana and LSD and also "such vessels, implements, and furniture used in connection with the manufacture, production, storage, or dispensing of such drugs." Officers found a purse in a bedroom of the apartment that belonged to a juvenile who was a guest in the apartment. The Colorado Supreme Court held that the purse is fairly characterized as a "vessel" which could be used to store drugs, and therefore its search was authorized by the warrant. *People v. D.F.L.,* 931 P.2d 448 (Colo. 1997).

Officers investigating an extortion had probable cause to believe that crime-related evidence, including documents and an automobile title, were located in a certain residence. While the officers were executing a search warrant for the evidence, the officers saw a 12-inch by 15-inch leather pouch, which was seized, opened and found to contain cocaine and paraphernalia. The court ruled that since the documents described in the warrant could have been in the pouch, the search was within the scope of the warrant. The cocaine was therefore admissible. *People v. Hearty,* 644 P.2d 302 (Colo. 1982).

3. Searches of Closed Containers in Vehicles

An officer who is lawfully searching a vehicle on probable cause to believe the vehicle contains crime-related evidence may search any closed containers which could hold the evidence.

Examples:

A reliable informant told officers that he had just seen Ross selling narcotics out of the trunk of his vehicle at a certain location. Officers went to the location and searched Ross's trunk. They found a sack and a leather pouch, which they searched and found narcotics and money. The United States Supreme Court ruled that since the officers had probable cause to search the entire trunk it was proper to search any containers where the evidence might be located. *United States v. Ross,* 456 U.S. 798 (1982).

Acevedo arrived at the apartment of a suspected drug dealer and stayed for ten minutes. Officers observed him leaving with a brown paper bag that he placed in the trunk of his car. The officers stopped him a few blocks away and, without a warrant, located and opened the bag. Inside the bag the officers discovered marijuana. The United States Supreme Court held that officers may search a vehicle and the containers within it which they have probable cause to believe contain contraband. *California v. Acevedo,* 500 U.S. 565 (1991).

Note: This decision expressly overrules the *Arkansas v. Sanders,* 442 U.S. 753 (1979) rule that an officer must get a warrant to search a closed container found in a suspect's vehicle. The Supreme Court opined that "it is better to adopt one clear-cut rule to govern automobile searches and eliminate the warrant requirement for closed containers set forth in *Sanders.*

See also People v. McMillon, 892 P.2d 879 (Colo. 1995)(search of the contents of a purse found in the passenger compartment of the vehicle was proper because the officer had reasonable grounds to believe the vehicle contained contraband and McMillon's purse was in the passenger compartment when the search was made; also a proper search incident to arrest of driver wanted on outstanding warrants).

4. Suggested Techniques

a. If you have probable cause to believe a container holds crime-related evidence you must get a warrant to search it.

1. You may seize the container until a warrant can be obtained.

2. If you can otherwise lawfully arrest the suspect, doing so will mean you may search a container on his or her person.

B. Emergencies – Exigencies

Officers usually must be able to prove emergency (rather than just exigent) circumstances to justify the warrantless search of a container. The following are the specific emergency and exigent circumstances justifying a warrantless search.

1. Emergency

An emergency is circumstance where "life or limb" is endangered, such as a person being unconscious or disoriented and the officer must locate identification (e.g., in a wallet, purse, briefcase, etc.), or officers have a specific reason to believe a container holds a bomb, loaded weapon, or other dangerous instrumentality.

Example:

Wright was taken to the hospital for minor injuries sustained in a car accident. She was alert and coherent at all times. She was in the x-ray room by the time the investigating officer arrived at the hospital with her purse, which had been given to him by one of the paramedics at the accident scene. Instead of attempting to talk to Wright, the officer searched her purse for identification, opening two zipper bags within the purse before looking in her wallet. The bags contained illegal drugs, and Wright was charged with a drug offense. The Colorado Supreme Court held that the officer's warrantless search of Wright's purse was unlawful. Although the court may validate an otherwise illegal search under the medical emergency exception, it refused to apply that exception here because Wright was conscious, coherent, and only slightly injured. Moreover, the officer was not conducting the search for the purpose of discovering identity or other information that might assist the medical staff in its treatment, nor was there a real and immediate threat to Wright's life or safety. *People v. Wright,* 804 P.2d 866 (Colo. 1991).

2. Exigency

An officer may search a container under specific limited circumstances.

Examples:

a. The officer knows crime-related evidence is in one of many closed containers in a "mobile" vehicle but does not know which specific container. *United States v. Ross*, 456 U.S. 798 (1982).

b. The officer has arrested a suspect. (*See* Searches Incident to Arrest, below)

c. The officer has a good explainable reason to believe a detainee has a weapon in a container which is within reach.

3. Suggested Techniques

It is very rare for courts to justify a search under the emergency or exigency theory. Unless someone's life is in danger, always consider other alternatives to a warrantless search (e.g., warrant or consent).

C. Searches Incident to Arrest

An officer may search any closed container an arrestee could possibly reach at the time of the arrest.

1. Containers Which May Be Searched Incident to Arrest

Officers may search containers within "lunging distance" at the time of arrest. *Chimel v. California*, 395 U.S. 752 (1969).

a. Containers on Premises

Example:

Officers were let into Hufnagel's residence to arrest him on a warrant. They found Hufnagel lying on the couch and told him he was under arrest for selling cocaine. The officers handcuffed him with his hands behind his back. In the meantime, the sheriff searched the immediate area around Hufnagel for weapons. Concerned by a glance Hufnagel gave towards an end table, the sheriff opened the drawer in the table and found several baggies containing cocaine. The Colorado Supreme Court upheld the search here as incident to arrest, noting that handcuffing an arrestee does not completely eliminate his ability to reach for and grab weapons or other items. The court also noted that the search here was contemporaneous with the arrest and was limited to

the area immediately around the suspect in an area where he could have lunged for a hidden weapon. *People v. Hufnagel,* 745 P.2d 242 (Colo. 1987).

b. Containers on the Arrestee's Person

Any closed containers found on an arrestee at the time of arrest may be searched incident to arrest.

Examples:

"Cookie tin." *People v. Rios,* 43 P.3d 726 (Colo. App. 2001).

Cylindrical container in pocket. *People v. Bischofberger,* 724 P.2d 660 (Colo. 1986).

Paper sack. *People v. Rueda,* 649 P.2d 1106 (Colo. 1982).

Coat pocket. *People v. Tottenhoff,* 691 P.2d 340 (Colo. 1984).

c. Containers in Vehicles

Officers may search closed containers in the passenger compartment of a vehicle incident to the valid custodial arrest of an occupant. *New York v. Belton,* 453 U.S. 454 (1981).

Note: It is important to establish the precise theory upon which a search is conducted because the areas an officer is permitted to search will vary depending upon that particular theory. *Compare People v. Corpany,* 859 P.2d 865 (Colo. 1993)(protective search of car revealing a fanny pack under the seat was proper; exploration into the fanny pack was improper because there was no reason to believe it contained a weapon) with *People v. McMillon,* 892 P.2d 879 (Colo. 1995)(search of the contents of a purse found in the passenger compartment of the vehicle incident to arrest of driver wanted on outstanding warrants was proper).

2. Reason for the Rule

The reason an officer may search closed containers incident to arrest but may not search a closed container under the probable cause theory is that the underlying reasons for the searches are different. The reasons an officer may search incident to arrest are:

a. To look for evidence which an arrestee could possibly destroy.

b. To look for weapons which could be used against the officer.

3. The Contemporaneous Requirement

The search of the closed container must be conducted contemporaneously (at the same time and place) with the arrest.

4. Locked or Sealed Containers

Neither the United States nor the Colorado Supreme Court has ruled on the search of locked or sealed containers incident to arrest. In order for an officer to determine the propriety of such searches the officer must remember the reason for the rule: protection of the officer and the evidence. If there is no way that an arrestee can get into the container to grab a weapon or destroy evidence, it will be very difficult for an officer to justify the search.

Note: If opening the container is based on probable cause, be sure to get a warrant and/or try to obtain consent. If the container is locked, also try to obtain consent to open it.

5. Suggested Techniques

Always search all unlocked containers on the arrestee or within the arrestee's reach at the time of the arrest.

D. Plain View, Feel, Smell

A plain view observation relating to closed containers almost always occurs when the contents are visible through the container The contents observed by plain view observations may be seized because the owner or possessor has not sought to protect the privacy of the contents.

Note: If an officer can see into a container because of an opening in the container, that container is obviously not "closed." Such an observation is plain view, but not of a "closed" container. *See, e.g., People v. Weston,* 869 P.2d 1293 (Colo. 1994)(unlike a closed container, an open or transparent container supports no reasonable expectation of privacy and its contents can be said to be in plain view).

1. Contents Apparent From Container

When the contents of a container are apparent from the container itself, the owner or possessor has not sought the privacy of those contents (e.g., a gun in a gun case). Therefore, no warrant is necessary to search the container. However, it is nonetheless advisable simply to seize the container and then obtain a warrant to search its contents.

Example:

Officers took Hammas into civil protective custody and brought him to the jail. There, an officer conducted an inventory search of his belongings, and found a clear plastic baggie containing a white crystalline substance. The officer believed that the white substance was methamphetamine, so he opened the bag, conducted a field test on the contents, and determined that the substance was methamphetamine. The Colorado Court of Appeals noted that in general, a civil detainee may be patted down for weapons, and removing items from the person's pockets is a permissible extension of the initial patdown search. While the court noted that a container found during this search generally may not be opened, when the incriminating nature of its contents is immediately apparent, it may be opened and its contents seized. Here, the officer was able to discover the incriminating nature of the contents without opening the bag as it was transparent. Thus, the officer was justified in opening the bag to conduct a test to confirm the presence of methamphetamine. *People v. Hammas*, 141 P.3d 966 (Colo. App. 2006).

2. Feeling the Container

Just because an officer can feel what is inside a container does not mean that the officer can search it without a warrant. A person does not lose a reasonable expectation of privacy in property just because that property is not placed in a hard-surfaced container.

3. Smelling

An officer may never search a container just because he or she smells crime-related evidence within the container. The officer must first seize the container and then obtain a warrant. In Colorado, having a dog sniff a container to establish probable cause is a search if the owner has done nothing to put the container where police have access to it. *People v. Unruh,* 713 P.2d 370 (Colo. 1986).

4. Apparently Crime-Related

An officer must remember that in order to seize evidence in a container the officer must have probable cause to believe the evidence is crime related.

Examples:

During the course of a protective frisk, several folded-up pieces of paper, which the officer recognized as "bindles," fell from the suspect's sock. The officer opened the bindles and discovered cocaine. The Colorado Court of Appeals upheld the seizure and search of the bindles, concluding that the "'closed container" cases do not require suppression of the evidence here, because the bindles seized from defendant are the sort of unique, single-purpose containers that may be opened without a search warrant under the 'single purpose container rule.'" That rule permits warrantless searches of folded-paper bindles on the theory that such objects are used almost exclusively to carry illicit drugs, "and thus by their very shape and design, may provide the required nexus to criminal activity where the investigating officer has knowledge of that unique character." *People v. Mascarenas,* 972 P.2d 717 (Colo. App. 1998).

Compare with:

An officer saw a foil package in plain view in Ware's shirt pocket, seized it, and determined that it contained hashish. The court ruled that the seizure was not justified under the plain view doctrine even though the officer testified that he knew drugs were often packaged tin foil, but admitted that the package could have contained anything. *People v. Ware,* 484 P.2d 103 (Colo. 1971).

5. Suggested Techniques

Unless you can see through the container, seize it and then obtain a warrant.

E. Consent

This issue is discussed in Chapter 6, **SEARCH AND SEIZURE – MISCELLANEOUS**. It is discussed in this section briefly as it relates to closed containers.

1. Always Ask

An officer should almost always seek consent to search a closed container, even if other valid legal theories exist under which a search may be conducted. Seeking consent can never hurt and may help a great deal if a court rules that the other theories are not valid.

Example:

An officer arrests the suspect and takes him to jail. At the jail the officer is about to search the suspect's locked brief case but instead seeks the suspect's consent. The suspect agrees. The officer opens the brief case and discovers crime-related evidence. The court rules that although the officer could not search the brief case on probable cause, as a search incident to arrest (not contemporaneous), or as an inventory search, the search was nevertheless valid because the officer obtained consent. Therefore, the evidence is admissible.

2. Voluntariness

In order for consent to be legal and valid, it must be given voluntarily. The following are factors that tend to establish either voluntary or involuntary consent.

a. Factors Which Tend to Show Voluntariness

1. Signed consent form
2. Fourth Amendment warnings
3. Officer's courteous demeanor
4. Consenting party admits guilt or possession of the evidence before consent is given
5. Consenting party aids in the search
6. Consenting party is intelligent and/or sophisticated

b. Factors Which Tend to Show Involuntariness

1. Force, threats, coercion
2. Promises

3. Deception

4. Custody

5. Consenting party hampers the search

6. Consenting party is retarded, insane, intoxicated, etc.

7. Consenting party originally refuses to consent

8. Consenting party refuses to sign the consent form

3. Authority to Consent

In order to obtain valid consent to search, the person giving the consent must have at least "joint access" to or "control over" the contents of the container. *Frazier v. Cupp,* 394 U.S. 731 (1969).

Example:

Officers investigating a fireworks complaint approached Hopkins and Green and asked for identification. Hopkins left with one officer to obtain his identification, while Green remained with the other officer. That officer noticed that Green had a fanny pack which he believed might contain an identification card, and he asked Green if he could search it. Green replied "Sure, if you want to." The officer opened the pack and found illegal drugs. Green then told the officers that the pack belonged to Hopkins, who asked him to carry it as they were approached by the officers. The Colorado Supreme Court held that the officer's assumption that Green was the owner of the pack was objectively reasonable, and therefore upheld the search. *People v. Hopkins,* 870 P.2d 478 (Colo. 1994).

4. Limitations Upon Consent

A consenting party has the power to control a consent search. The officer must therefore confine the search to containers that are within the scope of the consent provided by the owner or possessor. In addition, if the consenting party withdraws consent, the search should stop (assuming that consent is the only legal theory for the search).

Example:

Wiley was arrested for driving under suspension, told by the officer that her car was to be impounded, and asked by the officer

whether she wanted her purse to remain in the car. She then asked the officer to bring the purse with him to the police station. At the station the officer advised Wiley of her *Miranda* rights and after an hour of polite conversation he asked her whether her purse contained any illegal items. Wiley responded "no," and then agreed to allow the officer to search it. The search revealed illegal drugs. The court of appeals found voluntary consent to search and concluded that a reasonable person in Wiley's position would have understood that granting the officer consent to search the purse for "illegal items" also authorized him to search all containers found inside the purse. *People v. Wiley,* 51 P.3d 361 (Colo. App. 2001).

Narcotics officers introduced a drug-sniffing dog to the luggage compartment of a bus that had arrived at a routine stop, and the dog "alerted" to a bag with a uniquely numbered claim tag denoting a Las Vegas, Nevada origin and Detroit, Michigan destination. Although Najjar was the only passenger destined to Detroit, Michigan, he (and all other passengers) denied that the bag was his, so the officer opened it and discovered narcotics. Najjar then consented to a search of his person and his zip-up hip bag for weapons or illegal substances, where the officers found and seized a claim ticket that matched the tag affixed to the bag containing narcotics. The Colorado Supreme Court concluded that, under the circumstances, the incriminating nature of the claim ticket was immediately apparent to the officers and was properly seized under the plain view doctrine. The court found that the opening of the bag and observing its contents did not exceed the scope of the consent: "a suspect who consents only to a limited search for certain materials does not automatically insulate him or herself from the lawful seizure of other objects not delineated in the officer's request. Within those areas likely to contain the items that were specified, officers may observe other incriminating objects." *People v. Najjar,* 984 P.2d 592 (Colo. 1999).

5. Suggested Techniques

Always seek consent to search closed containers in addition to any other theories you have for your search.

F. Standing – Abandonment

A person cannot contest an arguably illegal search or seizure unless the person has standing. In order to have standing the person must posses a sufficient relationship to the container so that the court recognizes the person's reasonable expectation of privacy in the container.

1. Asserting Another's Fourth Amendment Rights

A suspect cannot object to the unconstitutional search of a third person's closed containers even when the search leads to evidence against the suspect.

Example:

While investigating a sexual assault in which a shotgun was used, officers arrested Whisler and went to the apartment where he lived with his girlfriend. The girlfriend let them enter and search the apartment. In a bedroom closet officers found a locked suitcase which belonged to the girlfriend. She initially refused to produce the key, but eventually did produce it, and the officers found the sawed-off shotgun inside. The court recognized that the girlfriend, and not Whisler, had standing to challenge the validity of the consent to search. *People v. Whisler,* 724 P.2d 648 (Colo. 1986).

2. Abandonment

When a person abandons a closed container, he or she no longer has any reasonable expectation of privacy in the container and therefore loses standing to contest a search of the container.

a. Types of Abandonment

There are several important ways in which a suspect can abandon a closed container.

(1) "Dropsy"

The usual and most obvious way in which a suspect abandons a container is when the suspect drops crime-related evidence as officers approach. Such evidence is admissible against the suspect.

(2) Denying Ownership

Another way of abandoning a closed container is to deny owning it when someone asks.

Example:

An occupant of a car was "casing" a house for a burglary. After an officer stopped the car he asked the three male occupants about a purse on the floor. No one

claimed any possessory interest in the purse, but a passenger said he "found" the purse. When the officer offered to return the purse to its lawful owner the passenger agreed to let him take it. The officer looked into the purse and found the victim's identification. Soon thereafter the victim reported the burglary of her home. The court ruled that the occupants had no standing to object to the introduction of the purse because they denied any possessory right to the purse and had no objection to the officer taking it. *People v. Cobb,* 690 P.2d 848 (Colo. 1984).

b. Possessing Another Person's Closed Container

When a suspect says that the closed container in his or her possession belongs to another person, the officer must clear up the suspect's claimed relationship to the container. If the suspect's only relationship to the container is that of a "bailee" or "mule," the suspect might have no hesitation to consenting to the search.

Example:

Officers knew that Crutchfield had narcotics in his bag. When they stopped Crutchfield, the officers asked him about his relationship to the bag. Crutchfield said he was carrying it for someone else. The officers searched the bag and found the narcotics. The Arizona court ruled that Crutchfield had a possessory interest in the bag and therefore had standing to contest the search. *State v. Crutchfield,* 556 P.2d 312 (Ariz. 1976).

3. Suggested Techniques

The experienced professional officer will almost always ask a suspect about his or her relationship to a container holding suspected crime-related evidence. The reason is that no mater how a suspect answers, he or she cannot win:

a. if the suspect says the container belongs to him, he has standing but he admits to possession of the contents;
b. if the suspect denies possession or ownership, he loses the right to contest any alleged Fourth Amendment violations.

However, if the officer does not find out the suspect's relationship to the closed container, the suspect can assert at the suppression hearing that the container and its contents belonged to him (the suspect) for purposes

of Fourth Amendment violations. Later, at trial, the suspect's admission cannot be used against him unless the suspect takes the witness stand.

G. Searches by Private Persons

The Fourth Amendment was written to protect citizens from searches and seizures by the government, not other private citizens. When a private citizen illegally intrudes into another person's containers, the intrusions are not a "search" under the Fourth Amendment.

Example:

An employee heard two men arguing over a sack. The men put the sack in a rental locker and left. Because the action "looked awfully suspicious" the employee and another person opened the locker and examined the contents of the sack. The sack contained plastic bags containing heroin. The employees then called police, who waited and saw Rueda open the locker and take out the sack of heroin. The court ruled that the evidence was admissible against Rueda. *People v. Rueda,* 649 P.2d 1106 (Colo. 1982).

1. Agency Relationships

When an officer encourages a private citizen in any way to open a closed container, the citizen becomes an "agent" of the state and is then bound by the same legal theories as the peace officer. Even if an officer (knowing the private person is going to search or seize) simply stands idly by and willingly awaits the fruits of the search or seizure, the private person is viewed as working jointly with the officer and is subject to the Fourth Amendment's restrictions. If, however, the private person disobeys or disregards an officer's instructions, the search will usually be private.

2. Cooperative Searches

When an officer permits a private citizen to accompany him or her (in order, for example, a witness to identify stolen property) the officer usually must take responsible steps to control the citizen so that the citizen does not illegally intrude upon a suspect's private areas.

3. Reopening Closed Containers

What if a private person finds crime-related evidence in a closed container and then reseals it before calling the police? Must the officer get a warrant to reopen the container? The United States Supreme Court and most other courts have ruled that officers may reopen containers and inspect the contents to the same extent the private person did. Also, if

mailed packages are opened and contain contraband, the package may be resealed, delivered to the addressee and then reopened without a warrant after the addressee is arrested. *Illinois v. Andreas,* 463 U.S. 765 (1983).

However, the Colorado Supreme Court has not decided this specific issue. It is very likely that it will rule that a warrant is required. (The Colorado Supreme Court sometimes reaches different results from the United States Supreme Court, based upon its interpretation of the state Constitution.)

Be safe. Get a warrant. There is nothing to lose.

4. Suggested Techniques

a. If a private person asks you what to do with a closed container which might contain evidence, tell him or her to do nothing.

b. If the private person has already opened the package and observed evidence

1. and the container is still open, you can seize the evidence.
2. and has resealed the container, strongly consider getting a warrant.

H. Inventory Searches

1. Closed Containers in Vehicles

Colorado courts have ruled that generally an officer may not inventory closed containers found during the inventory of a vehicle. *People v. Counterman,* 556 P.2d 481 (Colo. 1976). An exception to this rule is that an officer may inventory an unlocked closed container where it is obvious that the container contains valuables which must be accounted for.

While the federal constitution allows an inventory of closed containers in this situation, the United States Supreme Court has ruled that it is unconstitutional to search a locked container during an inventory of a vehicle absent a policy sufficiently designed to prevent general rummaging for purposes of uncovering incriminating evidence. *Florida v. Wells,* 495 U.S. 1 (1990).

2. Closed Containers Closely Associated with an Arrestee

Closed containers closely associated with an arrestee may be inventoried at the jail during booking.

Example:

An officer arrested Lafayette when Lafayette caused a disturbance in a movie theater. The officer took Lafayette to the jail and, during booking, inventoried the contents of Lafayetts's shoulder bag. During the inventory the officer found drugs. The United States Supreme Court ruled that it is proper for officers to "inventory property found on the person or in the possession of an arrested person who is to be jailed." Among the reasons why officers should be permitted to inventory is that the procedure deters false claims of theft. *Illinois v. Lafayette,* 462 U.S. 640 (1983).

I. Civil Detentions

Examples:

An officer took the defendant into custody after a complaint by a tavern owner that he was intoxicated. Since no detoxification facilities were available, the officer took the defendant to jail and inventoried his possessions. During this process the officer found a pocket planner with a folded-up bindle inside, which the officer opened and found cocaine. The Colorado Supreme Court distinguished the scope of an inventory search in the case of a criminal custodial arrest from that in the case of a civil protective detention. When an inventory search is undertaken pursuant to an arrest, the police officer may completely search all of the arrestee's belongings, including closed containers like the suspected bindle. However, when such a search is conducted pursuant to protective custody, the scope of the inventory search is limited by the privacy interest of the detainee, and any closed containers must be set aside and a warrant obtained before they may be opened. *People v. Chaves,* 855 P.2d 852 (Colo. 1993).

Compare with:

Carper was placed in civil custody pursuant to the Detoxification Act by an officer who observed that he was highly intoxicated. As the officer was conducting a routine search of Carper's possessions so as to inventory them, Carper volunteered that he had cocaine in his shirt pocket. The officer removed a bindle from the pocket, opened it, and found cocaine. The Colorado Supreme Court upheld the search, and distinguished *Chaves* on the basis that Carper abandoned any

expectation of privacy in the bindle when he announced to the police that it contained cocaine. *People v. Carper,* 876 P.2d 582 (Colo. 1994).

Police officers observed that Herrera was intoxicated and concluded that they should take him into civil protective custody. Before placing defendant into a police vehicle, the officers handcuffed him and conducted a search of his possessions. They removed all of the contents of defendant's pockets, and found a transparent plastic baggie that contained what appeared to be marijuana. Upon searching the contents of the bag, the officers noticed a bindle. One of the officers opened the package and found two smaller bindles, one of which contained cocaine.

a. the container is searched at booking

b. the container obviously holds something valuable.

V. LEGAL THEORIES WHICH JUSTIFY SEIZURES OF CLOSED CONTAINERS

Often an officer may seize a container even if the officer cannot search it.

A. Probable Cause But No Emergency

If an officer has probable cause to search a closed container the officer may seize the container until a warrant can be obtained to search it.

B. Reasonable Suspicion

Officers who have reasonable suspicion to believe a container holds crime-related evidence may briefly "detain" (seize) the container in order to determine whether there is probable cause to search.

Example:

Officers had reasonable suspicion to believe that Place had narcotics in his suitcases. The officers therefore seized the bags but released Place. Ninety minutes later a narcotics dog was brought to the scene and alerted on the bags. Later, a warrant was obtained and cocaine was discovered. The United States Supreme Court ruled that although it is proper for officers to detain luggage on less than probable cause, the officers in this case held the bags too long. The court ruled that the dog could have been brought out much faster and, therefore the seizure was unduly and unreasonably long. The cocaine was therefore suppressed. *United States v. Place,* 462 U.S. 696 (1983).

Officers removed a suitcase from the luggage compartment of a bus and subjected it to a sniff test by a trained narcotics dog. The bag was then carried onto the bus by an officer dressed as a bus driver and asked the owner of the suitcase to come forward. Once the officer identified Ortega as the owner of the suitcase, the officer asked her to come with him so that "a new tag" could be attached to the case. The officer,

accompanied by Ortega, was taken to the garage and questioned by the officers. The Colorado Supreme Court held that, while the initial sniff of the suitcase by the narcotics dog did not constitute a seizure, the subsequent conduct of the officers caused a "meaningful interference" with Ortega's possessory interest in the suitcase, and therefore constituted a seizure of the suitcase. However, since the detention lasted only twenty to thirty minutes and did not delay the departure of the bus, the officer's conduct amounted to an investigative detention requiring only reasonable suspicion. *People v. Ortega,* 34 P.3d 986 (Colo. 2001).

C. Suggested Techniques

1. Always seize a container if you have probable cause to search it. Get a search warrant before searching it.

2. If you have reasonable suspicion to believe a container holds crime-related evidence, "freeze" it for a short period and implement detention procedures in determining whether probable cause exists.

Chapter 6

SEARCH AND SEIZURE – MISCELLANEOUS

CONSTITUTION OF THE UNITED STATES
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 except upon probable cause supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

I. INTRODUCTION

This chapter discusses in alphabetical order other arguably private areas which were not discussed, or were just briefly discussed, in the other search and seizure chapters.

Note: Although this chapter discusses all of the legal theories related to the search of these areas, an officer should always obtain a WARRANT if possible.

II. ADMINISTRATIVE SEARCHES AND SEIZURES

Administrative searches and seizures are searches or seizures conducted primarily for regulatory purposes and not to locate crime-related evidence. Administrative searches and seizures are still controlled by the Fourth Amendment, and therefore must be "reasonable." Sometimes besides being reasonable, the search or seizure must be supported by an "administrative warrant."

A. Types of Administrative Searches and Seizures

There are many types of searches and seizures which the courts have categorized as "administrative." A couple of those discussed later in this chapter are searches occurring at airports, and in jails and prisons. The following are some more of the searches or seizures which courts usually characterize as administrative.

1. Housing violations. *Camera v. Municipal Court of San Francisco,* 387 U.S. 523 (1967)(must have administrative warrant).

2. Commercial violations. *See v. Seattle,* 387 U.S. 541 (1968)(must have administrative warrant).

3. Closely regulated industries (the need for a warrant depends on legislation and regulations). *Colonnade Catering Corp. v. United States,* 397 U.S. 72 (1970)(retail liquor stores); *United States v. Biswell,* 406 U.S. 311 (1972)(gun dealers).

4. Arson scene. *Michigan v. Tyler,* 436 U.S. 499 (1978) (on reasonable suspicion).

B. Reasons for the Searches or Seizures

The reasons why the courts permit administrative searches or seizures are that:

1. The searches or seizures are intended for regulatory or administrative purposes rather than to find crime-related evidence.

2. It is important that the regulatory examinations be conducted and there is no way to do it without searching or seizing.

3. The search or seizure is "minimally intrusive." This means that the search or seizure does not disrupt anyone's life very much.

The courts "weigh all these factors when deciding whether the search or seizure is a reasonable administrative search.

Examples:

An officer stopped Prouse's car in order to determine whether the driver had a license and registration. After the stop the officer saw crime-related evidence in the car and arrested Prouse. The United States Supreme Court ruled that the intrusion was minimal but that the need to check licenses and registrations was even lower. Besides, the court reasoned, officers can check licenses and registrations when they stop violators. Therefore, the administrative seizure was unreasonable and the evidence inadmissible. *Delaware v. Prouse,* 440 U.S. 648 (1979).

Wright was taken to the hospital for treatment of minor injuries incurred in an automobile accident. Upon bringing Wright's purse to the hospital, the investigating officer found that she was in the x-ray room and temporarily unavailable. The officer had already determined that Wright would not be charged with a traffic violation, but looked through her purse for identification information to complete his accident report. He opened two zipper bags which contained illegal drugs before looking into her wallet. In determining that the search was unreasonable, the

Colorado Supreme Court refused to consider the fact that the officer had an administrative duty to complete the report. Because he was faced with several reasonable alternatives (i.e., he could have asked permission to talk to Wright in the x-ray room; asked someone to take her purse to her to have her remove her wallet; or he could have obtained the identifying information from the hospital admission staff), the court did not validate the officer's action as an administrative search. *People v. Wright,* 804 P.2d 866 (Colo. 1991).

Compare with:

A chief judge issued a directive that all members of the general public entering the courthouse building were required to pass through a security checkpoint. Signs were posted advising persons entering the building that they were subject to a search. Guards at the doors required the contents of bags and parcels be examined by an x-ray machine, and all members of the public were required to walk through a magnetometer. As Troudt was entering the courthouse, she placed several items into a basket before entering the magnetometer, and a guard opened one of the items to determine if it contained a knife, razor blade or other sharp object. Instead, the guard discovered methamphetamine. The Colorado Court of Appeals recognized that warrantless administrative searches are constitutional when conducted pursuant to a "regulatory program calculated to further a manifestly important governmental interest under circumstances where the program is reasonably tailored to further the governmental interest and where the intrusion on personal privacy or security is relatively slight in comparison to the interest served by the program." The court upheld the trial court's conclusion that the checkpoint was necessary to further the important governmental interest in maintaining courthouse security. The court also affirmed the trial court's conclusion that, by entering the building, Troudt consented to the search and the minimally intrusive search conducted by the guard did not exceed the scope of that consent. *People v. Troudt,* 5 P.3d 349 (Colo. App. 1999).

A tractor-trailer rig driven by Escano was inspected by a port of entry inspector who was conducting tax assessments and commercial vehicle safety inspections. After Escarno told the inspector that the trailer was empty, the inspector noticed several rows of cardboard boxes which had been taped shut. He notified the Colorado State Patrol, reporting that he had a rig with hidden cargo. Escano was charged with possession of cocaine when the state patrol officer found cocaine in one of the cartons. A subsequent search warrant uncovered over 1,000 pounds of cocaine in the trailer. The Colorado Court of Appeals determined that the port inspection officer was authorized to enter into and conduct a warrantless administrative search of the trailer's contents for purposes of observing

any cargo secured therein under an inspection regulation designed to protect against shifting and falling cargo. The court concluded that the search by the state patrol officer was reasonable in light of a statutory provision giving officers authority to inspect vehicle cargo when they have "reasonable cause to believe that the vehicle is being operated in violation of the law." *People v. Escano,* 843 P.2d 111 (Colo. App. 1992).

C. Administrative Warrants

Administrative warrants are not like search or arrest warrants where probable cause must be shown. An administrative warrant may be obtained by proving to a judge that there is a "reasonable governmental interest" in the search or seizure.

D. Suggested Techniques

As courts expand the searches and seizures which they categorize as administrative, officers should learn how to draft and obtain administrative warrants.

III. AIRPORTS

Persons and their property are normally subject to warrantless search and seizure when they travel by airplane. All passengers may be searched by magnetometers before boarding a plane and all carry-on luggage may be searched by x-ray or "hand inspected."

A. Reasons for the Searches and Seizures

The main reason that an air traveler is subject to search at an airport is to prevent the plane being hijacked. A second reason officers *want* to search and seize at an airport is to prevent narcotics trafficking. The difference between these reasons is that the courts have ruled that hijacking is an emergency circumstance justifying the search for instruments which could be used (bombs, weapons, etc.) in commandeering a plane. Because of this emergency, officers may conduct *limited* searches of all passengers and their property in order to discover these instruments.

On the other hand, the courts have ruled that officers may not seize potential passengers to inquire about narcotics unless there is at least reasonable suspicion to believe the passenger is carrying narcotics. Furthermore, officers may normally not search for narcotics unless a warrant (or consent) is obtained.

B. Types of Searches

There are two basic types of searches uniquely related to airport passengers. These are the x-ray and magnetometer. Other searches, however, may be reasonable in airports to the same extent that they are calculated to detect and intercept instruments that could endanger the airplane and/or its passengers.

1. Magnetometer

Magnetometers detect metal. These devices are usually placed in vertical poles between which passengers must walk in order to board a plane. The use of this device to detect metal is a "search" under the Fourth Amendment. *United States v. Albarado,* 495 F.2d 799 (2nd Cir. 1974).

2. X-Rays

The x-ray of carry-on luggage is also a search. Those using the x-ray machine are instructed to look for anything that could be used as an instrument of piracy.

Note: In addition to the x-ray, a security guard or airport personnel is also authorized to open and search luggage.

C. Legal Theories for Searches

There are three primary legal theories justifying airport searches. These are that the hijacking problem represents an extreme emergency. Secondly, passengers give their explicit or implicit consent to limited searches by deciding to travel by air. Finally, because these searches are administrative, that is, regulatory rather than investigatory, the searches are reasonable.

1. Emergency Theory

In 1968, skyjacking was reaching epidemic proportions. Skyjackers were normally very unstable and almost impossible to deal with once the piracy in the air had begun. For that reason, the courts and legislatures determined that it was reasonable for airport security to make limited searches of passengers to discover instruments which could be used to commandeer an airplane. The September 11, 2001 attack upon the World Trade Center and the Pentagon by terrorists who commandeered airplanes, which were then turned into weapons capable of killing thousands of citizens, heightened the necessity of subjecting air travelers to minimally intrusive searches for weapons, explosives, and other instrumentalities that could endanger the airplane.

2. Consent Theory

Courts have also ruled that a passenger consents to the search by deciding to fly rather than take some other means of travel. The validity of the consent theory is bolstered by the posting of conspicuous signs advising passengers that they and their baggage are subject to search.

Examples:

Heimel approached the security checkpoint station at the airport, which was clearly posted with signs indicating that all bags would be x-rayed and searched. He passed through the magnetometer without activating any signal, although he refused to allow the security agent to search the bag he was wearing. He retreated from the security area and sat in a nearby waiting area. He was then approached by an officer who took him to the airport security office and searched his bag. The Colorado Supreme Court upheld the constitutionality of the search pursuant to a legitimate regulatory airport security program. Since Heimel presented himself at the checkpoint area for screening and the screening process had actually begun, the court found that he had consented to a search for weapons or other destructive materials and was unable to withdraw that consent until the search was completed *People v. Heimel,* 812 P.2d 1177 (Colo. 1991).

Note: Police officers may also approach passengers and seek their consent to search their luggage or persons. Unless such a contact constitutes a "seizure," the Fourth Amendment is inapplicable. *Compare People v. Johnson,* 865 P.2d 836 (Colo. 1994)(request of officers to search a passenger's carry-on bags constituted merely a consensual encounter) with *Florida v. Royer,* 460 U.S. 491 (1983)(officers actions of retaining a passenger's ticket and taking the passenger into a small interview room escalated a consensual encounter into a seizure without reasonable suspicion).

3. Administrative Searches

Another important legal theory justifying the search of passengers and their luggage is that the search is administrative. That is, it is a regulatory procedure and not part of a criminal investigation. As the court stated in *United States v. Davis,* 482 F.2d 893 (9th Cir. 1973):

"The essential purpose of the scheme is not to detect weapons or explosives or to apprehend those who carry them but to deter persons carrying such material from seeking to board at all."

Under this theory, a requirement of limiting the search to the "least intrusive" method is imposed.

Example:

Airports use magnetometers rather than physical "frisks" to discover instruments of crime.

Also, a passenger may avoid the search by simply deciding not to board the plane.

D. Legal Theories for Seizures

A person or property may normally not be seized beyond the magnetometer and x-ray search unless there is reasonable suspicion to believe the suspect is a skyjacker or a narcotics trafficker.

1. Profiles

Federal officers have developed skyjacker and drug courier profiles which many courts have ruled justify a limited detention and possible frisk.

2. Reasonable Suspicion Developed Because of X-Ray or Magnetometer

Reasonable suspicion to believe a person has skyjacking instruments or narcotics may be developed as a result of the x-ray, magnetometer, or other reasonable administrative search.

E. Suggested Techniques

Unless the officer is on special duty, he or she rarely has airport search or seizure issues to worry about. The following, however are some tips relating to airport searches and seizures.

1. If you personally see a person whom you reasonably suspect is in the process of committing a crime, you should try to maintain detention procedures as long as possible while attempting to establish probable cause.

2. If you are called to the airport in response to a stop by a security guard, try to maintain detention procedures unless probable cause has been established.

3. If there is probable cause to believe luggage or boxes contain crime-related evidence, seize the container and obtain a warrant to search it.

IV. BEEPERS

The question addressed in this section is whether the placing of a "beeper" on a vehicle constitute a search under the Fourth Amendment.

A. Federal Constitutional Standard

The United States Supreme Court ruled unanimously that placing a beeper on a vehicle for surveillance purposes is not a "search."

Example:

Officers put a beeper in a container which a suspect was supposed to pick up from a local business. After the suspect picked up the container, the officers kept track of the suspect's movements by virtue of the beeper. The officers were led to the place where the suspect was manufacturing amphetamine. Later, as a result of this information, the officers obtained a warrant. The court ruled that a person does not have an expectation of privacy in his or her movements outside a residence. Therefore, no search had taken place and the evidence was admissible. *United States v. Knotts,* 460 U.S. 276 (1982).

Even this principle is quite limited.

Example:

DEA agents learned through an informant that Karo ordered some ether to be used to extract cocaine. With the informant's permission, the agents substituted their own can of ether containing a beeper. Agents were then able to verify the location of ether which the suspects repeatedly moved. The United States Supreme Court stated that the installation of the beeper violated no one's rights. However, the court ruled that monitoring the beeper at a location not open to visual surveillance requires a warrant. *United States v. Karo,* 468 U.S. 705 (1984).

B. State Constitutional Standard

To be valid, a search or seizure must comport with requirements in both the federal and state constitutions. The Colorado Supreme Court has the authority to interpret the state constitution, and it has demonstrated that it can adopt stricter rules in this area than the federal standard.

Example:

With the consent of the general manager of a chemical company, DEA agents put a beeper on a drum of chemicals often used to make "speed." The drum was tracked to Colorado, where police identified the van carrying the drum and smelled the amphetamine lab. Officers then obtained and executed a search warrant. The Colorado Supreme Court held that the legitimate privacy expectation of the owner (or possessor) of a commercially purchased item is violated under the Colorado Constitution whenever the item contains a government-installed beeper. Without a warrant, as here, the beeper placement is an illegal search. *People v. Oates*, 698 P.2d 811 (Colo. 1985).

C. Suggested Techniques

1. Never, without a warrant, place a beeper on or in a commercial product.

2. Never, without a warrant, use a beeper to monitor movements in areas not open to lawful visual surveillance.

3. An officer should probably not place a beeper on a car without a warrant. The Colorado Supreme Court has not ruled on this issue, but there is a good chance it would find this conduct unlawful Besides, the officer cannot be sure the vehicle will not go to private areas where it is surely unlawful to monitor without a warrant.

V. BINOCULARS

A. The General Rule

The general rule is that officers may use binoculars to view crime-related activity or evidence if they could have seen the activity with the naked eye from a closer position and they had a lawful right to be in the closer position but chose not to be closer (usually for fear of detection).

Note: The courts are much more likely to rule the observations are merely plain view when officers do not use binoculars to look into residences.

Examples:

Officers used a spotting scope to look through the suspect's second story window and observed marijuana. The Oregon court ruled that, because the evidence could not have been seen from a lawful closer position with the naked eye, the viewing intruded into a legitimate expectation of privacy and was unconstitutional. *State v. Blacker,* 630 P.2d 413 (Or. App. 1981).

Arno was selling pornographic films. An officer, during surveillance of Arno, stationed himself on a hill 200-300 yards from the 8th floor window where Arno was "working." Using binoculars, the officer could see through the window and viewed crime-related evidence. This fact was placed in an affidavit and a warrant was obtained. The California court ruled that the evidence must be suppressed because the evidence could not have been lawfully viewed with the naked eye from a closer position. *People v. Arno,* 153 Cal. Rptr. 624 (Cal. App. 1979).

B. Suggested Techniques

Do not use binoculars to look into people's premises unless you can see into the premises from a closer position with the naked eye. You will have to be able to prove in court that the same things lawfully could be seen from that closer position.

VI. BOOKING SEARCHES

Officers may normally search all property associated with an arrestee's person when the arrestee is booked. *People v. Glaubman,* 485 P.2d 711 (Colo. 1971); *People v. Harfmann,* 633 P.2d 500 (Colo. App. 1981).

Warning: The courts will analyze these cases closely to determine whether the "inventory" was merely a pretext for a general exploratory search for crime-related evidence.

A. Legal Theories for the Search

The search of persons and their property at booking is normally justified under the inventory and administrative theories. As stated by the United States Supreme Court in *Illinois v. Lafayette,* 462 U.S. 640 (1983):

"At the stationhouse, it is entirely proper for police to remove and list or inventory property found on the person or in the possession of an arrested person who is to be jailed. A range of governmental interests support an inventory process."

1. Theft and Claims of Theft

"It is not unheard of for persons employed in police activities to steal property taken from arrested persons; similarly, arrested persons have been known to make false claims regarding what was taken from their possession at the station house. A standardized procedure for making a list or inventory as soon as reasonable after reaching the station house not only deters false claims but also inhibits theft or careless handling of articles taken from the arrested person." *Id.*

2. Injury

"Arrested persons have also been known to injure themselves or others – with belts, knives, drugs or other items on their person -- while being detained. Dangerous instrumentalities, such as razor blades, bombs or weapons, can be concealed in innocent-looking articles taken from the arrestee's possession. The bare recital of these mundane realities justifies reasonable measures by police to limit these risks – either while the items are in police possession or at the time they are returned to the arrestee upon his release." *Id.*

3. Administrative Search

"Examining all items removed from the arrestee's person or possession and listing or inventorying them is an entirely reasonable administrative procedure." *Id.*

4. Scope of the Search – Closed Containers

"It is immaterial whether the police actually fear any particular package or container; the need to protect against such risks arise independently of a particular officer's concerns." *Id.*

5. Identification

"Finally, inspection of an arrestee's personal property may assist the police in ascertaining or verifying his identity." *Id.*

"In short, every consideration of orderly police administration benefiting both police and the public points toward the appropriateness of the examination of [Lafayette's] shoulder bag prior to his incarceration." *Id.*

B. Suggested Techniques

Before searching an arrestee's property at booking, an officer should consider the following tips.

1. Probable Cause

If there is probable cause to believe a container holds crime-related evidence, take the safest route and seize it and then obtain a warrant.

2. Consent

Always seek consent to search. It can never hurt and if the arrestee consents it gives the court an additional theory to rely upon.

3. Inventory Procedure

When you search an arrestee's property at booking:

a. Have another person and the arrestee present when you search the arrestee's property.

b. Write down (document) all of the arrestee's property on an inventory sheet and ask all persons present to sign the inventory sheet (including the suspect).

4. Departmental Policies

A court may limit you to your departmental rules and regulations in conducting an inventory (even though this is incorrect as a constitutional ruling). Therefore, if your departmental rules state that you may not search closed containers (e.g., luggage) you may want to try to get them changed in accordance with the *Lafayette* opinion.

5. Locked Containers

Do not break open locked containers. Either obtain consent (and a key) from the arrestee or obtain a warrant if there is probable cause to believe the container contains crime-related evidence.

6. Searches of Persons

You may strip search an arrestee to prevent the introduction of weapons and drugs into the jail. The searches are normally limited to visual inspections of the naked arrestee's body. Indignities, such as touching

or probing an arrestee's body are unlawful unless conducted in privacy by medical personnel.

VII. BUSINESSES

Although a person has a reasonable expectation of privacy in his or her business premises, that privacy is somewhat different than that which can be expected in a home. Therefore, the "search" of businesses and seizure of evidence therein is different than searches and seizures in homes.

A. Reasonable Expectation of Privacy

Businesses, of course, do not share the same expectations of privacy as the home because many areas of businesses are open to the public. An officer may go anywhere, do anything and see anything in a business that a member of the general public may go, do or see. If, however, an officer wishes to enter "private areas" of a business, he or she will need a warrant or consent or the existence of exigent circumstances. The following are examples of places where the courts have ruled a business person has a reasonable expectation of privacy:

1. The "rear room" of a store.

   Example:

   Galvadon was the night manager and sole person in charge of a family-owned liquor store. The Court held that he had a legitimate expectation of privacy from government intrusion in the back room of the store because: 1) he exercised control over delivery persons' access to the room; 2) videotaped surveillance of room was reviewable only by Galvadon and the store owner and inaccessible to the government; and 3) the warrantless police search was investigatory, not regulatory, in nature. *People v. Galvadon*, 103 P.3d 923 (Colo. 2005).

2. A private club where the officer was not invited in.

3. A factory which is entered only by employees.

Compare with:

Rosa, an airman, was charged with theft. After he was charged, he was denied access to the air force base. Some months later, one of his supervisors found a notebook containing incriminating information while looking for a document in Rosa's belongings. The Colorado Court of Appeals determined that Rosa had no reasonable expectation of privacy in his work place, inasmuch as

people in the building and on the base were subject to search at all times. *People v. Rosa,* 928 P.2d 1365 (Colo. App. 1996).

B. Records

Often officers enter a business to seize records. Records are "papers" under the Fourth Amendment and are specifically protected. *See* Chapter 8, **SEARCH WARRANTS.**

C. Administrative Searches

Most businesses are subject to administrative searches under appropriate circumstances.

D. Suggested Techniques

1. You may go anywhere and look at anything in a business which the average citizen could legitimately look at.

2. If the area to be entered or the thing to be looked at would not be naturally observable by "the public," you must get a warrant or consent or be faced with exigent circumstances.

VIII. CONSENT

The issue of consent is very important to officers. Although consent is discussed in other chapters as it relates to particular places (persons, premises, vehicles, and closed containers) it is discussed in detail in this chapter without regard to the place to be searched or the person or thing to be seized. The reason for this is that consent is consent, regardless of the place, person, or thing; the issues are the same.

A. When to Seek Consent

An officer should *always* seek consent whenever possible.

1. The Reason

An officer can never lose by seeking consent, as long as consent is sought in addition to, and not instead of, another legal theory for the search.

a. Even if, for some reason, the consent is ruled defective or unconstitutional or the person refuses, the officer is no worse off than if he or she had not sought the consent.

b. On the other hand, getting consent may turn out to save a case where an alternative legal theory (e.g., warrant, probable cause,

exigency, search incident, inventory) for the search or seizure is later ruled defective.

2. Alternative Legal Theories

Rarely should an officer rely on consent alone to justify a search or seizure. In other words, an officer should seek consent in addition to, not instead of, another theory (or theories) for the search or seizure.

a. Search Warrant

Officers serving a search warrant should strongly consider seeking consent *before* they mention or show the warrant to the resident.

1. If the warrant is ruled invalid, the consent should then make the search constitutional.

2. If officers show a resident the warrant before seeking consent, the consent may be ruled involuntary because the resident will feel that he has no choice but to consent.

b. Warrantless Searches

Often when there is a "close case" justifying a warrantless search the courts will rule that the search was proper if the officer obtained voluntary consent.

Examples:

Frisks and searches incident to arrest.

Probable cause searches of mobile vehicles.

Searches of containers under the inventory theory.

Emergency searches of body cavities.

c. Warrantless Seizures

Before seizing a person's body or property, it is often helpful if the officer seeks consent.

Examples:

Movement of a detainee.

Plain view seizures from a vehicle.

Seizure of a container for a short period on reasonable suspicion to determine whether probable cause exists.

B. Voluntariness

Officers are required to prove to a court that the consent was voluntarily given. This is sometimes a difficult burden because consenting parties often testify that they did not give their consent voluntarily. In cases where an officer and the consenting party are in dispute over the facts, the courts often rule that the consent is involuntary because the state has the burden of proving the consent was given voluntarily. *Bumper v. North Carolina,* 391 U.S. 543 (1968).

1. Totality of the Circumstances

A consensual search is voluntary if it is the product of an essentially free and unconstrained choice by its maker and not the result of circumstances which overbear the consenting party's will and critically impair his or her capacity for self-determination. A consensual search is involuntary if it is the result of duress or coercion, express or implied, or any other forms such as undue influence, promises, threats, or intrusive police conduct. Courts are required to examine the "totality of the circumstances" in determining whether consent has been provided voluntarily. This involves considering the individual circumstances of the consenting party (e.g., age, education, perceptions, etc.); the circumstances of the search (e.g., location, duration, etc.); and the conduct of the officers.

The following are some factors which tend to show a consent search is voluntary or involuntary. Bear in mind, however, that no single factor will or will not determine whether consent is voluntary; the circumstances must be examined in their totality. In addition, "the essential consideration in determining voluntariness of a consent to search is the impact of overbearing, coercive, or deceptive police conduct on a person with the knowledge and particular characteristics of the defendant. *People v. Magallanes-Aragon,* 948 P.2d 528 (Colo. 1997).

2. The Officer's Conduct

Officers can control most of the important factors relating to the voluntariness of consent.

a. Factors Tending to Show Involuntariness

The following are factors that tend to show that consent was involuntary.

(1) Coercion

Any coercion used by officers in order to obtain consent will often result in the court ruling that the consent was involuntary. The following are the types of coercion the courts have ruled upon.

(a) Weapons

An officer who seeks consent with a weapon drawn or immediately after drawing a weapon will almost always cause the consent to be involuntary. *See United States v. Jones,* 641 F.2d 425 (6th Cir. 1981)(many uniformed officers with guns drawn; consent involuntary).

(b) Threats

If an officer's uses threats to obtain consent, the consent will be ruled involuntary.

Example:

Officers investigating an armed robbery went to McMahon's apartment. They knocked and identified themselves. When a voice from inside asked who it was the officers again identified themselves and one officer said, "Open the door or we [will] kick it down." McMahon then opened the door. After entry the officers saw crime-related evidence. The Arizona court ruled that the consent was involuntary. Therefore, the evidence was suppressed. *State v. McMahon,* 568 P.2d 1027 (Ariz. 1977).

A more common threat made by officers is the threat to obtain (or attempt to get) a warrant if the person refuses to consent. The courts have not condemned this approach as long as there are no other indications of coercion. *People v. Hancock,* 525 P.2d 435 (Colo. 1974).

(c) Custody

Custody is a factor indicating that the consent was involuntary. This fact, however, will not result in the involuntariness of the consent unless other factors indicting involuntariness are also present. *See, e.g., People v. Cleburn,* 782 P.2d 784 (Colo. 1989)(improper custodial interrogation is a factor in determining whether consent to search a home was voluntary).

Examples:

After Robinette was issued a verbal warning for speeding, the officer then asked him if he had any contraband, weapons, or drugs. Robinette said "no," and consented to a search of his car. The United States Supreme Court held that the Fourth Amendment does not require that a lawfully seized defendant be advised that he or she is "free to go" before the consent to search will be recognized as voluntary. *Ohio v. Robinette,* 519 U.S. 33 (1996).

(2) Promises

When officers make promises which appear in any way to have influenced the person to give consent the court will usually rule that the consent was involuntary. *See, e.g., United States v. McCaleb,* 552 F.2d 717 (6th Cir. 1977)(promise to release arrestee).

(3) Deceit

Colorado courts are very tough on officers who use deceit in order to get a person to consent to a search. This is true whether the deceit was about the officer's identity or purpose.

Examples:

Officers told McCall's parents that they wanted to talk to McCall as a witness when in fact the officers planned to arrest McCall. McCall's parents gave the officers consent to enter the home. The court ruled that the officers' "preconceived deception as to the purpose" rendered the consent involuntary. As a result of the

illegal entry, the evidence was suppressed. *People v. McCall,* 623 P.2d 397 (Colo. 1981).

Compare with:

Officers told Zamora that they just wanted a "quick look" at the layout of his apartment to aid in their investigation of a domestic dispute at an adjacent apartment. Zamora agreed. In fact, the officers were investigating a rape and wanted to compare Zamora's apartment with the victim's description of the perpetrator's apartment. The Colorado Court of Appeals upheld the trial court's determination that the consent was voluntary. The officers truthfully stated that they wished to see the layout of the apartment, they did not exceed the scope of the consent, they did not feign an emergency, conceal their identities or misrepresent their authority. *People v. Zamora,* 940 P.2d 939 (Colo. App. 1996).

(4) Many Officers

A large number of uniformed officers present during the seeking of consent is an important factor tending to show involuntariness.

(5) Words Used and Officer's Demeanor

Courts will often find consent involuntary when an officer's attitude or words create a coercive atmosphere. An officer who creates an atmosphere of dominance or uses coercive words will often cause the involuntariness of the consent. Obviously, an officer who *tells* a person to do something will cause the consent to be involuntary.

Example:

"Let me see what you have in your pocket."

However, the courts have ruled that even a much "milder" demand can be coercive.

Example:

"You're going to save everybody a lot of trouble if you just tell me where [the evidence] is." *State v. Ahearn,* 227 N.W.2d 164 (Iowa 1975).

Finally, asking the consenting party to perform the search may also be found to be "coercive."

Example:

"Would you mind opening the trunk?"

(6) Nighttime Searches

Many courts feel that a nighttime or early-morning consent to search premises is more coercive. This factor becomes more coercive the later the hour and the more officers who are involved. Further, the courts consider whether the consent could have been sought during the day.

b. Factors Tending to Show Voluntariness

The following are factors relating to the officer's conduct which tend to show the consent was voluntary.

(1) Unusual Courtesy and Respect

An officer who shows the consenting party unusual courtesy and respect is much more likely to get a court to rule that the consent was voluntary. The officers who approach the consenting party in the same manner as if they were borrowing something from a neighbor cannot go wrong. This approach has the additional advantage that people are more likely to cooperate if the officer treats them with courtesy.

(2) Fourth Amendment Warnings

"The question whether a consent to search was in fact 'voluntary' is a question of fact to be determined from . . . all the circumstances. While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as a prerequisite of an effective consent." *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973).

However, if an officer does tell the consenting party of the right to refuse, that will be a very strong factor showing voluntariness of the consent.

Example:

Genrich initially was angry when officers came to his door and he told them to get away. After he calmed down and was advised of his right to refuse to consent to search, he read and signed a consent form. The Colorado Court of Appeals concluded that the consent was voluntary because the officers were not in uniform, did not display weapons, and spoke in conversational tones for several minutes before the search was discussed. *People v. Genrich,* 928 P.2d 799 (Colo. App. 1996).

(3) Fifth Amendment Warnings

An officer need not give a suspect Fifth Amendment warnings before seeking consent, even if the suspect is in custody. *People v. Garcia,* 11 P.3d 449 (Colo. 2000). Furthermore, if a suspect asserts his or her Fifth Amendment rights, an officer may still seek and obtain a valid consent to search. *People v. Phillips,* 594 P.2d 1053 (Colo. 1979). However, when a suspect waives his or her Fifth Amendment rights it is a factor which the courts consider as supporting voluntariness.

3. The Consenting Party's Condition, Status or Conduct

The courts consider the consenting party's "condition" in their determination of voluntariness. It is important to remember, however, that while the characteristics of the suspect, such as age, education, and knowledge, are pertinent factors, the courts are required to determine also whether the police conduct was objectively coercive in relation to the defendant's subjective state. *People v. Magallanes-Aragon,* 948 P.2d 528 (Colo. 1997).

a. Factors Tending to Show Involuntariness

The following are factors relating to the "condition" of the suspect which may contribute to a finding of involuntariness.

(1) Consenting party's Condition

(a) Influence of Alcohol or Drugs

The courts sometimes rule that suspects are not capable of giving voluntary consent because they are under the

influence of intoxicants or drugs to such an extent that the consent was not the product of a rational intellect and a free will. This, however, is a difficult standard for the suspect to meet: "Intoxication does not subvert consent if the individual is capable of giving an explanation of his actions." *People v. Helm,* 633 P.2d 1071 (Colo. 1981).

Example:

Licea was booked into protective custody after he called police alleging that he was in danger, and then appeared frightened, hyperactive, and intoxicated by alcohol or drugs. He also verbally gave consent to search his car, and then signed a written consent form. The Colorado Supreme Court concluded that, in the absence of evidence that Licea did not understand the request to consent or that police coercion overbore his will, the totality of the circumstances did not establish that the consent to search was involuntary. *People v. Licea,* 918 P.2d 1109 (Colo. 1996).

(b) Incompetency

The courts consider the consenting party's competency in the determination of voluntariness if there is any question that the consenting party is retarded, insane, young, etc. *See United States v. Elrod,* 441 F.2d 3533 (5th Cir. 1971). Officers should be very careful to explain Fourth Amendment rights if there is any question. Make sure the suspect understands those rights before obtaining a statement.

(c) Elderly, Decrepit, Weak

A court will often take into consideration the fact that the consenting party was elderly, decrepit, or weak because judges often feel that the will of such individuals are more easily overborne.

(2) Custody

Custody is a factor which the courts consider in the determination of whether the consent was voluntary. It is,

however, only one factor and will not alone result in the involuntariness of the consent.

(3) Original Refusal

The original refusal of a person to grant consent is an extremely important factor reflecting involuntariness. If an officer again seeks consent after an original refusal, the officer should give the suspect his or her Fourth Amendment warnings and try to obtain a signed waiver.

(4) Refusal to Sign a Written Waiver

The refusal to sign a written waiver is a factor which tends to reflect that the person really does not want to consent. However, this factor, alone, will rarely cause the involuntariness of the consent. In order to protect themselves, officers should give the consenting party an advisement as to his or her Fourth Amendment rights, and again seek consent.

(5) Consenting Party Hampers the Search or Seizure

When a person consents and then does things which hamper the search, the courts sometimes rule that the consent was involuntary or that the consent was withdrawn.

Examples:

The consenting party agrees to the search of the car. As the suspect unlocks the trunk, he suddenly slams the trunk shut. An officer in such circumstances should give the suspect a Fourth Amendment advisement and again seek consent. If it is granted, the officer should open the trunk himself.

Castaneda was arrested at a friend's house. Officers asked him if they could search his apartment, and Castaneda agreed. He then led officers on a "wild goose chase" instead of going to his apartment. The California court suppressed the evidence finally discovered because "these efforts [to frustrate the search] made abundantly clear that the suspect did not freely and voluntarily consent to the search of his home." *Castaneda v. Superior Court,* 380 P.2d 641 (Cal. 1963).

b. Factors Tending to Show Voluntariness

The following are factors relating to the "condition of the consenting party which tends to show that the consent was voluntary.

(1) Consenting Party is Intelligent or Sophisticated

An officer who can prove that the consent was given by an intelligent or "criminally sophisticated" person is more likely to get the court to rule that the consent was voluntary.

Examples:

College education

Sophisticated business persons
Attorneys
Convicted felons

(2) Fifth Amendment Waiver

If a suspect has been advised of, and waives, his or her Fifth Amendment rights, these facts tend to suggest that the consent was voluntarily given. However, a *Miranda* advisement is not a prerequisite to voluntary consent, nor does the exercise of Fifth Amendment rights preclude a finding of voluntariness.

(3) Consenting Party Admits Guilt Before Consent

A person who has confessed to the crime and then gives consent is much more likely to have voluntarily consented.

(4) Fourth Amendment Waiver

The courts feel that a person who waives his Fourth Amendment rights after officers explain them is much more likely to have given voluntary consent.

(5) Signed Consent

The courts usually feel that when a person signs a consent to search form it is more likely that the consent was given voluntarily. Unfortunately, some courts also feel that a

person who refuses to sign may not really want to consent, even if the consent is given orally.

Example:

Police officers found cocaine during a warrantless search of Herrera's apartment. Herrera signed a consent to search form written in Spanish that, translated into English, gave permission to the police to search his car which was located at his residence, but said nothing concerning the search of his residence. The Colorado Supreme Court affirmed the trial court's determination that, by the terms of the written agreement, Herrera did not give consent for the search of his residence. *People v. Herrera,* 935 P.2d 956 (Colo. 1997).

(6) Consenting Party Aids in the Search

A person who voluntarily helps the officers in their search tends to show that the consent is voluntary.

Note: Never ask the person to perform the task, as this will tend to show the consent is involuntary. The question, "Would you mind opening the door? sounds like a command to some courts.

Example:

Wieckert threatened his wife and daughter with a gun. Officers responded and asked for consent from the wife to search the house. The wife said she wanted all of the guns out of her house and offered the officers coffee and helped the officers locate a gun in the garage. Later, the wife told the court that she did not give consent for the search. The court ruled that the wife's assistance in the search showed that she gave voluntary consent. *People v. Wieckert,* 544 P.2d 688 (Colo. 1976).

C. Authority to Consent

A person does not have authority to consent to a search or seizure unless the person has at least joint access to the area being searched.

In order to determine whether a person has the power to consent, officers should read the chapter relating to the area to be searched (**PERSONS, PREMISES, VEHICLES, CONTAINERS**)

D. Where and How the Officer May Search

Officers may search only areas where they have been given specific authority to search. A general consent does not give officers the power to search unusual places within those areas. Permission to search an area may or may not include permission to search closed containers in the area, depending upon the latitude provided by the consenting party.

Examples:

Officers were invited into Hill's house and were told to stay in the den. Hill left the room and an officer went to the kitchen, from where he could see Hill get marijuana from under the living room couch near Monahan. The Wisconsin court ruled that because the officers did not have consent to go to the kitchen, any testimony about observations from the kitchen must be suppressed. *State v. Monahan,* 251 N.W.2d 421 (Wis. 1977).

Officers suspected Thiret of abducting a girl, and went to his home and asked him if they could "look around." Thiret said, "Go ahead," and four officers then searched the house for 45 minutes. The Colorado Supreme Court ruled under these circumstances that a "look around" means a "casual observation of the premises." Because the search exceeded the scope of the consent, the evidence was suppressed. *People v. Thiret,* 685 P.2d 193 (Colo. 1984).

An officer asked Sanders if the officer could search the trunk of Sanders's car. Sanders opened the trunk, and as the officer reached for a paper bag in the trunk, Sanders grabbed the bag and said the officer could not look in there. The officer nevertheless opened the bag. The Illinois court ruled that Sanders's consent to a search of the trunk did not include "consent to a probing exploration into a closed container within the trunk." *People v. Sanders,* 358 N.E. 2d 375 (Ill. 1976).

Frequently, officers will ask for consent to look for certain evidence and then they will look in areas where the evidence could not possibly be. Courts usually rule that the officers in such cases exceeded the scope of the consent provided to them.

Example:

An officer had consent to look for some large items and a stolen small camera. During the search the officer looked into a shaving kit and saw a ring which turned out to be stolen. A big issue was whether the camera had already been found when the officer looked into the kit. If so, there was nothing left to look for which was small enough to fit in the kit. *People v. Torand*, 622 P.2d 562 (Colo. 1981).

E. Withdrawal of Consent

Courts rule that once a suspect has withdrawn his or her consent, the search must stop unless there is some other legal theory to support the search. If a person withdraws consent, the officer should find out the reasons. If the person continues to refuse consent, the officer should stop the search unless there is some other legal justification to continue.

F. Burden of Proof

It is very important that officers understand that courts do not favor consent searches and therefore impose a very high burden on officers to prove the legality of the consent. Therefore, if it is one officer's word against the suspect, the officer will sometimes lose. In order to better be able to prove the voluntariness of a consent, officers should tape the conversation surrounding the consent and document all of the factors in their reports.

G. Suggested Techniques

1. Always seek consent, in addition to your other theories for a search, from someone who has authority to grant the consent, if at all possible.
2. Try to "create" as many voluntariness factors as possible and avoid as many involuntariness factors as possible. The most important thing you can do is be polite.
3. If there is any question whether the suspect's consent covers a particular or unusual area within the area of general consent (especially closed containers) get the suspect's specific consent for that area.
4. Document everything carefully and specifically in your reports.

IX. CONVERSATIONS

Whether a person has a reasonable expectation of privacy in his or her conversations depends upon many factors. Most legal problems relating to the "interception" of conversations occur when officers listen in on telephone conversations.

A. Electronic Eavesdropping

Normally, an officer may not "tap in on" or "bug" a conversation between two individuals.

Example:

Officers suspected that Katz was involved in bookmaking activities and was using a certain telephone booth to make his bookmaking calls. The officers put an electronic "bug" on the outside of the telephone booth and intercepted Katz's conversation. The United States Supreme Court ruled that Katz had a reasonable expectation of privacy in his phone conversations from a closed phone booth. Therefore, the warrantless interception of the conversation was a violation of the Fourth Amendment and the evidence obtained was not admissible. *Katz v. United States,* 389 U.S. 347 (1972).

Note: This is probably the most significant case in Fourth Amendment history. The government, in this case, argued that since the bug was put on the outside of the phone booth, the government did not "trespass" upon Katz's privacy. The court responded that, under the Fourth Amendment, property concepts such as trespass were not controlling. The test was whether the officers intruded upon an area in which the suspect had a reasonable expectation of privacy. This is now, of course, *the* key issue in all Fourth Amendment cases.

1. Other Penalties

Officers who listen in on telephone conversations between two persons or otherwise "bug" a telephone conversation without a warrant may also subject themselves to criminal penalties which make it unlawful to electronically listen in to another's conversations.

2. Exceptions to the Warrant Requirement

The courts have ruled that officers may sometimes listen in on conversations between two persons without a warrant.

a. Consent of One Party

Officers may listen in, tap, bug, or record conversations between two or more persons if one of the persons agrees to the interception.

Example:

Before meeting the defendant, an informant had voluntarily consented to have his phone conversations concerning drug activities monitored by police officers. As a result of this agreement, a conversation between the defendant and the informant containing incriminating statements against the defendant took place. The court held that no unlawful interception occurs if one party to the conversation voluntarily consents to such monitoring. *People v. Meinerz,* 890 P.2d 130 (Colo. App. 1994) *cert granted and judgment vacated on other grounds.*

Consent by a party to be electronically monitored must be voluntary.

Example:

White agreed to be wired during his conversation with Rivera, based on a promise by a police officer that White's possession of a weapon by a previous offender charge would not be prosecuted. However, the officer failed to disclose that the charge had previously been dropped by the district attorney. The Colorado Supreme Court held that White's consent to be wired was indeed voluntary, in spite of the deceit and improper inducement. *People v. Rivera,* 792 P.2d 786 (Colo. 1990).

b. Prisoners

The courts have ruled that normally prisoners do not have a reasonable expectation of privacy in their conversations except when they use a telephone.

Example:

Blehm visited her husband at the jail. Their conversation, which was monitored, involved Blehm's participation in the escape of her husband. The court ruled that Blehm had no reasonable expectation of privacy in the conversation in the

jail. Therefore, the evidence was admissible. *People v. Blehm,* 623 P.2d 411 (Colo. App. 1980).

Note: If officers lead suspects to believe that their conversation (or conduct) is private, an interception of that conversation will not be admissible. Also, if a jailhouse conversation is protected by a privilege (e.g., attorney-client), any interception of such conversations is illegal and will be inadmissible.

B. Eavesdropping

Whether an officer may eavesdrop on a conversation without electronic aids depends upon whether the officer invades an area where the suspect reasonably expects privacy.

Examples:

A detective asked a juvenile and his father to come to the police station to discuss a sexual assault allegation. On his way to meet the juvenile and his father, the officer stopped off at a room adjoining the interview room and started a videotape recorder. Before the interview began, the juvenile's father noticed a large mirror in the interview room, and the detective told him that "nothing was behind there." During the initial interview, the juvenile then made incriminating statements to the detective. Soon thereafter, the detective left the interview room and returned a short time later, and did this on three separate occasions. At one point, upon returning to the room, the detective allowed the juvenile and his father to speak privately with the assurance that the detective would be outside the room and would not be listening to the conversation. However, all of the conversations were in fact videotaped. The Colorado Supreme Court ultimately held that the juvenile's initial statements to the detective, and subsequent statements made in response to the detective's questions, were not subject to suppression because "one who is speaking in the actual presence of a police officer or detective has neither a subjectively nor an objectively reasonable expectation of privacy." However, the court concluded that the juvenile's statements to his father which were purportedly "private" were "oral communications" obtained in violation of Colorado's Wiretapping and Eavesdropping Act [Section 16-15-101, 6 C.R.S (c2002), *et seq.*] and were therefore inadmissible for any purpose, including impeachment. *People v. A.W.,* 982 P.2d 842 (Colo. 1999).

Officers recorded conversations between Palmer and his accomplice in the back of a police car. Officers were able to eavesdrop on the unsolicited, unprompted conversation by means of a concealed tape

recorder. The Colorado Court of Appeals upheld the trial court's ruling that Palmer had no reasonable expectation of privacy while in the back of the police car. Moreover, the court concluded that the police conduct was not designed to motivate Palmer to make incriminating statements, but rather to take advantage of any statements that were volunteered. *People v. Palmer,* 888 P.2d 348 (Colo. App. 1994).

Officers who were lawfully present in a motel room adjacent to the suspect's room were able to overhear certain conversations unaided by listening enhancing devices. The Colorado Court of Appeals held that the officers' conduct did not intrude into any reasonable expectation of privacy. *People v. Hart,* 787 P.2d 186 (Colo. App. 1989).

Compare with:

Officers placed a listening device on the window sill of the men's restroom of a local bar. The bar owner found and removed the device and reported it to the district attorney's office. The trial court found, and the court of appeals affirmed, that the occupants of the restroom had an objectively reasonable expectation of privacy which could not be thwarted by use of a hidden transmitter. *People v. Lesslie,* 939 P.2d 443 (Colo. App. 1996).

C. Suggested Techniques

Before "listening in on" or "tapping" a conversation you should consider the following tips.

1. There is no constitutional reason why you cannot listen in on a conversation between people if you can do so with the "naked ear" and are standing in a place where you have the right to be.

2. Anytime you are engaged in an important conversation with a suspect or hostile witness, you should consider taping it.

    a. If you tape a conversation, a witness can never say you are lying or mistaken about the conversation.

    b. Buy a pocket tape recorder.

    c. If you tape conversations of witnesses they must be preserved for disclosure to the defense.

3. Get your informants or witnesses to tape conversations with the suspect if appropriate.

4. Never, never listen in on a telephone conversation unless:

   a. One of the parties consents; or

   b. you have obtained a warrant.

X. DOGS

The issue discussed in this section is whether an officer conducts a search when he or she has a dog sniff in order to detect narcotics or explosives in a container or a vehicle.

A. Federal Constitutional Standard

The answer under the federal constitution is that, normally, a person does not have a reasonable expectation in the area surrounding a closed container or vehicle.

Example:

Officers had reasonable suspicion to believe Place had narcotics in his luggage. The officers brought in a narcotics dog which sniffed the luggage, and "alerted" to the presence of narcotics. The officers thereafter obtained a warrant. The United States Supreme Court ruled that a dog sniffing a container was not a "search" under the Fourth Amendment. *United States v. Place,* 462 U.S. 696 (1983).

Caballes was stopped for speeding. During the investigatory stop, a second officer had a narcotics-detection dog walk around the car, and the dog alerted to the trunk. A subsequent search of the trunk uncovered marihuana. The United States Supreme Court held that a dog sniff of the exterior of a car that occurs during a lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not implicate the Fourth Amendment. *Illinois v. Caballes*, 125 S.Ct. 834 (2005).

B. Colorado Constitutional Standard

The Colorado Supreme Court has held that, under the state constitution, the use of a dog trained to detect narcotics constitutes a "search." However, the search need not be justified by probable cause sufficient to obtain a search warrant, but instead by reasonable suspicion similar to that required to stop and frisk a person suspected of involvement in criminal activity. *People v. Boylan,* 854 P.2d 807 (Colo. 1993).

Examples:

Officers were called because Unruh's house had been burglarized. Missing from Unruh's house was a safe. The officers later recovered the safe from the burglar and held it as evidence. Based on having seen drug paraphernalia in Unruh's basement while investigating the burglary, and on having been told by the burglar that drugs were in the safe, the officers suspected that the safe contained drugs. They had a dog sniff performed, which "alerted" to the presence of narcotics. The officers then obtained a warrant and found drugs inside the safe. The Colorado Supreme Court ruled that, since officers had not placed his safe in a position where officers could subject it to a dog sniff, the dog sniff constituted a "search." However, the court held that the search could be based on reasonable suspicion, and the court found ample evidence to support reasonable suspicion in these circumstances. *People v. Unruh,* 713 P.2d 370 (Colo. 1986).

May called the Air Mail Center twice to inquire about an Express Mail package which purportedly contained baby formula. May volunteered to drive 235 miles to retrieve the package. A postal inspector examined the package and concluded that it contained a "suspicious lumpy type powdery material" comparable to narcotics. The inspector also learned that the New York City return address belonged to two businesses, a candy store and a hairstylist. The inspector therefore, had a dog sniff the package. The Colorado Supreme Court concluded that the dog-sniff was supported by reasonable suspicion because May's actions were suspicious, the weight and material of the package were consistent with narcotics, and this package had a suspicious return address from a city known as a source city for drug distribution. *People v. May,* 886 P.2d 280 (Colo. 1994).

See also People v. Boylan, 854 P.2d 807 (Colo. 1993)(dog sniff of a package sent via UPS constituted a "search;" however, the search was justified by reasonable suspicion); *People v. Haley,* 41 P.3d 666 (Colo. 2001)(dog sniff search of a person's automobile in connection with a traffic stop that is prolonged beyond its purpose to conduct a drug investigation intrudes upon a reasonable expectation of privacy and constitutes a search and seizure requiring reasonable suspicion of criminal activity).

Compare with:

Officers removed a suitcase from the luggage compartment of a bus and subjected it to sniff test by a trained narcotics dog. The bag was then carried onto the bus by an officer dressed as a bus driver and asked the owner of the suitcase to come forward. Once the officer identified

Ortega as the owner of the suitcase, the officer asked her to come with him so that "a new tag" could be attached to the case. The officer, accompanied by Ortega, was taken to the garage and questioned by the officers. The Colorado Supreme Court held that the initial sniff of the suitcase by the narcotics dog did not constitute a seizure because there was no "meaningful interference" with Ortega's possessory interest in the suitcase. *People v. Ortega,* 34 P.3d 986 (Colo. 2001).

C. Suggested Techniques

Anytime you do not have probable cause to believe a vehicle or closed container holds narcotics or explosives and want to use a dog to establish probable cause you should consider the following tips.

1. If explosives are involved the courts will be more lenient in giving you time to bring in the dog.

2. However, where narcotics are involved, you should try to have the dog present at the time of the seizure or soon thereafter.

3. Try to get valid consent to search or seize from someone who is controlling the area to be searched.

XI. FLASHLIGHTS

The general rule relating to an officer's use of a flashlight is that it is constitutional to use a flashlight to see that which could not be seen because of the darkness. The courts rule that this is nothing more than a plain view observation.

The most common issue relating to the use of flashlights occurs when an officer shines a flashlight into the passenger compartment of a vehicle. This issue has been clearly decided; such conduct does not constitute a "search" or implicate the Fourth Amendment. *People v. Haggart,* 533 P.2d 488 (Colo. 1975). However, there are some other issues which are not so easily resolved.

A. Lawful Presence

The first thing to remember is that the flashlight issue is almost always a plain view question. In order to lawfully observe an item in plain view an officer must be lawfully present in the area where the observation is made.

B. Particular Places

The following are situations where the flashlight issues most often arise.

1. Premises

Officers may always shine their flashlights on the "grounds" around premises if the officers are lawfully present where they shine the light. The issue becomes more difficult, however, when an officer shines a flashlight into a home or other building on the premises. The test under such circumstances is whether the owner or occupant had an objectively reasonable expectation of privacy in the particular are being illuminated by the flashlight. *Katz v. United States,* 389 U.S. 347 (1972). It is far different, for example, for an officer to shine a flashlight into an open garage than into a person's bedroom.

Example:

An eyewitness told officers that he saw burglars put a stolen stereo cabinet into a garage. An officer shined his flashlight through the open garage door and saw the cabinet. The California court ruled that the viewing was not a "search." Therefore, no warrant, emergency, or consent was necessary to justify the viewing. *People v. Wheeler,* 105 Cal. Rprtr. 56 (Cal. App. 1972).

2. Vehicles

An officer who has lawfully stopped or is lawfully beside a vehicle may shine a flashlight into the passenger compartment of the vehicle, and such conduct does not constitute a Fourth Amendment search.

Example:

An officer observed two men sitting in a parked automobile. The automobile's engine was not running, the headlights were turned off, and the two men appeared to be bent over something in the front seat. The officer approached the car, shined his flashlight into the car, and observed both men with cash in their hands. He also observed Dickinson holding a small plastic bag containing a white powdery substance. The Colorado Supreme Court held that there is no legitimate expectation of privacy in the interior of an automobile when it may be viewed from outside the vehicle by either passersby or police officers, and an officer's use of a flashlight to illuminate the inside of a vehicle does not cause the officer's viewing to become a search. *People v. Dickinson,* 928 P.2d 1309 (Colo. 1996).

3. Persons

As long as the officer is lawfully present, the officer may shine a flashlight on persons. If, because of this light, crime evidence is observed the evidence may be seized.

Examples:

An officer shined a light into Bainch's shirt pocket while Bainch was sleeping on a park bench. The officer saw marijuana and arrested Bainch. The Arizona court ruled that the fact that the officer observed the marijuana "with the aid of the flashlight did not make this a search." *State v. Bainch,* 505 P.2d 248 (Ariz. 1973).

An officer lawfully stopped Woods and, without touching him, shined his flashlight into his shirt pocket and saw marijuana. The California court ruled that no search had taken place. *People v. Woods,* 86 Cal. Rptr. 264 (Cal. App. 1970).

C. Suggested Techniques

You may use your flashlight to view at night what could be viewed during the daylight.

XII. HI-TECH METHODS AND USE OF OTHER AIDS

A. The Trend

New technology will lead to new sophisticated methods for police investigation. Constitutional rules based on more traditional investigative techniques have been, and will continue to be, adjusted when applied to new "hi-tech" methods. Most adjustments will be in the direction of greater protection of privacy rights.

For example, either the United States or Colorado Supreme Courts, or both, have already made rulings giving protections in the following areas:

1. Beepers: Requiring a warrant before being placed on commercially purchased items. *People v. Oates,* 698 P.2d 811 (Colo. 1985)(decided under Colorado constitution)

2. Bugs: Warrant required for any electronic eavesdropping procedure. *Katz v. United States,* 389 U.S. 347 (1972)(decided under Federal constitution).

3. Dogs: May or may not be a search, depending upon whether reliance is upon the federal constitution, *United States v. Place,* 462 U.S. 696 (1983)(no search), or the state constitution, *People v. Unruh,* 713 P.2d 370 (Colo. 1986)(search but only reasonable suspicion is required).

4. Pen Registers: Warrant required. *People v. Sporleder,* 666 P.2d 135 (Colo. 1983)(decided under Colorado constitution).

5. Ultraviolet Scans: Warrant required. *People v. Santisteven,* 715 P.2d 792 (Colo. 1986).

Each of the above examples is discussed in detail elsewhere in this chapter. Officers should keep in mind that courts will take a hard look at each new hi-tech method, and will likely be quite stringent in requiring warrants.

B. Suggested Techniques

Before using any new technological device not covered in this book to search or seize, an officer should work with the district attorney to obtain a warrant.

XIII. JAIL AND PRISON SEARCHES

A prisoner has such a low expectation of privacy while incarcerated that officers may normally "search" an inmate's body and personal effects without a warrant, probable cause or even reasonable suspicion.

A. Reason for the Law

The biggest reasons why officers are given such broad powers when searching prisoners is that prisoners have such low expectations of privacy and that there must be very tight security controls in the institutions.

B. Types of Searches

1. Searches of Cells

Officers may search an inmate's cell and personal effects at any time. *Bell v. Wolfish,* 441 U.S. 520 (1979).

2. Searches of the Person

Officers may search the person of an inmate and may conduct strip searches after a contact visit. *Bell v. Wolfish,* 441 U.S. 520 (1979); *see also People v. Schreck,* 107 P.3d 1048 (Colo. App. 2004) (seizure of inmate's blood for DNA database).

3. Searches of Mail

a. Incoming Mail

Incoming mail may be opened and inspected for contraband.

b. Outgoing Mail

An officer may open and read outgoing mail if there is any reason to believe the letter may contain crime-related information (except letters to attorneys).

Example:

While defendant was being held in the detention facility, he received letters from an inmate in the Department of Corrections. The defendant wrote letters in response which contained incriminating statements. Defendant's letters were reviewed by an employee of the detention facility pursuant to a written policy. Several statements from these letters were admitted into evidence at trial. In upholding the admissibility of the letters the court of appeals recognized that an inmate is placed on notice and does not have a reasonable expectation of privacy concerning the mail he writes and sends through the prison system. Any examination of letters, packages, or any correspondence sent through the mail is not an unreasonable search and seizure by prison officials. *People v. Whalin,* 885 P.2d 293 (Colo. App. 1994).

c. Notes Between Inmates

Notes passed between inmates may almost always be read.

4. Searches of Jail Property

Officers may normally search the jail property of inmates.

C. Suggested Techniques

Before conducting searches of jail and prison inmates an officer should consider the following tips.

1. Read the departmental rules of the institution relating to searches.

2. If there is probable cause to make the search, "freeze" the area and get a warrant (just to be safe).
3. Warn and get a waiver from the suspect; then obtain an incriminating statement.

XIV. MAIL

This section discusses the issues relating to the privacy persons can expect relating to their mail.

A. Mail Covers

A "mail cover" is the documentation of information on the outside of an envelope. This purpose of a mail cover is to locate fugitives or determine a suspect's associations. Neither the United States or Colorado Supreme Court has ruled whether the recording of this information constitutes a search.

B. Reading Mail

An officer may normally not read mail without a warrant, as a person's "papers" are specifically protected by the Fourth Amendment.

1. First Class Mail

Mail being sent by first class postage traditionally was defined by statute as "matter closed against postal inspection." Such mail is generally closed to postal inspection and may not be opened except pursuant to a search warrant or to determine an address at which the letter can be delivered. However, it may be proper to "detain" first class mail for a short period in order to develop probable cause or to obtain a warrant.

Example:

Van Leeuwan airmailed two 12-pound packages. Because officers had reasonable suspicion to believe the packages contained contraband the officers "detained" the packages until they had probable cause. Then they obtained a warrant. In ruling that the evidence was admissible, the United States Supreme Court stated:

"Detention for this limited time was, indeed, the prudent act rather than letting the packages enter the mails and then, in case the initial suspicious were confirmed, trying to locate them en route . . . ." *United States v. Van Leeuwan,* 397 U.S. 249 (1970).

2. Parcels Mailed Via Private Courier Service

A package sent via a private courier service such as Federal Express or UPS has the same expectation of privacy as a letter mailed via first class postage: "The package is sent in a sealed, opaque envelope. As such, the contents of the package are hidden from view. Any revelation of the contents of such a package would require some prying into what was hidden from view, and, when done by a state actor, is a search." *People v. Boylan,* 854 P.2d 807 (Colo. 1993)

3. Non First Class Mail

Neither the United States or Colorado Supreme Courts have ruled on the propriety of opening mail which is not first class. The majority of courts have ruled that if persons want to avoid "inspections" of their mail (and expect "privacy") they need only send them first class. *See United States v. Riley,* 554 F.2d 1282 (4th Cir. 1977).

However, Colorado courts are likely to rule that, if an officer requests a postal official to open such mail, the "inspection" becomes a "search" which can only be justified by a warrant, consent, or emergency circumstances. *See, e.g., Commonwealth v Dembo,* 301 A.2d 689 (Pa. 1973).

4. International Mail

Mail which enters this country, like vehicles, may be searched without probable cause, reasonable suspicion, or any cause at all. These inspections are merely administrative border searches.

5. Prisoner Mail

Normally, the opening or reading of prisoner mail is regulated by the institutional rules or statute.

a. Contraband

Most courts have ruled that the Fourth Amendment does not prohibit the opening of all incoming mail to check for contraband.

b. Censorship – Reading Mail

Reading incoming or outgoing mail is more likely to be ruled constitutional if the reading relates to some institutional security problem such as possible escape plans or threats.

Note: Do not read any letters to or from attorneys without a warrant.

C. Suggested Techniques

Normally, before a mail cover is implemented or mail is read, you should contact your legal advisor. If necessary, seize the mail briefly while seeking a response.

XV. PEN REGISTERS

A pen register is a device which records the phone numbers called from a particular phone. Pen registers are used to provide surveillance and primarily to determine associates of a suspect.

A. Federal Constitutional Standard

The United States has ruled that a pen register is not a search. Therefore, under the Fourth Amendment no warrant is necessary to install a pen register. *Smith v. Maryland,* 442 U.S. 735 (1979).

B. Colorado Constitutional Standard

The Colorado Supreme Court has ruled that, under the Colorado Constitution, a person has a reasonable expectation of privacy in the telephone numbers he or she dials. *People v. Sporleder,* 666 P.2d 135 (Colo. 1983). Therefore, in Colorado an officer must obtain a warrant before placing a pen register on a suspect's phone. Furthermore, officers need a warrant to get phone company records of a suspect's toll calls.

Example:

As part of an investigation into an alleged drug distribution network, officers obtained telephone toll call records for a telephone registered in Corr's name. The court ruled that the requirement of a warrant based on probable cause applies both to pen register information and to toll records. *People v. Corr,* 682 P.2d 20 (Colo. 1984).

C. Suggested Techniques

Officers should always seek the assistance of an attorney in drafting and executing a search warrant for a pen register.

XVI. PROBATIONERS AND PAROLEES

Normally probationers and parolees have the same Fourth Amendment rights as everyone else. There is, however, a big exception to this rule. It is common in the conditions of release for a probationer or parolee to be subject to have their homes, vehicles or persons searched at anytime by their probation or parole officers.

A. Legal Theories for the Searches

Probationer and parolee searches are usually justified by the fact that these people normally consent to the searches in order to be free of incarceration. Also, these searches are often considered administrative; that is, regulatory rather than investigative. The Colorado Supreme Court has recognized that "what may be a reasonable search when a parolee is the subject of the investigation may be unreasonable when directed against another person." *People v. Anderson,* 536 P.2d 302 (Colo. 1975).

1. Colorado's Parole Statue

Section 17-2-201(5)(f)(I)(D), C.R.S. (2008), provides that a parolee shall "allow the parole officer to make searches of his person, residence or vehicle." This requirement is typically incorporated into the standard terms of parole once a person has been paroled from the Department of Corrections. Although the statute does not require any level of probable cause or reasonable suspicion to conduct a search, the Colorado Supreme Court has stated the search must meet the following three requirements:

a. it is conducted pursuant to any applicable statute;

b. it is conducted in furtherance of the purposes of parole, i.e., related to the rehabilitation and supervision of the parolee; and

c. it is not arbitrary, capricious, or harassing.

Example:

McCullough was paroled from the Department of Corrections and signed a parole agreement providing that his residence, person, or vehicle was subject to search by the parole officer. Thereafter, two

parole officers went to his home to conduct an unannounced home visit. During a search of his belongings in a closet, an officer discovered a baggie of cocaine. The Colorado Supreme Court upheld the search, concluding that the search was conducted as part of the parole officers' routine duties and was conducted pursuant to the applicable parole statute; the purpose of the search was to determine whether McCullough was in violation of any of his parole conditions; and the search was conducted at a reasonable time, was reasonable in scope, and not unnecessarily prolonged. *People v. McCullough,* 6 P.3d 774 (Colo. 2000).

Note: In upholding the search, the Colorado Supreme Court noted that statute upon which the search was based was amended after the court's decision in *People v. Anderson,* 189 Colo. 34, 536 P.2d 302 (1975). In *Anderson,* the court held that a parole officer needed reasonable grounds to believe a violation had occurred in order to search. The court in *McCullough* noted that the amended statute did not include a "reasonable grounds" requirement, and concluded that the legislature therefore specifically decided not to require "reasonable grounds" in order to conduct a search. The court found the amended statute constitutional, with the limitations set forth above.

B. The Officer's Role

A parole officer may request a police officer to accompany him or her when a search is being made. *People v. Anderson,* 536 P.2d 302 (Colo. 1975). "The presence of a police officer during a parole search does not, in and of itself, indicate that the search was not conducted in furtherance of the purposes of parole. However, these searches may not be conducted simply as a subterfuge for criminal investigations." *People v. McCullough,* 6 P.3d 774 (Colo. 2000).

Example:

Officers were investigating allegations that Slusher, who was on parole for sexual assault, was taking nude photographs of young boys. The officers exchanged information with Slusher's parole officer, and the parole officers ultimately searched Slusher's home, where they found boxes of pornographic photographs. The photographs were then turned over to police who accompanied the parole officers and were waiting outside the home. Slusher was then arrested for parole violations. The Colorado Court of Appeals upheld the search and admission of the evidence in Slusher's criminal trial, noting that the decision to search was the parole department's decision, and not the officer's, and the search was valid for parole purposes and "not as a police subterfuge." *People v. Slusher,* 844 P.2d 1222 (Colo. App. 1992).

C. Biological Samples

Probationers may properly be required to provide biological samples for DNA testing. The use of DNA samples in a DNA database falls within the "special needs exception" to the warrant requirement. *People v. Rossman*, 140 P.3d 172 (Colo. App. 2006).

D. Suggested Techniques

Never try to use a probation or parole officer to make searches which you may not perform. However, if probation or parole officers ask you to accompany, do it.

XVII. RECORDS – PERSONAL AND BUSINESS

Normally a person has a reasonable expectation of privacy in his or her written records such that officers may not read those records unless a warrant is obtained. This includes not only records which persons keep in their home or office, but also which are discovered or kept by a bank, credit company or telephone company.

A. Personal Records

An officer may not read the personal written materials of an individual without a warrant except during normal booking searches or searches incident to arrest.

B. Business Records

A person has a reasonable expectation of privacy in business records. Normally an officer needs a warrant to look at them.

1. Federal Constitutional Standard v. Colorado Constitution

The United States Supreme Court has ruled that a person does not have a reasonable expectation of privacy under the Fourth Amendment in records which are shared with a business (e.g., bank records, credit records, phone bills, etc.). The Colorado Supreme Court, however, has ruled that Colorado residents should be granted more protection from the police under the Colorado Constitution, and has ruled that a person does have a reasonable expectation of privacy in business records even if these records are shared with other institutions.

Example:

In an investigation into an alleged drug distribution network, officers obtained telephone toll call records for a telephone registered in Corr's name. The court ruled that a warrant was required to obtain the toll records. *People v. Corr,* 682 P.2d 20 (Colo. 1984).

2. Exceptions the Warrant Requirement

Officers may obtain and read business records of a suspect if:

the records are public records;

the record holder is a victim;

the officers get consent from a person who has "joint access" with the suspect to the records;

the state issues a subpoena and disclosure is preceded by a finding of probable cause by a judge.

a. Public Records

Example:

Swearington forged and recorded a deed of trust with the County Clerk. Later, his lawyer gave the documents to the district attorney the court (in ruling that the documents were not protected by the attorney-client privilege) noted that Swearington had no reasonable expectation of privacy in the document. *People v. Swearington,* 649 P.2d 1102 (Colo. 1983).

b. Business is the Victim

Example:

Forsyth forged a client's endorsement on a check. Officers obtained the check and accounts records from the bank without first obtaining a warrant. The court ruled that the "bank was an active party to the transaction (the victim) and the defendant lost his expectation of privacy in his account." *People v. Forsyth,* 653 P.2d 417 (Colo. App. 1982).

Selph was charged with twelve counts of fraud by check. The police investigators requested Selph's account records from the bank without first obtaining a warrant. The bank

provided the records without Selph's consent, and Selph later sought to have the records suppressed. The court ruled that Selph did not have a legitimate expectation of privacy in bank account records resulting from his short checks because the bank, as victim, was an actual party to the transaction. *People v. Selph,* 786 P.2d 1078 (Colo. 1989).

c. Third Party Consent

Officers may obtain the business records of a suspect if they obtain the consent of a third party who has joint access to or joint control over the records.

Example:

Crawford, an ice rink employee, was "skimming profits off" of ice skating receipts. Crawford's employer authorized police to search the office Crawford shared with other employees. The court ruled that evidence located in the business records in the office was admissible, in part, because the employer authorized the search. *People v. Crawford,* 632 P.2d 626 (Colo. App. 1981).

d. Subpoena Duces Tecum

In lieu of obtaining a warrant, the state may issue a subpoena duces tecum to a business to produce records to the court so long as the defendant has the opportunity to challenge the subpoena for lack of probable cause. If a defendant challenges probable cause for the issuance of a subpoena for protected records, "the court must determine whether it is reasonable to conclude that the subpoenaed [records] exist, and whether there is a nexus between the materials and the charges against the defendant. *People v. Mason,* 989 P.2d 757 (Colo. 1999).

3. Reasonable Expectation of Privacy

Not all business enjoy a legitimate expectation of privacy. The following are examples of certain records that the courts have found do not require a warrant.

Examples:

Pursuant to an administrative subpoena, DEA officers examined UPS shipping records from named garden supply dealers. Based on those records, officers learned that Beckstrom had received hydroponic equipment, suitable for growing marijuana, from an Oregon supply store. The Colorado Court of Appeals held that Beckstrom had no legitimate expectation of privacy in the information contained in the UPS records because the information sought by the DEA was information a mail order customer consensually and voluntarily makes available to third parties (i.e., the supplier, the commercial shipper, and their respective employees). *People v. Beckstrom,* 843 P.2d 34 (Colo. App. 1992).

An officer prepared an affidavit for a warrant that relied in significant part upon the unusual amount of electricity used in the residence as reflected by a record of the monthly utility billings. The Colorado Court of Appeals concluded that the acquisition of defendant's utility records did not constitute a search under either the federal or state constitutions. Society does not view an expectation of privacy in utility records as reasonable and, unlike telephone and bank records, utility records can be obtained by other members of the public. *People v. Dunkin,* 888 P.2d 305 (Colo. App. 1994).

C. Suggested Techniques

Before reading any materials belonging to a suspect, you should always consider whether there may be probable cause to get a warrant. Otherwise, you may read materials only if:

1. the search is incident to arrest (materials on the suspect's person);
2. the search is a booking search;
3. the materials are public records;
4. the materials are held by the victim of the crime;
5. consent is obtained from a person who has joint and legal access to the records (except banks, credit companies, telephone companies, etc.);
6. the materials were turned over by a judge pursuant to a subpoena duces tecum.

XVIII. ROADBLOCKS AND CHECKPOINTS

There are several places and situations where roadblocks may and may not be implemented. Roadblocks constitute "stops" of vehicles. Therefore, when roadblocks are permitted, they constitute an exception to the rule that there must be reasonable suspicion for the stop.

A. International Borders

The most obvious example of a justifiable roadblock is at international borders. The courts have universally ruled that it is reasonable to briefly detain persons at the border and to make cursory searches for illegal aliens and narcotics.

B. State Borders

Many states stop vehicles entering the state for regulatory purposes as opposed to criminal investigative purposes.

C. Emergencies

It may in some extraordinary cases be constitutional for officers to set up a roadblock in order to prevent the escape of a violent criminal. This device should be used only if a life is at stake. In many cases, however, courts rule that it is unreasonable for officers to establish roadblocks, even if suspects are dangerous.

D. Sobriety Checkpoints

The United States and Colorado Supreme Courts have determined that the use of sobriety checkpoints may not violate the Fourth Amendment, so long as established policies and procedures are employed. *Michigan State Police v. Sitz,* 496 U.S. 444 (1990).

Compare:

Police officers, acting with the intent to interdict persons transporting drugs to a music festival, posted large signs on a road stating "Narcotics Checkpoint, One Mile Ahead" and "Narcotics Canine Ahead." The signs were part of a ruse - there was no checkpoint or other impediment to the free flow of traffic. The purpose of the signs was to allow police officers to monitor the reactions of persons traveling past the signs. One of the officers saw a passenger in the defendant's car toss a small item out of the window onto the side of the road. The defendant's car was then stopped. The Colorado Court of Appeals held that the fictitious drug checkpoint did not violate the defendant's Fourth Amendment rights because the stop of his car was based

upon individualized suspicion of unlawful activity, i.e., littering. *People v. Roth*, 85 P.3d 571 (Colo. App. 2003).

E. Wildlife Checkpoints

The Colorado Supreme Court has indicated that the state has a legitimate interest in protecting wildlife and check stations may be permitted to aid in the management of wildlife and enforcement of the wildlife rules in certain circumstances. *People v. Coca,* 829 P.2d 385 (Colo. 1992)(finding no grounds for the checkpoint under the specific facts of the case).

F. Investigatory Checkpoints

A police checkpoint established to ask motorists for information about a hit and run homicide that had occurred at about that time and location a week earlier was constitutional, as the Court found that the public concern was grave, and information-seeking stops are brief, do not involve suspicion or lack thereof, and the questions are not designed to provide self-incriminatory information. *Illinois v. Lidster*, 540 U.S. 419 (2004).

G. Suggested Techniques

Never put up a roadblock except under emergency circumstances, under the authority of an administrative warrant, or upon established polices and procedures that have been cleared with your department and your county or district attorney.

XIX. SCHOOL SEARCHES

There are two major issues relating to school searches:

May a school administrator or teacher search a student's property?

May a school administrator consent to an officer's search of a student's property?

A. Governmental Nature of Searches

The United States and Colorado Supreme Courts have ruled that in carrying out searches and other disciplinary functions, school officials act as representatives of the state, not merely as surrogates for the parents. Therefore, they cannot claim the parent's immunity from the Fourth Amendment. The courts have decided, however, that the school setting calls for some easing of the restrictions on searches; neither a warrant nor probable cause is required. To be legal, the search of a student by school officials must simply be reasonable.

Ordinarily, this means that:

in order to start a search, there must be reasonable grounds to suspect that a search will uncover evidence that a student has violated a school rule or a law;

and

the scope of the search must be reasonably related to the object of the search and not be excessively intrusive.

Examples:

A teacher saw a student, T.L.O., smoking in the bathroom in violation of a school rule. In the vice principal's office, T.L.O. denied she smoked. The vice principal searched her purse and found cigarettes, marijuana and drug-related items. The United States Supreme Court ruled that this was a reasonable search and so was lawful, even without probable cause or a warrant. *New Jersey v. T.L.O.,* 469 U.S. 325 (1985).

Based on a student's tip that two students might be selling marijuana on school grounds, a principal and school security guard questioned the two students and searched their lockers. When no marijuana was found, the principal searched P.E.A., a student who had driven the two suspects to school that day. School officials also searched P.E.A.'s locker, and his car. Marijuana was found in the car. The Colorado Supreme Court ruled the search was reasonable. *In re: P.E.A.,* 754 P.2d 382 (Colo. 1988).

Example - Drug Testing

The United States Supreme Court has upheld a school district policy which authorized random urinalysis drug testing of students who participate in its athletics programs. The court concluded that the school district had an immediate and legitimate concern in preventing drug use and that students, and particularly student athletes, have a lesser privacy interest than adults. *Vernonia School District v. Acton*, 515 U.S. 646 (1995).

However, the Colorado Supreme Court has ruled that a school district's policy of subjecting all students participating in extra-curricular activities, including members of a school marching band, to random drug testing was not an efficacious approach to meeting the state's concern of drug use in schools, and therefore violated the Fourth Amendment. *Trinidad School District v. Lopez,* 963 P.2d 1095 (Colo. 1998). The court reasoned that members of the school marching band had higher privacy expectations than student athletes, in part, because

band members do not undergo the type of public undressing and communal showers required of student athletes.

B. Consent from a School Official to an Officer

When an officer's investigation involves a student, the officer might wish to search areas at school for evidence. In considering whether to seek consent to search from a school official, the officer should keep in mind that the "normal" rules about consent will apply. An officer probably will not be allowed to take advantage of the more liberal rules regarding a school's administrative searches in conducting a criminal investigative search. For instance, a principal may (for school purposes) search a student's private locker without a warrant. But it is very unlikely that an officer could lawfully search the locker (pursuant to a criminal investigation) without a warrant even with the principal's permission. A school officer can, however, give valid consent to search those areas where the school and the student have joint access.

C. Officer's Involvement in School Official's Search

An officer who merely provides information to school officials, upon which those officials decide to conduct a search, will not cause the school officials to "lose" their relaxed search standards.

Example:

A student told a police officer that two students might be taking marijuana to school to sell. The officer gave this information to the school principal. School officials then searched the two students and a third student who had driven them to school. They found marijuana in the car. The police officer stayed at the school but did not participate in the search. The court ruled that the school officials had not acted as "agents" of the police, so their searches on less than probable cause were lawful. *In re: P.E.A.,* 754 P.2d 382 (Colo. 1988).

D. Suggested Techniques

Before searching areas on a school's property you should consider the following tips.

1. Consider obtaining a warrant or consent for the search, particularly if you are asked to assist a school official in a search.

2. If school officials ask you what to do, remember: if you tell them to search or seize, they may become "agents" of the police and lose the benefit of the relaxed restrictions on school searches. Under such

circumstances, the search or seizure would require some other legal justification (probable cause plus warrant/exigency, or consent.)

XX. SECURITY GUARDS

Private security guards have traditionally been considered to be private citizens and, therefore, their "searches" are often ruled outside the scope of the Fourth Amendment. *Burdeau v. McDowell,* 256 U.S. 465 (1921). Understand, however, that if actions by security guards are prompted by, or done at the behest of law enforcement, they may been deemed "agents" of the police and subject to the requirements of the Fourth Amendment.

XXI. SURVEILLANCE

The general rule relating to surveillance is that a person does not have a Fourth Amendment right to be free from officer's surveilling public movements and relationships in order to determine whether the person under surveillance is involved in criminal conduct. The United States Supreme Court has ruled "[w]hat a person knowingly exposes to the public is not a subject of Fourth Amendment protection." *Katz v. United States,* 389 U.S. 347 (1972).

A. Surveillance Techniques

It is normally not a "search" to use surveillance techniques like binoculars or following a suspect around. Some surveillance techniques, however, are not so easily resolved.

1. Hi-Tech Devices

Surveillance techniques employing beepers, pen registers, and other such devices are discussed in the preceding sections.

2. Tape Recordings and Photographs

It is normally not a "search" or other constitutional violation to:

a. photograph or videotape a suspect as long as the suspect is in public;

b. tape record a suspect as long as the suspect is speaking to the public.

Note: An officer may not audio or video tape record a private conversation between non-consenting participants.

3. Harassment

If the intensity of the surveillance rises to the level of harassment, the courts sometimes rule that the suspect's Fourth Amendment rights have been violated.

B. Suggested Techniques

You may generally conduct surveillance on a person's activities as long as those activities are exposed to the public. In order to observe activities not open to the public, an officer should obtain a warrant or consent.

Chapter 7

PROBABLE CAUSE

CONSTITUTION OF THE UNITED STATES
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."

I. INTRODUCTION

The concept of probable cause presents difficulties for the following reasons:

A. Definition

Probable cause is a concept which is difficult to define in a way that is helpful to officers when they are confronted with a particular factual situation. Courts traditionally hold that probable cause exists where the facts and circumstances within the officer's knowledge are sufficient to warrant a person of reasonable caution to believe that a person has committed a crime, or that contraband or evidence of criminal activity is located at a particular place at a particular time. *See People v. Lewis,* 975 P.2d 160 (Colo. 1999); *People v. Hebert,* 46 P.3d 473 (Colo. 2002). In discussing the kind and amount of evidence necessary to establish probable cause, the Colorado Supreme Court has stated:

"Probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment, and probable cause involves probabilities similar to the factual and practical questions of everyday life upon which reasonable and prudent persons act . . . Similarly, the information that can be relied upon to establish probable cause need not be admissible evidence, but relatively complex rules have developed concerning the nature and sources of information that may be considered sufficiently reliable." *People v. Gall,* 30 P.3d 145 (Colo. 2001).

The court, in the context of discussing probable cause to search, has also stated:

> "The probable cause standard does not lend itself to mathematical certainties and should not be laden with hyper-technical interpretations or rigid legal rules. . . Rather, judges, considering all of the

> circumstances, must make a practical, common sense decision whether a fair probability exists that a search of a particular place will reveal contraband or evidence of a crime. . . Because there is no precise formula for determining probable cause, reasonable minds frequently may differ on the question whether a particular affidavit establishes probable cause." *People v. Altman,* 960 P.2d 1164 (Colo. 1998).

The facts in *People v. Altman* are illustrative of the difficulties in determining what circumstances actually constitute probable cause. In that case, a magistrate found probable cause and issued a warrant to search. The same judicial officer later concluded that the affidavit was insufficient to establish probable cause. Subsequently on appeal, four justices of the supreme court concluded that the officers reasonably relied upon the affidavit and warrant in conducting the search, while three dissenting justices concluded that the affidavit failed to establish probable cause.

The moral is that in order to begin to understand probable cause, an officer must have an understanding of some of the factual situations where probable cause was and was not established.

B. Probable Cause Based Upon Hearsay

The second reason the concept of probable cause is so difficult is that rarely does an officer obtain probable cause without some reliance upon what someone else has said. When an officer relies on these "hearsay" statements to establish probable cause, the courts will look closely at the information to decide whether it is trustworthy. Certain factors are very important in this decision. These factors are discussed at length in this chapter, but in general, they are:

1. Whether the informant is reliable.

2. Whether the informant speaks from first-hand knowledge of the facts.

3. What corroboration (other information) there is to show the information is trustworthy.

C. Documenting Probable Cause

The final problem for officers is how to show there is probable cause when the officer seeks an arrest or search warrant. Officers who seek a warrant must not only prove to the issuing judge that there is enough evidence to order the arrest or search, but also that any information received from others is trustworthy.

II. GENERAL

The following are some general rules to keep in mind to help you better understand probable cause. The determination of whether probable cause exists is based upon an examination of the "totality of the circumstances." *Illinois v. Gates,* 462 U.S. 213 (1983). The reliability and the basis of knowledge of the individual supplying the information, as well as the depth of detail provided and the attempts by police to corroborate the information all play a role within the totality of circumstances in determining whether probable cause exists. *See People v. Randolph,* 4 P.3d 477 (Colo. 2000).

A. Probable Cause to Search/Arrest

Probable cause to **search** "requires the police to establish that reasonable grounds existed to believe that contraband or evidence of criminal activity was located in the area to be searched." *People v. Winpigler,* 8 P.3d 439 (Colo. 1999). Probable cause to **arrest** "exists where the facts and circumstances within the arresting officer's knowledge are sufficient to warrant a person in believing that the defendant has committed a crime." *People v. Lewis,* 975 P.2d 160 (Colo. 1999).

There is no real difference between the amount of evidence necessary to search or arrest. Obviously, though, certain information or evidence available to an officer will establish probable cause to search but not arrest, and vice versa.

1. When Assessed

The appropriate time for determining whether probable cause exists is the time of the arrest and/or search.

Example:

Acting upon a tip by a citizen, an officer observed Barros walking in an alley carrying a heavy trash bag. After seeing the police car, Barros dropped the bag and ran. The officer then radioed for assistance, looked in the bag, observed a VCR as well as various other household goods, and Barros was then arrested by a responding officer. Although the officer did not know what was in the bag at the time she radioed for assistance, she did see the items before Barros's arrest. Because the dispositive time for assessing probable cause is the time of arrest, the court of appeals determined that Barros's arrest was valid. *People v. Barros,* 835 P.2d 587 (Colo. App. 1992).

2. Promptness Requirement

A suspect may not be detained following an arrest indefinitely; a court is required to make a "prompt" determination as to the existence of probable cause to support the arrest. In determining how long a suspect arrested without a warrant may be detained before a judicial determination of probable cause is made, the United States Supreme Court held that a determination of probable cause made within 48 hours of the arrest will generally comply with the promptness requirement. The intervention of weekends or holidays will not justify a delay beyond 48 hours. *Riverside County, California v. McLaughlin,* 111 U.S. 1661 (1991).

B. Warrant v. Warrantless Searches/Seizures

The question discussed in this section is whether there is a difference between the evidence necessary to search or arrest when an officer has a warrant as opposed to when an officer does not have a warrant.

1. Evidence Sufficient to Establish Probable Cause

Although there are circumstances in which an officer may search and/or arrest without a warrant, the courts are clear that the probable cause requirements are "at least as strict in warrantless searches as in those executed pursuant to a warrant." *People v. Winpigler,* 8 P.3d 439 (Colo. 1999). However, when courts determine whether there is enough evidence to search or arrest, they usually give all benefit of the doubt to the officer when the search or arrest was conducted under the authority of a warrant. As stated by the United States Supreme Court,

> "[I]n a doubtful or marginal case a search under a warrant may be sustainable where without one it would fail . . . and when a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hyper-technical, rather than a commonsense, manner." *United States v. Ventresca,* 380 U.S. 102 (1965).

Example:

Officers investigating a homicide presented an affidavit which stated the following facts: the victim was seen at her residence the night before a body matching her description was found in her parked, running car on Valencia Street; the victim was found wearing only one shoe, had oil on the back of her pants, and her glasses were askew on her head; the night before the body was found a neighbor observed Hebert backing the victim's (his wife)

car into the garage; a neighbor told police that it was unusual for Hebert to drive his wife's car and unusual for him to back it into the garage; the evening before the body was discovered Hebert told a friend that his wife, who had gone shopping, was missing; and witnesses reported that the victim's car was observed on Valencia Street "running all day." Although a "close case," the Colorado Supreme Court concluded that the affidavit established probable cause to search Hebert's house: "Thus the timeline, [Hebert's] unusual activity, the fact that [the victim] was last seen – according to [Hebert] - at the residence only one hour after [Hebert's] unusual action, and the victim's physical state within the trunk all support a reasonable inference that criminal activity occurred at the home and supply the necessary nexus linking [Hebert's] home to criminal activity." *People v. Hebert,* 46 P.3d 473 (Colo. 2002).

There are several important reasons why the courts give officers the benefit of the doubt regarding the existence of probable cause if the officer has first obtained a warrant.

a. The courts want to encourage officers to obtain warrants because it involves an orderly procedure with an impartial person (judge or magistrate) deciding whether probable cause exists, rather than a decision made on the streets by a person engaged in the ferreting out of crime. *United States v. Jeffers,* 342 U.S. 48 (1951); *Johnson v. United States,* 333 U.S. 10 (1948).

b. A judge, by authorizing the warrant, has already decided that there was enough evidence to search or seize. A court which later reviews the question is (and should be) very reluctant to overrule that decision. [In fact, an appellate or reviewing court does not decide whether probable cause in fact existed, but rather decides whether the issuing judge or magistrate had a "substantial basis" for issuing the search warrant in the first instance. *People v. Gall,* 30 P.3d 145 (Colo. 2001).]

2. Probable Cause Based Upon Hearsay

Whether an officer who relies on hearsay proceeds with a warrant or without one, he or she must be able to prove that the information relied upon to establish probable cause deserves to be trusted. The only difference is how the officer goes about showing this:

a. Warrantless Search or Arrest Based on Hearsay

When an officer warrantlessly searches or arrests based on information given by others, the officer must be prepared to testify:

1. why the informant was a reliable and truthful person;

2. what establishes that the information provided to the officer was based on personal knowledge; and

3. what corroboration the officer had which made it more likely that the information was truthful.

Note: The officer must also be ready to prove that there was an exigency that prevented him or her from obtaining a warrant.

b. Search or Arrest With Warrant Based On Hearsay

When an officer obtains a warrant based (even in part) on the statements of others, the officer should state in the affidavit to the judge:

1. why the informant is a reliable and truthful person;

2. how the officer knows that the informant speaks from personal knowledge.

3. what corroboration the officer has which shows the judge that the information is accurate.

III. THE ESTABLISHMENT OF PROBABLE CAUSE

Probable cause exists when there is enough evidence, based on common sense, to reasonably believe a suspect committed a crime (arrest) or crime-related evidence is located in a certain place (search).

A. Probable Cause Established

1. Probable Cause to Arrest

Officers were called to an apartment in a public housing complex, given a key to an apartment and advised that there might be unauthorized persons in the apartment. When they arrived at the apartment the officers knocked on the door and identified themselves as police

officers. They heard movement inside the apartment but no one came to the door. The officers then entered the apartment and found Trusty and another man in the apartment. Trusty was then arrested for trespassing. The court of appeals concluded that these circumstances were sufficient to support a reasonable belief by the officers that Trusty was trespassing. *People v. Trusty,* 53 P.3d 668 (Colo. App. 2002).

An officer saw a car parked in a parking lot occupied by two men who appeared to be bent over something in the front seat. As he approached, the officer shined a flashlight into the car and noticed that both men had cash in their hands and that one of them was holding a plastic bag containing a powdery substance. The Colorado Supreme Court concluded that the officer had probable cause to arrest for a crime related to controlled substances. *People v. Dickinson,* 928 P.2d 1309 (Colo. 1996).

Officers aired Cappelli's name on reasonable suspicion that he had committed arson. He was encountered by officers and told to "freeze" but he ran away, climbed a six foot fence, and climbed on to the roof of a building, where he assumed an aggressive fighting stance. The Colorado Supreme Court concluded that the officers had probable cause to arrest Cappelli based on a reasonable belief that he had committed crimes while attempting to run away, including trespass, second degree assault, and resisting arrest. *People v. Cappelli,* 927 P.2d 832 (Colo. 1996).

An officer searching for a male suspect on a motorcycle observed a passing Cadillac with a broken rear window. When he attempted to pull the Cadillac over, Smith, the driver, attempted to elude the officer and twice swerved toward the officer's car. The Cadillac then pulled into a dead-end street and the driver tumbled out while the car crashed into a garage. The Colorado Court of Appeals upheld the trial court's determination that, although there were serious doubts as to whether the officer initially had reasonable suspicion, at the time the police arrested Smith they had probable to arrest him for, at least, felony criminal mischief. *People v. Smith,* 870 P.2d 617 (Colo. App. 1994).

When officers arrived at the scene of a single-car accident, Shepherd and one of his passengers were seriously injured and the other passenger was dead. Officers observed that Shepherd's breath smelled of alcohol and that there were skid marks across three lanes of the highway; there were also empty beer cans at the scene and the car was on the wrong side of the road. The Colorado Supreme Court concluded that officers had probable cause to arrest Shepherd for an alcohol-related driving offense. *People v. Shepherd,* 906 P.2d 607 (Colo. 1995).

In responding to a broadcast of a possible burglary of a car, officers discovered Melgosa and Rivero driving away from the location of the reported crime. After stopping and detaining the two men, officers saw Rivero try to hide an object under his seat. Upon a lawful search of the passenger compartment for weapons, officers found a stereo unit, knobs, a stereo plate, and tools commonly used in the theft of property from automobiles. Other officers then reported that they had found a truck nearby which had its stereo removed. Melgosa and Rivero were arrested. The court held that officers had probable cause to believe Melgosa and Rivero had unlawfully entered a motor vehicle and stolen items. *People v. Melgosa,* 753 P.2d 221 (Colo. 1988).

An undercover drug transaction was set up in Boulder. Officers knew the dealer (Russell) was having credit problems with his supplier. They saw three people go inside Russell's residence before the drug deal was to take place. An undercover officer arrived and made a deal to buy cocaine from Russell. After the substance was tested, officers converged on the house and arrested not only Russell, but two other men found in a back room. One of these men appeared to be attempting to flee through a window. The court held that the attempt to flee, combined with the officers' knowledge of Russell's credit problems, supplied probable cause to arrest the other people in the house. The court said the officers' training and experience led them to believe that Russell's supplier would be present to receive the purchase money. *People v. Tufts,* 917 P.2d 45 (Colo. 1986).

Rayford, an officer, was suspected of trafficking in cocaine. Todesco, an undercover officer, met and discussed drug transactions with Rayford, and Rayford agreed to obtain cocaine for her. Rayford then called Todesco to tell her he had "something for her." When they met, Rayford told Tedesco he had the "stuff" close by. Todesco went to Rayford's car where Rayford opened the trunk and gave her a folded piece of paper with a white powdery substance inside. Todesco arrested Rayford. The substance was flour, but when Rayford's car was later searched with a warrant, cocaine was found The court held that Rayford's recent promises to provide cocaine, his attitude in dealing with Todesco, his claim on the night of the arrest that the "stuff" was close by, and the officer's receipt of a white powdery substance packaged in a manner commonly used for transfer of cocaine established probable cause to believe that Rayford possessed cocaine. *People v. Rayford,* 725 P.2d 1142 (Colo. 1986).

Police knew Beltran was engaged in the sale of methamphetamine, saw the defendant's car at Beltran's house, made personal contact with the defendant after he left Beltran's house, and saw Beltran arrive at the defendant's house after they suggested that he go to his supplier to get

drugs to sell. After the undercover officer arranged to buy methamphetamine from Beltran and understood that he was waiting for his supplier to arrive with the drugs, the defendant arrived at Beltran's house. The Court of Appeals held that the officers had probable cause to arrest the defendant. *People v. Villano*, 181 P.3d 1225 (Colo. App. 2008).

Police observed the defendant's vehicle follow another vehicle into a parking lot at the approximate time of an arranged drug deal. The defendant parked his vehicle next to the first vehicle and waited while the first vehicle's occupant made contact with the confidential informant. After the confidential informant gave the first vehicle's occupant $200 for drugs, police heard that person say that he had to go "to the truck" to get the drugs. The first vehicle's occupant then immediately got in to the defendant's vehicle before getting in to his own vehicle and delivering the drugs to the confidential informant. The first vehicle and the defendant's vehicle then left the parking lot at the same time. The court held that there was probable cause to believe that an offense had been committed by the defendant. *People v. Flowers*, 128 P.3d 285 (Colo. App. 2005).

After stopping a car for speeding, a police officer searched the car and found over $700 in cash in the glove compartment and five baggies of cocaine between the back seat armrest and the back seat. The United States Supreme Court held that the officer had probable cause to arrest any or all of the car's three occupants, as it was reasonable for the officer to infer a common drug dealing enterprise among them. *Maryland v. Pringle*, 540 U.S. 366 (2003).

2. Probable Cause to Search

a. Probable Cause to Search Without a Warrant

Officers arrested the driver of an automobile on an outstanding arrest warrant and discovered illegal drugs in the car in a search incident to the arrest. The driver then informed officers that he had been enroute to see Winpigler at his residence. Officers went to Winpigler's house, knocked on the door, but received no response. Two individuals arrived shortly thereafter who told the officers that they were staying with Winpigler and that Winpigler was probably asleep in the house. They opened the front door and, at the request of the officers, went inside to wake up Winpigler. As the individuals had left the front door open, the officers could see partially into the residence from their position on the front porch. From that location the officers smelled the strong odor of iodine which, from their experience, was consistent with the manufacture

of methamphetamine. The Colorado Supreme Court held that the totality of these circumstances, coupled with the officer's experience and their smelling of iodine, contributed to the existence of probable cause that crime-related activity was occurring inside the residence (although the subsequent warrantless and non-consensual entry was not justified by exigent circumstances). *People v. Winpigler*, 8 P.3d 439 (Colo. 1999).

Officers approached a car parked in a parking lot occupied by three men and observed open beer bottles inside the car. The Colorado Supreme Court held that the officers had probable cause to search based upon violation of the open container law. *People v. Hill,* 934 P.2d 821 (Colo. 1996).

b. Probable Cause for Search Warrant

A sexual assault victim reported to police that she had been abducted in a "Blazer of some type," and she identified Martinez in a photo lineup as her assailant. Martinez was arrested at his home pursuant to a warrant and a Blazer was parked on the street outside of his residence. The Blazer was the same color as that described by the victim, and a check of the license plate revealed it was registered to Martinez. The Colorado Supreme Court held that these facts, as stated in an affidavit, established probable cause to search the car for crime-related evidence. *People v. Martinez,* 32 P.3d 520 (Colo. App. 2001).

A deputy's affidavit averred that, while he believed the bright light he had seen was a "grow light" and that the plants he observed were similar in shape, color, and outline to marijuana, he was unable to make a positive identification. The Colorado Court of Appeals concluded that the affidavit demonstrated probable cause, commenting that affidavits in support of the issuance of a warrant should be interpreted in a common sense fashion. *People v. Oynes,* 920 P.2d 880 (Colo. App. 1996).

Affidavits supporting search warrants recounted reports of numerous interviews with the victims; the crime scene investigation; responses to the publication of a composite drawing of the suspect, including that of a friend of Page who reported that Page acted suspiciously after the shootings; an analysis comparing tread marks from the crime scene with Page's motorcycle; and a statement by a citizen who had seen a gun at Page's home. The Colorado Court of Appeals concluded that these facts established probable cause to search. *People v. Page,* 907 P.2d 624 (Colo. App. 1995).

An apartment complex manager went into an apartment, where she saw no evidence of residential use. She did observe Styrofoam coolers lined with tin foil, a number of doughnut-shaped objects on railings inside the cooler covered by a mold-like substance, cases of canning jars, coolers containing soil, an air conditioner and humidifier operating at full capacity (in March), and three ultraviolet growing lights, one of which was in use. The court held that an affidavit containing this information, plus a statement detailing the particular investigative experience and knowledge of an officer with respect to the process of manufacturing and cultivating mushrooms, established probable cause for the issuance of a search warrant. *People v. Atley,* 727 P.2d 376 (Colo. 1986).

Bossert applied with the department of Motor Vehicles for a bond title on a homemade motorcycle. The engine used in Bossert's motorcycle was from a stolen motorcycle, as listed on the state patrol computer and verified by the National Auto Theft Bureau. The court ruled that this information established probable cause for the issuance of a search warrant. *People v. Bossert,* 722 P.2d 998 (Colo. 1986).

Vest told officers that a suspect had told him about committing a burglary of a marine products shop. Vest corroborated the date and time of the crime, and its details; he described the crime scene, the items taken, and said he had seen several of those items in three individuals' possession. He also gave a stolen item to a detective. The court held that this information constituted probable cause for a search warrant. *Peltz v. People,* 728 P.2d 1271 (Colo. 1986).

During an undercover drug buy, a broker told the undercover officer that he needed to go elsewhere to obtain the drugs from his source. The officer followed the broker to the defendant's property, where the broker drove to the garage, went inside, then returned to his truck and drove back with the drugs to meet the officer. The Court of Appeals held that there was probable cause to search the garage. *People v. Eirish,* 165 P.3d 848 (Colo. App. 2007).

B. Probable Cause Not Established

1. No Probable Cause to Arrest

a. Warrantless Arrest

Officers responding to a convenience store robbery obtained a vague description of the suspect from the victim but did not locate

a suspect upon arriving on the scene. An officer decided to check out a nearby motel and, from a distance of 50-feet, observed a man generally matching the description in one of the motel rooms talking to a woman who was outside the room. When the woman saw the officer she closed the door to the room. The officer then demanded entry into the room, where he found four men who all generally matched the descriptions. The men were all removed from the room and Lewis was arrested. The officer then searched the room and found a gun. The Colorado Supreme Court held that the officer lacked probable cause to believe that Lewis was the robber or that evidence of the robbery was inside the motel room. *People v. Lewis,* 975 P.2d 160 (Colo. 1999).

An officer observed Davis approach a woman in front of a convenience store and the woman quickly walk way. The officer concluded that Davis was panhandling, and he was informed by the dispatcher that there was a report of a transient attempting to sell marijuana at the same location. The officer approached Davis and asked to see identification. Davis showed a Colorado identification card and denied panhandling or selling drugs. The officer then arrested Davis for loitering. The Colorado Supreme Court concluded that the officer lacked probable cause to arrest Davis for loitering because he had no information that he was begging. *People v. Davis,* 903 P.2d 1 (Colo. 1995).

Reynolds was involved in a single car traffic accident at 3:00 a.m. He told an officer at the hospital that he had consumed three beers between the hours of 6:30 and 8:30 p.m.. He declined to submit to a blood test. The Colorado Supreme Court upheld the trial court's determination that there was no probable cause to arrest because Reynolds's statement that he had been drinking earlier that day did not support a reasonable conclusion that the accident was alcohol related. *People v. Reynolds,* 895 P.2d 1059 (Colo. 1995).

A woman saw Quintero go up to a neighbor's home, ring the doorbell and look into the window for twenty seconds. Quintero then appeared to look into a side window. He then stopped at another house and walked off. About an hour later the woman saw Quintero standing at a bus stop holding a television which was covered by his shirt. Police were called, and the first officer to arrive asked Quintero for identification (he had none) and where he had obtained the television. Quintero replied that he had just purchased the television for $100 from someone in the neighborhood. He was then frisked and gloves were found in his back pocket. Quintero was then arrested. At the time of the arrest the police had not been informed about a witness seeing Quintero

"casing" her neighbor's home. Later that day the owners of a home one block away called police to report a burglary. The Colorado Supreme Court ruled that the facts known to police at the time of the arrest did not constitute probable cause to believe Quintero had committed a crime. *People v. Quintero,* 657 P.2d 948 (Colo. 1983).

Officers, after arresting four men for narcotics sales, heard Branin knock at the door. The officers invited him in and arrested him. The officers then searched Branin and found narcotics. The officers later testified that they arrested Branin because he was "coming into that apartment where we knew drugs were to be sold." The court ruled that the arrest was not supported by probable cause to believe Branin had committed a crime. *People v. Branin,* 533 P.2d 1138 (Colo. 1975).

b. Arrest With Warrant

Banks robbed an killed a jewelry store owner. The only basis for the arrest warrant issued against Banks was that his fingerprints were "found on the display case in the jewelry store." The court ruled that "the facts recited in the affidavit failed to establish probable cause for defendant's arrest." *People v. Banks,* 655 P.2d 1384 (Colo. App. 1982).

2. No Probable Cause to Search

a. Warrantless Search

Police received a 911 call reporting that several men had entered an apartment through the window, admitted another man through the door and then pulled the curtains. The caller "didn't believe they lived there" but was not certain. Officers responded and were able to see Thompson seated on a couch inside the apartment. The officers then knocked on the door and when Thompson answered the officers immediately entered and handcuffed him without questioning him about whether he lived there or the identity and reason for the presence of the other men seen entering the apartment. No signs of a burglary were observed. The officers later ascertained that Thompson lived in the apartment with his girlfriend. The Colorado Supreme Court recognized that in some circumstances police officers may enter a house without a warrant when they have probable cause to believe a burglary has just recently occurred or is in progress, in order to secure the premises and search for suspects or victims. However, under the circumstances of this case the court concluded that the information

and observations available to the officers did not establish probable cause to believe a burglary was in progress. *People v. Grazier,* 992 P.2d 1149 (Colo. 2000).

Ware went to the police station to retrieve a bicycle which had been impounded by the police. While there an officer checked intelligence reports and learned that "Ware's name had in some manner been related to narcotics activities." While Ware began to write a report on the bicycle the officer saw an aluminum foil-wrapped package in Ware's shirt pocket. The officer seized the packet, opened it, and discovered hashish. The court ruled that probable cause did not exist to seize and search the package because the reliability or first-hand knowledge of the informant was not proved and the aluminum foil package "could have contained most anything." *People v. Ware,* 484 P.2d 103 (Colo. 1971).

b. Search Based on a Warrant

An affidavit alleged that an informant had seen methamphetamine carried into a barn near Randolph's residence and had seen an individual smoking methamphetamine in Randolph's trailer. The affidavit also alleged that the informant knew that Randolph had sold marijuana in the past. The affidavit sought a warrant to search two of Randolph's trailers, his barn, and "all out buildings and all motor vehicles located on the property." In holding that the warrant was overbroad in its geographic scope, the supreme court stated, "The affidavit listed at least five separate buildings without connecting the alleged criminal activity to each of those buildings. At most, the affidavit alleged criminal activity in the barn and Randolph's trailer. In addition, nothing in the affidavit indicated common ownership of the property by Randolph." The evidence seized following the search was therefore suppressed. *People v. Randolph,* 4 P.3d 477 (Colo. 2000).

An officer presented an affidavit in support of a search warrant stating that the defendants had purchased known precursors to methamphetamine over a period of five months; that the materials were taken to a particular residence; that one of the defendants was observed by police driving a car while smoking something in a clear glass pipe; that another of the defendants was a former police officer who was terminated from duty while a SWAT team stood nearby; that the same defendant had a number of arrests for assault and marijuana cultivation, he had admitted to methamphetamine use at the time of that arrest, and officers found drug paraphernalia in the residence where marijuana was being cultivated at the time of the arrest. The trial court determined that the statements

regarding the previous arrests for assault, the reference to the SWAT team and the size of the bottles containing the precursor materials were all false and were made by the officer in reckless disregard for their truth. The Colorado Supreme Court upheld the trial court's decision to strike those statements from the affidavit and concluded that the redacted affidavit failed "to provide a nexus between the purchase of legal ingredients that could be methamphetamine precursors and illegal activity in the defendant's home." *People v. Kazmierski,* 25 P.3d 1207 (Colo. 2001).

Deputies arrested the defendant in his garage on an outstanding warrant, and searched him and his companion, upon whom they discovered methamphetamine in his pocket. An informant then provided information that persons present at the defendant's home were "possibly" dealing drugs. The companion had also admitted that he and the defendant used methamphetamine on the day of the arrest and that he had purchased one-eighth of an ounce of the drug weekly, sometimes giving it away or trading it for property. The Court of Appeals held that this information was insufficient to establish probable cause to believe that drugs would be found in the house. *People v. Bachofer*, 85 P.3d 615 (Colo. App. 2003).

C. Reasonable Suspicion

An officer should remember that even if there is not enough evidence to arrest or search, there may be enough information available to the officer to "freeze" the situation for a short period until the officer can determine whether probable cause exists.

1. Reasonable Suspicion to Seize Persons

An officer who does not have probable cause to arrest but does have reasonable suspicion may detain a suspect briefly. This issue is discussed in detain in Chapter 1, **SEARCH AND SEIZURE – PERSONS**.

2. Reasonable Suspicion to Seize Property

Officers who have reasonable suspicion to believe property holds crime-related evidence may briefly "detain" (seize) the property in order to determine whether there is probable cause to search.

Examples:

Officers had reasonable suspicion to believe that Place had narcotics in his suitcases. The officers therefore seized the bags but released Place. Ninety minutes later a narcotics dog was brought to the scene and alerted on the bags. Later, a warrant was obtained and cocaine was discovered. The United States Supreme Court ruled that although it is proper for officers to detain luggage

on less than probable cause, the officers in this case held the bags too long. The court ruled that the dog could have been brought out much faster and, therefore the seizure was unduly and unreasonably long. The cocaine was therefore suppressed. *United States v. Place,* 462 U.S. 696 (1983) .

Officers removed a suitcase from the luggage compartment of a bus and subjected it to a sniff test by a trained narcotics dog. The bag was then carried onto the bus by an officer dressed as a bus driver, who asked the owner of the suitcase to come forward. Once the officer identified Ortega as the owner of the suitcase, the officer asked her to come with him so that "a new tag" could be attached to the case. The officer, accompanied by Ortega, was taken to the garage and questioned by the officers. The Colorado Supreme Court held that, while the initial sniff of the suitcase by the narcotics dog did not constitute a seizure, the subsequent conduct of the officers caused a "meaningful interference" with Ortega's possessory interest in the suitcase, and therefore constituted a seizure of the suitcase. However, since the detention lasted only twenty to thirty minutes and did not delay the departure of the bus, the officer's conduct amounted to an investigative detention requiring only reasonable suspicion. *People v. Ortega,* 34 P.3d 986 (Colo. 2001).

However, officers conducting a search in a suspect's home may not pick up or move an object to get a better look in order to establish probable cause.

Example:

While lawfully in Hicks's apartment searching for guns, suspects, and victims, an officer developed a reasonable suspicion that stereo items were stolen. He looked closer and could read the serial numbers of some of the items without touching them. However, he also turned over a turntable to read its serial number. The officer then had the serial numbers checked and learned that the turntable was stolen. At that point he obtained a search warrant and seized the turntable. Later he learned that other stereo pieces were stolen, so he obtained another warrant and seized them. The United States Supreme Court ruled that in order to "search" any item the officer needed probable cause to believe it was crime-related. Reading the serial numbers he could see without moving anything was not a "search," and was therefore lawful. But moving the turntable even the slightest bit was a search, and since the officer lacked probable cause to search the turntable, the search was unlawful. *Arizona v. Hicks,* 480 U.S. 321 (1987).

The difference between *Place/Ortega* and *Hicks* might be the lower expectation of privacy of a suitcase in transit at the airport or bus station that allows a level of intrusion that will not be tolerated in a home This explanation would suggest that outside the home officers may seize items on reasonable suspicion to get a closer look and try to develop probable cause, assuming the seizure does not meaningfully interfere with the freedom of the suspect.

Another difference may be "seizure" versus "search." The holding of the suitcases in *Place* and *Ortega* was only a seizure (in both instances the courts concluded the dog sniffs were not "searches"), while moving the turntable to read its serial number in *Hicks* constituted a "search." This explanation would suggest that officers may seize property on reasonable suspicion so long as they do not search it in any way.

Until the courts provide a definitive answer to this issue, officers should be very cautious. The following is one possible approach. If you have a reasonable suspicion that an article is crime-related, try to establish probable cause by detaining the *person* (if there is one) and asking questions. Try to obtain consent to look at the evidence and to hold onto it so you can investigate. If you get permission to hold onto the article, seek a search warrant.

IV. PROBABLE CAUSE BASED ON HEARSAY

Probable cause is based on hearsay when any of the information relied on was given to the officer by an "informant." An "informant" is anyone who gives information to an officer. The courts used to be very rigid in requiring certain factors to be present whenever probable cause was based on hearsay. If a required factor was missing, probable cause was automatically found to be lacking. However, courts have now abandoned this rigid approach and, instead, employ a flexible "totality of the circumstances" test. That is, considering all the available information, would a reasonably cautious person believe that the person committed a crime or that crime-related evidence is present at a certain location.

The factors which used to be rigidly required were designed to ensure that hearsay information was trustworthy. Those same factors still shed light on whether the hearsay is trustworthy, and so they continue to be very important. The following is a discussion of those factors.

A. Reliability of the Informant

The courts presume, and almost always rule, that the following informants are reliable and, therefore, believable:

1. citizens with no apparent motive to give the information other than civic duty;

2. victims of crime;

3. fellow officers or dispatchers.

The courts presume, and almost always rule, that the following informants are unreliable (unbelievable) and, therefore, do not usually give truthful information:

1. criminals;

2. persons who want to get something for their information;

3. person who have ill-will toward the suspect;

4. confidential and anonymous informants.

1. Reliable Informants

The following are examples of reliable informants. When these informants speak from personal knowledge they can usually establish probable cause to search or seize.

a. Citizen-Informants

"A citizen eye-witness who, with no motive but public service, and without expectation of payment, identifies himself and volunteers information to the police, [is automatically credible or truthful]. Therefore, the usual requirement of showing prior reliability when police act on an informant's tip does not apply in these circumstances." *People v. Saars,* 584 P.2d 622 (Colo. 1978). Therefore, "when a citizen report prompts police action, and the informant's identity is known, the issue is not whether the information is credible, but rather whether it is complete and specific enough to constitute probable cause for entry and search." *People v. Grazier,* 992 P.2d 1149 (Colo. 2000).

Examples:

Weidmaier met four men, including Saars, in a bar. After a conversation Weidmaier told the four men that he would take them to an acquaintance's home in order to buy some drugs. When the five men arrived at the residence the four men drew guns and raped the female resident. Weidmaier watched but did not participate. After the assault Weidmaier called police and gave descriptions of the suspects' cars. Officers arrested Saars soon thereafter and in a search incident to arrest found the victim's property. The court ruled that Weidmaier was a citizen-informant. Therefore, there was probable cause to arrest and the search incident to the arrest was constitutional. *People v. Saars,* 584 P.2d 622 (Colo. 1978).

Compare with:

Police received a 911 call reporting that several men had entered an apartment through the window, admitted another man through the door and then pulled the curtains. The caller "didn't believe they lived there" but was not certain. Officers responded and were able to see Thompson seated on a couch inside the apartment. The officers then knocked on the door and when Thompson answered the officers immediately entered and handcuffed him without questioning him about whether he lived there or the identity and reason for the presence of the other men seen entering the apartment. No signs of a burglary were observed. The officers later ascertained that Thompson lived in the apartment with his girlfriend. The Colorado Supreme Court acknowledged that the information supplied by the 911 caller was *reliable*, since it came from a citizen informant. However, the content of the information was *insufficient* to establish probable cause to believe a burglary was in progress. *People v. Grazier,* 992 P.2d 1149 (Colo. 2000).

b. Victim of a Crime

The victim of a crime is almost always reliable when relating the details of the crime.

Example:

The victim told officers that he had been beaten up by Ross Henry. Officers later found Henry and arrested him. As a

result of the arrest the officers discovered evidence of other crimes and obtained a statement from Henry. The court ruled that an officer "is not required to establish the credibility" of a citizen-victim. *People v. Henry,* 631 P.2d 1122 (Colo. 1981).

c. Fellow Officer

Often the arresting or searching officer knows nothing about the facts of the case. The officer simply has received information from a law enforcement agency or fellow officer authorizing the arrest or search. In such circumstances the "fellow-officer" rule means that an officer may rely upon the reliability of another officer or law enforcement agency. In *People v. Nanes,* 174 Colo. 294, 483 P.2d 958 (1971), the Colorado Supreme Court adopted the following language:

> "It is not necessary for the arresting officer to know of the reliability of the informer or to be himself in possession of information sufficient to constitute probable cause, provided he acts upon the direction or as a result of communication with a brother officer or that of another police department and provided the police, as a whole, are in possession of information sufficient to constitute probable cause to make the arrest."

Examples:

Denver police received information from an FBI agent in Washington that the defendant was wanted on an outstanding fugitive warrant and was staying at a motel room from which he was dealing narcotics. The FBI agent provided a description and reported that the defendant used the alias "Jules White." Acting upon this information, officers went to the motel, confirmed both defendant's alias and physical description, and arrested him. Following the arrest, officers learned that the warrant was invalid in Colorado, and on appeal the defendant argued that the officers did not have probable cause to arrest him. Applying the fellow officer rule, the Colorado Supreme Court found that the Denver police acted in reliance upon the FBI agent's communication and that the police, as a whole, possessed sufficient information to constitute probable cause. *People v. Thompson,* 793 P.2d 1173 (Colo. 1990).

Officers in Illinois received a tip from an informant who reported that Alexander was wanted and provided his address and date of birth. In verifying this information with Denver police, the officers received a notice of an outstanding Colorado warrant that gave a physical description of Alexander but erroneously listed two dates of birth. Illinois officers acted on the notice and Alexander was arrested. The Colorado Supreme Court ruled that probable cause was established when the Illinois police verified and relied upon the notice of the outstanding warrant. Because the notice was a communication from a fellow officer, the arrest was not invalidated. The fact that the warrant gave two dates of birth was not probative where officers also had a physical description of Alexander. *People v. Alexander,* 797 P.2d 1250 (Colo. 1990).

During a routine patrol of a neighborhood experiencing a rash of burglaries, an officer was told by a citizen about a man in the next alley carrying a large trash bag. Upon investigation, the officer spotted Barros carrying a trash bag which appeared to be heavy. Barros dropped the bag and ran as soon as he saw the police car. The officer radioed for assistance and placed the trash bag in her car, observing a VCR as she did so. Barros was arrested a block away by another officer responding to the call. The Colorado Court of Appeals held that because the arresting officer was acting as a result of the communication from the broadcasting officer, the arrest was valid under the fellow officer rule. The court concluded that when one officer possesses knowledge sufficient to establish probable cause, that knowledge is imputed to other members of the force who are acting at that officer's direction. *People v. Barros,* 835 P.2d 587 (Colo. App. 1992).

2. Unreliable Informants

An unreliable informant is a person who apparently has ulterior motives when he or she gives information to police. When an officer obtains information from an unreliable informant the officer should (a) be able to give specific reasons why the informant is believable; and/or get corroboration for the informant's statement in order to establish probable cause.

a. Examples of Unreliable Informants

(1) Criminal or "Underworld-Type" Person

The courts have a natural skepticism of anything a criminal or "underworld-type" person says.

(2) A Person Who Wants or Gets Something For Information

Persons who expect something in return for the information (money, charges dropped, etc.) are often not considered to be reliable.

(3) An Informant Who Has An "Axe to Grind"

A person who has an "axe to grind" against the suspect, or who harbors ill-will toward the suspect, is not a reliable informant.

(4) A Confidential or Anonymous Informant

A confidential informant is a person whose identity an officer does not know, or knows but wishes to protect.

Examples:

An officer received an anonymous letter stating that the defendant was picking up drugs in Kansas and selling them in Colorado. The letter described the defendant and his car, and the room in Kansas where the drugs were collected. The letter suggested that collection times may coincide with University vacations. The officer was able to confirm the non-incriminating facts, but no other information was obtained implicating the defendant in criminal activity. A search warrant was issued and drugs were discovered in the residence. The court found that the anonymous letter did not establish probable cause to search as there was no inference in the letter that the informer had personal knowledge that the defendant was involved in an illegal act. The type of illegal substance was not named. The letter merely speculated about the defendant's schedule, and there was no indication that the defendant's residence was the site of the drug activity. The court also found that corroboration of non-criminal activity may support finding of probable cause, but here the indicia of

reliability about the informant was not also present. *People v. Leftwich,* 869 P2d 1260 (Colo. 1994).

Two anonymous callers to officers said that Bobby Joe Williams was involved in heroin trafficking. Later, two more anonymous calls were received by police. One caller said that Loretta Ann Williams was returning from Texas that evening and would be met by Bobby Joe Williams. When Loretta Ann Williams got off the plane and met Bobby Joe, officers arrested her and seized the heroin she was carrying. The court ruled that anonymous informants are not reliable. Therefore, since there was no "independent information that either [of the Williams were] involved in criminal activity apart from the anonymous calls" the evidence was suppressed. *People v. Williams,* 525 P.2d 463 (Colo. 1974).

Police received anonymous information that "James Pacheco" was selling cocaine and heroin from his residence. Six years later, police received information from a different confidential informant that "Jimmy Pacheco" was selling illegal drugs only from vehicles. The Colorado Supreme Court held that the information was insufficient to establish probable cause. The Court first noted that the affidavit did not elaborate on the identity of either informant, did not explain how or when the various informants obtained their information, and did not link "James Pacheco" with "Jimmy Pacheco." The court also noted that the informant's veracity and basis of knowledge were not sufficiently described in the affidavit. *People v. Pacheco,* 175 P.3d 91 (Colo. 2006).

b. Circumstances Which Make an Unreliable Informant Believable

There are many situations where the courts believe an apparently unreliable informant. Unfortunately, the United States and Colorado Supreme Courts have had very few opportunities to discuss what these situations are. This creates two conflicting problems. On the one hand, an officer is not necessarily limited by the very few circumstances ruled on by the courts to establish the credibility of the informant. On the other hand, however, the officer should never assume that the circumstances discussed by the courts are sufficient, alone, to establish reliability. An officer

should always try to get as many facts as possible to establish the informant's credibility, including corroboration for what the informant has said.

(1) Past Performance

Often a proven "track record" of reliability will show that a confidential informant should be believed. According the United States Supreme Court, a person "who supplies information on a regular basis . . . is likely to be someone who is himself involved in criminal activity or is, at least, someone who enjoys the confidence of criminals." *United States v. Harris,* 403 U.S. 573 (1971).

(a) Previously Accurate Information

An apparently unreliable informant who has given prior accurate information is much more likely to be giving accurate information in the present case, especially when the prior information resulted in arrests or convictions for the same offense.

Examples:

An apparently "unreliable" (confidential) informant told officers that McCray was selling narcotics and presently had narcotics on his person at a certain place. Officers located McCray at the place related by the informant, arrested him, and discovered the narcotics on his person. At the suppression hearing, an officer testified that he had known the informant for about a year and that the informant had provided accurate information on as many as 25 occasions and that many times the information led to arrests. The United States Supreme Court ruled that there was "no doubt" that the informant was credible. Therefore, the evidence was admissible. *McCray v. Illinois,* 386 U.S. 300 (1967).

An officer, in order to prove that his informant was reliable, stated in an affidavit that a month earlier, "the informant supplied

your affiant with information that led to the arrest of James Kenneth Cabello, for possession of not more than one once of cannabis." The court ruled that this fact was sufficient to make the informant reliable. Therefore, the first-hand knowledge of the informant established probable cause to search Lucero's house. However, the court of appeals cautioned that "it clearly would have been preferable for the affidavit to have specified what type of information was supplied . . . it would have been preferable for the affiant to indicate whether an action was subsequently filed against Cabello and what its disposition was. *People v. Lucero,* 720 P.2d 604 (Colo. App. 1985).

(b) "Controlled" Past Performance

When an officer tests an informant under controlled circumstances, such as a controlled narcotics purchase, the informant's credibility is enhanced. Although a "track record" of controlled buys usually establishes an informant's credibility, one prior buy is often not good enough.

(2) Declarations Against Interest

When an informant gives information which implicates another in a crime, and at the same time is obviously against his or own interests, the informant's credibility is greatly increased.

Examples:

An investigator stated in an affidavit for a search warrant that the informant had told the investigator that the informant had "purchased [specified contraband] for a period of more than 2 years, and most recently within the past two weeks." In ruling that the informant was reliable, the United States Supreme Court stated, "Admissions of crime . . . carry their own indicia of credibility sufficient at least to support a finding of probable cause to search. That the

informant may be paid or promised a 'break' does not eliminate the . . . risk . . . of having admitted criminal conduct." *United States v. Harris,* 403 U.S. 573 (1971).

An informant gave some narcotics to officers and said that he had just bought the narcotics from Appleton at a certain apartment. The informant further stated that Appleton still had a big supply of narcotics left. The Maine court ruled that the admissions and conduct of the informant established the informant's credibility. Therefore, the evidence seized was admissible against Appleton. *State v. Appleton,* 297 A.2d 363 (Me. 1972).

A man came to the police station, identified himself as "Jim," and told the police that two men had just tried to sell him guns which one of the men had said were stolen. Jim said he had seen the weapons within the last fifteen minutes and that two of the guns were sawed-off shotguns. Jim also said he had made some attempt to sell the guns for the suspects. Jim and the officer went to the suspects' apartment. Soon the suspects came out of the apartment and they were arrested. The court ruled that, although "the informant cannot be regarded as a citizen-informant because he did not reveal his identity . . . he, nonetheless, has some of the indication of reliability of a citizen-informant. The informant voluntarily came to the police station, with no suspect motivation . . . [and] was willing to declare his accountability by . . . pointing out the suspects, and remaining with the police during the defendant's arrest." The informant also admitted that he tried to find buyers for the guns. The arrest was therefore based on probable cause and the consent search was valid. *People v. Glasener,* 550 P.2d 851 (Colo. 1976).

The informant and Henry participated in a robbery of a 7-11 where the clerk was killed. The informant was caught and, in a confession, told officers that Henry and Henry's wife were also involved. The court ruled that this statement established probable cause to arrest Henry and his

wife. *People v. Henry,* 631 P.2d 1122 (Colo. 1981).

(3) Penalties Against the Informant

A great way to increase any informant's credibility is to let the informant know what will happen if the informant lies. Officers rarely inform the courts about threats they have related to informants. When a court is told that an informant was subject to penalties (especially criminal) if he or she lied, the court is much more likely to rule that the informant is reliable.

(a) Explaining Penalties to the Informant

If there is any question as to the reliability of an informant, an officer should always explain to him or her what legal action will be taken if the informant lies (e.g., false information statute or ordinance).

(b) Written Statement

When an informant writes out a statement the informant puts his or her credibility on the line. This increases enormously the credibility of the informant even if the informant does not sign the statement. The following are examples of statements that might be helpful.

Arrests

"I swear that [the suspect] committed the crime of [ ]. I understand that if I am untruthful I can and will be charged with the crime of [ ]."

Searches

"I swear that [the crime-related evidence] is [place where located]. I understand that if I am untruthful I can and will be charged with the crime of [ ]."

Note: It is important for the officer to remember that these statements aid in establishing the *reliability* of the

informant. They do not establish probable cause because they do not relate how the informant obtained the information.

(c) Statements Under Oath

Any time an informant gives a statement under oath, the informant's statement is greatly enhanced. If possible, take the unreliable informant to a magistrate and let the magistrate assess the informant's credibility. The fact that the informant is put under oath will greatly enhance the informant's believability.

Note: See the **SEARCH WARRANT** chapter for a compete discussion.

(4) Obviously Trustworthy Information

Sometimes information given by an apparently unreliable informant is so obviously true that the informant is ruled reliable in the particular instance.

Example:

An unreliable informant told officers that he had just spoken to two men who had committed a robbery. He further said that he saw the shotgun used and the money taken. The court ruled that the information established probable cause because the informant's specific description of the men matched the description of the witnesses to the robbery. *People v. Clay,* 304 N.E.2d 280 (Ill. 1973).

3. Proving Reliability

It is never sufficient proof for an officer to simply swear in his or her affidavit (or in court, if the search is warrantless) that the informant was "reliable." The officer must state the *reasons* why the informant is reliable. However, under the more flexible "totality of the circumstances" standard, the informant's basis of knowledge, veracity and reliability are highly relevant but not necessarily conclusive factors in finding probable cause. In the absence of specific information regarding the reliability of the informant, a highly detailed statement

from the informant may allow a judge to conclude that the informant had access to reliable information about the activities.

Example:

A narcotics investigator prepared an affidavit stating that a confidential informant has stated that on a specific date the informant learned that Reyes had approximately 100 pounds of marijuana in his home. The informant stated that the marijuana was located in the rafters of the garage and in the crawl space of the room addition of the home. He also described the location of Reyes's home in sufficient detail to allow the investigator to pin-point an address. The affidavit stated that the informant "appeared to be very reliable," and had assisted the investigator on two prior occasions resulting in the recovery of 85 pounds of marijuana and a felony arrest. The trial court concluded that the affidavit was insufficient because it failed to identify how the informant obtained his information. However, the Colorado Supreme Court reversed, holding that the omission of the informant's basis of knowledge did not necessarily require invalidating the warrant where the affidavit itself provided detailed information regarding the informant's information. *People v. Maraz,* 961 P.2d 481 (Colo. 1998).

a. Mere Conclusion of Reliability

(1) Search Warrants

The courts will not accept an officer's "mere conclusion" in a search warrant that the informant is reliable.

Example:

An officer stated in an affidavit, "Affiants have received reliable informant from a credible person and do believe that heroin, marijuana, barbiturates, and other narcotics and narcotic paraphernalia are being kept at the above described premises . . . ." The court ruled that the officer failed to explain any reason why the informant was reliable so that a magistrate could believe him. Therefore, there was no probable and the evidence was not admissible. *Aguilar v. Texas,* 378 U.S. 108 (1964).

(2) Arrest Warrants

Officers often think that they need not consider the "formalities" when obtaining an arrest warrant. This is a misconception which may result in the needless loss of evidence.

Example:

An officer drafted a complaint in order to obtain an arrest warrant for Moreno. The following is an important part of the complaint: "[Named officer], being duly sworn, on oath says, that on or about [certain date stated] one GILBERT RAY MORENO at the approximate location of Denver Dry Goods Co, Inc., 10588 Melody Dr., at the approximate time of 2:00 p.m. In the County of Adams and State of Colorado, did then and there commit the crime of Grand Theft by unlawfully taking one Omega wristwatch from the Associated Dry Goods Corporation . . . of the value of over One Hundred Dollars ($100.00) . . . ." After obtaining the warrant, officers arrested Moreno and obtained his statement. In reviewing the sufficiency of the complaint in establishing probable cause to arrest, the Colorado Supreme Court stated, "Obviously, the existence of probable cause must be determined by a member of the judiciary, rather than by a law enforcement officer who is employed to apprehend criminals and to bring charges against those who choose to violate the law . . . In determining whether or not probable cause exists a judge should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime." Therefore, since there was no information establishing that the person providing officers the information was reliable, there was no way a judge issuing the warrant could find that there was probable cause. *People v. Moreno,* 491 P.2d 575 (Colo. 1971).

b. Information Not Specific Enough

Example:

An officer stated in his affidavit to support the reliability of his informant, that he had known the informant "for approximately 2 years, and said informant has given reliable

information on at least 3 prior occasions." The court ruled that this information was not sufficient to prove the reliability of the informant because there was no indication (1) of the nature of the information previously provided by the informant (i.e., whether it related to drugs, thefts, or other matters; or (2) whether the information resulted in an arrest, indictment, conviction, etc. *People v. Perschong,* 506 P.2d 1232 (Colo. 1973).

c. Information Sufficient to Show Reliability

The following are examples of information sufficient to show reliability of the informants.

Examples:

An officer stated in an affidavit that a reliable confidential informant had given truthful information on two occasions recently which had resulted in narcotics arrests and seizures. The court ruled that the affidavit was sufficient to satisfy the reliability requirement. *People v. Thomas,* 543 P.F2d 1249 (Colo. 1975).

An officer stated in an affidavit that the informant's "information has proven reliable on at least two recent past prior occasions which resulted in the seizure of cocaine, and arrests of parties with the contraband, and cases which were filed in Denver District Court and whose information has never proven unreliable." The court ruled that the officer's statement established the informant's reliability. *People v. Dailey,* 639 P.2d 1068 (Colo. 1982).

B. Personal Knowledge of the Informant

In order to establish probable cause an officer should be able to prove that his or her informant spoke from personal knowledge of the facts, and not just rumors, assumptions or conclusions of the informant.

1. Establishing Personal Knowledge

Establishing personal knowledge is so simple that prosecutors and judges cannot understand why, in so many cases, officers fail to do so. All an officer has to do to establish that the informant is speaking from personal knowledge is to ask the informant, "How do you know?" Make the informant state *specifically* how he or she got the information. Never assume that an informant personally witnessed something. Even

if you are correct, the court will not entertain the same assumption. You must be able to say in court how the informant obtained his or her information, so **always** ask, and then put that information in your report.

2. Stating Personal Knowledge

After determining that the informant had personal knowledge, the officer must prove to a court that the informant had that personal knowledge. To do this an officer must specifically state that the informant "saw," "heard," or "smelled" the pertinent information. It is usually not enough for an officer to state that the informant had "personal knowledge" of whatever facts are related. *United States v. Long*, 439 F.2d 628 (D.C. Cir. 1971).

a. Obtaining a Warrant

When the officer obtains a warrant based upon the statement of an informant the officer should establish the personal knowledge of the informant in the affidavit (search warrant) or complaint (arrest warrant).

Example:

An informant told officers that Whiteley committed a burglary of a business. An officer obtained an arrest warrant based on the officer's complaint that Whiteley "did . . . unlawfully break and enter a locked and sealed building." There was no statement in the complaint how the officer knew that Whiteley had broken into the building. Later, an officer arrested Whiteley, and discovered rare coins stolen in a burglary in a search incident to arrest. The United States Supreme Court ruled that the officer's conclusory oath to the magistrate did not establish probable cause because there was no statement that the informant was speaking from personal knowledge (or was reliable). Therefore, the evidence was not admissible. *Whiteley v. Warden,* 401 U.S. 560 (1971).

b. Warrantless Searches or Seizures

When an officer conducts a warrantless search or seizure (under exigent circumstances) based on the statement of an informant the officer must be prepared to explain later in court how the informant obtained the information.

Example:

Officers responded to a serious accident. An apparent witness, Joe Muro, told one of the officers that Donnelly had run a stop sign. That officer explained these facts to the investigating officer, who went to the hospital to see Donnelly. Donnelly smelled of alcohol, spoke with a slur and had watery, red eyes. After Donnelly was arrested and waived his Fifth Amendment rights, he made incriminating statements and the officer had blood drawn. The court ruled that there was no probable cause for the arrest because there was no evidence at the suppression hearing that the witness actually saw the events testified to. Therefore, the evidence obtained as a result of the arrest (statements and blood test) were suppressed. *People v. Donnelly,* 691 P.2d 747 (Colo. 1987).

c. Protecting the Identity of the Informant

The most important problem in proving personal knowledge is that if an officer is too specific in the explanation of where, when and how the informant obtained the information, the officer may "give away" the identity of the informant. On the other hand, if the officer is too general in the explanation, the court will rule that the officer did not establish the personal knowledge requirement. For example, the statement by an officer that the informant had "personal knowledge" is only a conclusion which does not explain whether the informant actually saw the activity or evidence.

An officer must be able to present enough facts so that someone who knows only what the officer states (i.e., the judge) could independently conclude that the information must be true. If giving enough facts will likely reveal the informant's identity, the choice is between revealing the identity or foregoing the search/seizure. The officer should almost always get the help of the district attorney in drafting the warrant and affidavit when dealing with this delicate balance.

C. Reasonable Suspicion

An informant can give reasonable suspicion to stop and detain persons or containers. Normally, however, either the informant must be reliable or the situation must appear to be an emergency. In *People v. Martinez*, 200 P.3d 1053 (Colo. 2009), the Colorado Supreme Court discussed the difference in types of informants and how the type of informant can affect the finding of reasonable suspicion:

- Tips from unidentified citizen informants can be sufficient to form reasonable suspicion because citizens are less likely to "fabricate information in return for immunity or other compensation."
- Tips where there is inadequate information to categorize conclusively an anonymous source as a citizen informant, but where the source's information indicates that the informant made first-hand, contemporaneous observations and likely is not affiliated with the criminal activity, can be sufficient to form reasonable suspicion.
- A truly anonymous tip is one not only where the caller fails to provide his or her name and has no known prior record of providing information, there is nothing to suggest that the caller was a citizen informant, and nothing in the tip indicates that the caller is an unaffiliated bystander contemporaneously witnessing criminal activity. Truly anonymous tips give the police no way to assess the caller's veracity or basis of knowledge, and, without more, these tips do not amount to reasonable suspicion.

However, a completely anonymous tip can establish reasonable suspicion if it contains specific details corroborated by police observation. Tips containing not easily obtained, non-public details increase the likelihood that the informant has a special familiarity with the suspect, and thus a stronger basis for his or her knowledge.

1. Unreliable Informants

Normally, unreliable informants cannot give reasonable suspicion to "freeze" persons or containers except in emergency situations.

Example:

An anonymous informant calls police and explains that a suspect with a certain car license number has just kidnapped a young girl and put her in the car trunk.

2. Reliable Informants

A reliable informant may be able to give reasonable suspicion to "freeze" persons or containers for a short period of time.

Example:

A citizen-informant called police, gave her name and said that suspicious people possibly involved in a drug transaction were parked near her home, and she asked the police to investigate. After the officers arrived and obtained the identification of the suspects, an officer smelled marijuana. The court ruled that "the

officers would have been derelict in their duty if they had not detained the defendant and his passengers to check their identity and the nature of their activity." Therefore, the evidence discovered as a result of the stop and detention was admissible. *People v. Mathis,* 542 P.2d 1296 (Colo. 1975).

V. TIMELINESS

In order to search, an officer must be able to prove that there was probable cause to believe the crime-related evidence was present at the time the search was conducted.

A. Staleness

The usual problem relating to timeliness of the search is that, although the evidence might once have been present, there is not enough information to show that the evidence is still there. The problem arises in several situations.

1. When the Informants Obtained Their Information

The most important questions are: when was the evidence last known to be in a certain place? Is it probable that the evidence is still there?

a. Type of Evidence

The most important factor in the court's determination of staleness is the nature of the evidence. For example, if the evidence is a small amount of narcotics, an officer must search immediately. If, on the other hand, the evidence is records kept at a business, an officer may wait much longer without probable cause growing stale.

Examples:

Wickham's companion stabbed the victim while Wickham assisted. The two men then stole the victim's ATM card, wallet, a cell phone and pager, two VCR's and his stereo equipment. After police found the victim's body, Wickham was identified in ATM surveillance videos withdrawing funds from the victim's bank account. Police then obtained a warrant to search his house for items stolen from the victim. Sixteen days after the murder Wickham was arrested and his house was searched pursuant to the warrant. The Colorado Court of Appeals noted that the police did not link Wickham to the crime until he was identified ten days after the body was discovered, and it was only after he was identified as a

suspect that probable cause was established to obtain a search warrant for his home. In addition, while the items sought by the warrant were easily disposable, there was reason to believe that Wickham still had them in his possession since officers had checked pawn records and found no signs that the items had been pawned. *People v. Wickham,* 53 P.3d 691 (Colo. App. 2001).

Masters was identified as a homicide suspect in large part based on his drawings depicting surprise attacks, gruesome death scenes and scenes of violence and sex, which were similar to the way the victim had been murdered. A forensic psychologist advised officers that it was likely that Masters would have continued to produce evidence of violent sexual fantasies after the crime. Officers therefore obtained a warrant to search Masters's residence for such materials. The Colorado Court of Appeals held that there was probable cause to believe that the materials would be found in Masters's home, and police were seeking evidence of Masters's "continued violent sexual fantasies to corroborate the psychologist's recent, not stale, theory of the case." *People v. Masters,* 33 P.3d 1191 (Colo. App. 2001), *aff'd* 58 P.3d 979 (2002).

The victim owned a cabinet shop. Erthal worked for the victim, then quit to run a competing cabinet shop. Six months later the victim reported that someone had stolen tools and supplies including saw blades. An officer went to Erthal's shop and saw blades "of the type" reported stolen. Two months later the officer obtained a warrant to seize the blades. The court ruled that there was no information in the affidavit that Erthal "continued to use [the] tools." The information obtained by the officer was, therefore, stale. *People v. Erthal,* 570 P.2d 534 (Colo. 1976).

An officer recited in an affidavit information establishing that there was probable cause to believe that the Balls were engaged in drug trafficking between April 1 and April 23. The officer obtained a search warrant for the Balls' residence on April 30. The court ruled that, because the "activity was of a continuous nature . . . the affidavit when considered as a whole, justifies the conclusion that illegal drugs probably were present in the defendants' residence when the warrant was issued." *People v. Ball,* 639 P.2d 1078 (Colo. 1982).

Cullen committed a murder, and about eight months later officers obtained probable cause to believe he was the culprit. The officers obtained a warrant to search Cullen's residence for items utilized in the kidnapping/murders and scientific evidence such as hair, fiber, blood and fingerprints. The court ruled that the "affidavit did not list items which are consumable or readily disposable such as narcotics or stolen property." Therefore, there was probable cause to believe these crime-related items were present in the residence. *People v. Cullen,* 695 P.2d 750 (Colo. App. 1984).

A warrant affidavit stated facts showing that, during the ten days prior to issuance of the warrant the suspect was involved in the sale of marijuana and kept the drugs and sale proceeds in her bedroom. The court ruled that the affidavit indicated a continuing course of conduct, and supported the conclusion that contraband would still be located in the suspect's residence. *People v. Grady,* 755 P.2d 124 (Colo. 1988).

A warrant affidavit recited information from an anonymous informant that, on December 9, 2002, he smoked methamphetamine at Miller's home that Miller had just finished manufacturing there. The informant also stated that Miller kept methamphetamine manufacturing supplies in his kitchen cabinets. The affidavit also recited another informant's information that on or near January 6, 2003, Miller was manufacturing methamphetamine at a location other than his home. The Colorado Supreme Court held that the warrant for the defendant's home was stale as the information relating to that residence was about a month old. *People v. Miller*, 75 P.3d 1108 (Colo. 2003).

b. Warrants

When an officer gets a warrant based on hearsay, the officer must state *when* the *informant* obtained the information.

Example:

An officer stated the following in an affidavit for a search warrant: "within the last 24 hours I have received information from [an informant] that he had seen marijuana in the form of bricks wrapped in clear cellophane inside the apartment where a Ray Bauer lived . . . ." A magistrate issued the warrant and drugs were seized at Bauer's apartment.

However, the supreme court suppressed the evidence because there was no statement in the affidavit as to "when the informant received the information so that the magistrate can independently determine whether reasonable grounds exist to believe that . . . contraband is currently located [in the place to be searched]."*People v. Bauer,* 552 P.2d 512 (Colo. 1976).

In 2004, police seized several of the defendant's computers pursuant to a warrant that included a 90-day time limit within which the computers could be analyzed. The defendant was not charged at that time, but was reinvestigated in 2006. At that time, the police sought a new warrant to search the computers that had never been returned. The Colorado Supreme Court held that the time limit on the first warrant did not affect the right of the police to obtain a later warrant to search the computers. Since the defendant did not dispute that the 2006 warrant established probable cause, the search of the computers was proper. *People v. Strauss*, 180 P.3d 1027 (Colo. 2008).

2. When the Officers Conducted Their Search

Even when the information is not stale, the officer must *act* upon the information before it goes stale. Although § 16-3-305(6), C.R.S. (2008) provides that a search warrant shall be executed within ten days after its issuance, searches executed within a proper statutory period may still violate the Constitution if the information upon which the warrant was based becomes stale. Whether a delay in executing a search warrant is unconstitutional depends on whether the probable cause recited in the affidavit continues to exist at the time the warrant is executed. In determining whether probable cause has dissipated over time or the warrant has become stale, a court must evaluate the nature of the criminal activity and the kind of property for which authorization to search is sought. A delay in execution does not render the search unconstitutional if it remains likely that the items sought will be found in the place to be searched.

Example:

An affidavit detailed multiple drug transactions between the defendant and the confidential informant and stated that defendant had invited the informant to return to the home later to buy more cocaine. The Colorado Court of Appeals noted that the invitation to return was an indication that the drug dealing activities at the defendant's home were ongoing and could be expected to continue. Thus, the court concluded that probable cause continued to exist

when police executed the warrant seven days after it was issued. *People v. Russom*, 107 P.3d 986 (Colo. App. 2004).

B. Anticipatory Search Warrants

Sometimes officers know that a location will contain evidence at some point in the future. The United States Supreme Court has recently stated in *United States v. Grubbs*, 547 U.S. 90 (2006), that an anticipatory warrant is proper if it is shown that: 1) there is a fair probability that contraband or evidence of a crime will be found in a particular place; and 2) there is probable cause to believe that the triggering condition will occur. The triggering condition need not be set forth in the warrant itself. *United States v. Outland,* 476 F.2d 581 (6th Cir. 1973)

The safest procedure to use in such circumstances, however, is to complete the affidavit and warrant. Then wait until the crucial event "triggers" the probable cause. At that point, add a final paragraph to the affidavit explaining the event and then obtain the warrant.

VI. CORROBORATION

Corroboration is evidence gathered by officers which tends to confirm information which the officers already have. Sometimes an officer does not need corroboration to search or seize. Sometimes, however, corroboration is crucial in the establishment of reasonable suspicion, probable cause, or proof beyond a reasonable doubt.

In cases involving probable cause based on hearsay, the less rigid "totality of the circumstances" approach places great importance on corroboration of the hearsay information. In these cases, officers should always get as much corroboration as possible before arresting or searching.

A. The Totality of the Circumstances Test

Both the United States and Colorado Supreme Courts have ruled that the test for determining whether probable cause exists is the "totality of the circumstances" test.

Examples – Probable Cause Established:

Officers received an anonymous letter that Gates and her husband were involved in drug trafficking. The letter stated that (1) the Gateses had over $100,000 worth of drugs in their basement in Illinois; (2) that Mrs. Gates would drive to Florida and pick up some drugs; and (3) that Mr.

Gates would fly down to Florida and drive the "load" car back to Illinois. After officers watched the Gateses and confirmed that the letter accurately predicted their movements, the officers obtained a warrant for the search of Gates' car and house. The state courts all suppressed the evidence because the state could not show that the informant was reliable and spoke from personal knowledge, and that the corroboration for the information was "crime-related." However, the United States Supreme Court, in reminding the Illinois courts that probable cause is a "practical, nontechnical conception" found that there was sufficient evidence to establish probable cause, based upon the totality of the circumstances. *Illinois v. Gates,* 462 U.S. 213 (1983).

An anonymous informant told officers that defendants were growing marijuana in a separate room off of their detached garage and were using artificial "grow lights" and automatic irrigation. The informant also stated that Billy Quintana had begun to harvest the plants and to sell the marijuana. An independent police investigation corroborated information about Quintana's facilities and harvest of the plants. The Colorado Supreme Court ruled that, due to the detail of the informant's information, and corroborated evidence from independent investigation, probable cause for a search warrant existed. *People v. Quintana,* 785 P.2d 934 (Colo. 1990).

In an affidavit for a search warrant, a Pueblo police officer stated that he had received three calls from anonymous informants reporting marijuana sales from the 1200 block of Eagen Street. Two of these informants stated that sales occurred at 1225. One informant described vehicular traffic to 1225 and another reported that the marijuana was sold in plastic bags or cigarette form. The affidavit also stated that two men who had entered 1225 were later found in possession of marijuana cigarettes. A search warrant for 1225 Eagen Street was issued and marijuana was seized. The trial court suppressed the marijuana, finding that the affidavit did not state a time frame for the informants' observations and it was not determined whether the marijuana cigarettes seized from the visitors had actually been purchased at 1225. However, the Colorado Supreme Court reversed and stated that under the totality of the circumstances probable cause to search was established, where the informants' statement reflected ongoing activity rather than isolated incidents, the informants corroborated each others' reports, the pattern of vehicular traffic in front of 1225 was corroborated by independent police investigation, and the seizure of marijuana cigarettes from visitors to 1225 tended to corroborate the informants' reports. *People v. Abeyta* 795 P.2d 1324 (Colo. 1990).

A police officer filed an affidavit in support of a search warrant that stated a previously reliable informant described the address and the

resident of a house where approximately a half pound of marijuana was kept and offered for sale. The affidavit further stated that the officer and the informant drove by the address and, together, observed a person matching the description given by the informant. However, the affidavit did not allege an independent police investigation. The Colorado Supreme Court ruled that probable cause to issue the search warrant was established where the house to be searched and its resident were identified by the officer in the presence of the previously reliable informant. *People v. Arellano,* 791 P.2d 1135 (Colo. 1990).

A warrant was issued based on the information of an informant, who related that he knew that the defendant was growing and selling marijuana in his home because he had personally purchased marijuana ten times at the residence. He gave a location and description of the exterior of the house, the yellow car parked in front of the house, and the number and height of the marijuana plants. He also related that the defendant had no phone service in the house. Before presenting the affidavit, police drove to the location and confirmed the description of the house, the yellow car and confirmed that the house had no telephone service. A subsequent search resulted in the seizure of marijuana. The Colorado Supreme Court found that the failure of the police to corroborate the evidence relating directly to the illegal activity did not invalidate the probable cause for the warrant. Here, the indicia of reliability and the self-verifying details of the informant's information were sufficient to support probable cause for the search warrant; the informant was named and the fact that he knew the size of the plants and there was no phone service showed that he was familiar with the residence. *People v. Turcotte-Scheffer,* 843 P.2d 658 (Colo. 1993).

A first time confidential informant said Pannebaker was growing marijuana in his two Boulder residences. He stated that Pannebaker lived in one residence and rented out the other. The informant said that he had recently been in both residences, and had seen the plants growing. He described both of the houses in detail and directed the detectives as to how to reach the houses. The detectives went to the two houses to verify the information. The houses matched the informant's description, including the fact that the second floor windows were covered with dark material. The detectives saw a mail box with Pannebaker's name on it, and confirmed that he had been previously arrested on drug charges. The Colorado Supreme Court held that the detailed statements of the informant, together with the independent corroboration by the detectives, when viewed in their totality and in a common sense manner, were sufficient to establish probable cause for a search warrant. *People v. Pannebaker,* 714 P.2d 904 (Colo. 1986).

Examples – Probable Cause Not Established

An officer received an anonymous letter stating that the defendant was picking up drugs in Kansas and selling them in Colorado. The letter described the defendant and his car, and the room in Kansas where the drugs were collected. The letter suggested that collection times may coincide with University vacations. The officer was able to confirm the non-incriminating facts, but no other information was obtained implicating the defendant in criminal activity. A search warrant was issued and drugs were discovered in the residence. The court found that the anonymous letter did not establish probable cause to search as there was no inference in the letter that the informer had personal knowledge that the defendant was involved in an illegal act. The type of illegal substance was not named. The letter merely speculated about the defendant's schedule, and there was no indication that the defendant's residence was the site of the drug activity. The court also found that corroboration of non-criminal activity may support finding of probable cause, but here the indicia of reliability about the informant was not also present. *People v. Leftwich,* 869 P.2d 1260 (Colo. 1994).

An affidavit in support of a search warrant contained the following information: an anonymous informant stated to police that the marijuana was being sold at Titus's address; the informant had observed a large number of visitors to the address who stayed for short periods of time and had recorded license plate numbers and descriptions of the vehicles; and the informant also stated that she had smelled the odor of burning marijuana from the house. Although police confirmed that the license plate numbers reported matched the vehicle descriptions, attempts by a police informant to buy marijuana from Titus were unsuccessful. The Colorado Supreme Court upheld the trial court's determination that no probable cause existed to support the issuance of the search warrant for Titus's residence, since the corroborating evidence that the vehicles had the correct license plates attached did not establish that the owners of the vehicles were involved in illegal activity. *People v. Titus,* 880 P.2d 148 (Colo. 1994).

B. Crime-Related Corroboration

It is always better to obtain corroboration which is *itself* crime-related rather than innocent details related by the informant.

Examples:

An unidentified informant told officers that the residents of a certain house would be "ripped off" that night by the Watkins brothers during a heroin sale. The officer watched the residence and at 8:45 p.m. saw a

car matching the informant's description pass by several times. At 10:00 p.m. the officers saw the same car drive up to the darkened house and the occupants got out. One of them was recognized as Larry Watkins. The other occupant began to load the car with a television and stereo. When the car drove off the officer stopped and arrested the occupants. The Arizona court ruled that the information was sufficiently corroborated to establish probable cause. Therefore, the arrest was proper and the evidence was admissible. *State v. Watkins,* 592 P.2d 1278 (Ariz. 1979).

A confidential informant tipped off police that a drug transaction would be taking place at a certain body shop on a specific date. The informant stated that Garcia, a man named Steve, and a woman, would be traveling in a vehicle with Florida plates, and that Garcia was going to sell two kilograms of cocaine. The informant further stated that the woman would be carrying the cocaine. Officers were watching the body shop when they saw a van with Florida plates drive into the body shop. Two men and a woman carrying a backpack got out of the car and into a jeep belonging to the body shop's owner. The officers followed the jeep to a hotel where all three people entered a room. Sometime later, the two men left in the jeep and then returned. The woman then left the room carrying the backpack and drove away alone in the jeep. Officers followed, stopped the jeep, and arrested the woman. After discovering cocaine in the backpack, the police arrested the two men. Under these circumstances the court ruled that the arrests and search of the backpack were based on probable cause. The court stated that probable cause was established through corroboration by the police of the information supplied by the informant. *People v. Garcia,* 752 P.2d 570 (Colo. 1988).

C. Corroboration of Innocent Details

It is more difficult to establish probable cause when the officers corroborate only innocent details of an unreliable informant's story. In most such situations an officer should try to implement detention procedures until more information can be obtained.

D. Corroboration with a Different Informant

It is always better to have more than one source for your information, even if it is another informant.

Example:

Two informants separately told officers that they had seen drugs in Stoppel's home. Afterward, the informants went to Stoppel's home, saw

marijuana, and recorded a conversation with Stoppel in which Stoppel discussed "removing the marijuana from his residence." The court ruled that these facts (including signed admissions by the informants) established the credibility of the informants. *People v. Stoppel,* 637 P.2d 384 (Colo. 1981).

E. Detailed Information

Detailed information, especially details that an informant is unlikely to know, will help establish probable cause.

Example:

A confidential first-time informant told officers that Conwell and his brother had burglarized a particular home and stolen some stereo equipment. The informant further said that he had just seen the equipment in Conwell's home and described the equipment by brand name. The officers confirmed that the home had been burglarized and the particular equipment stolen. The court, in ruling that probable cause existed, stated, "We conclude that the detail provided by the confidential informant, combined with the corroborating information from the victim, was sufficient to support the issuance of a search warrant." *People v. Conwell,* 649 P.2d 1099 (Colo. 1982).

Chapter 8

SEARCH AND SEIZURE – WARRANTS

CONSTITUTION OF THE UNITED STATES
FOURTH AMENDMENT

"The right of the people to be secure in their persons, homes, 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.**"

Note: **This section is intended to supplement the law regarding probable cause set forth in the previous section. Thus, cases relevant to issues that appear in both sections may not be included in both sections, and both sections should be considered when addressing probable cause issues as they relate to search warrants.**

I. INTRODUCTION

Officers must remember that the "heart" of the Fourth Amendment is the warrant requirement; and the "heart" of the warrant requirement is the establishment of probable cause. This chapter discusses, in approximate chronological order, many of the legal problems involved in getting and executing a search warrant. A search warrant must be obtained to search areas where a person has a high expectation of privacy unless the officer obtains consent or emergency circumstances exist. The two places where an officer should always consider getting a warrant are:

A. Homes

B. Closed Containers

II. THE ROLE OF THE JUDGE

Under the United States and Colorado Constitutions, an officer is not permitted to search or seize on probable cause except under exigent circumstances. Only an impartial judge may determine whether there is probable cause.

III. THE ROLE OF LEGAL COUNSEL

An officer should get competent legal counsel to review all search warrants. When an "informant" is involved, an officer should almost always seek the assistance of an attorney who is experienced in the drafting of search warrants.

IV. DEFINITIONS

The following are definitions of the important terms relating to search warrants.

A. Search Warrant

A search warrant is an order in writing from a court of record which permits officers to search a particular place for particular crime-related evidence.

B. Affidavit

An affidavit is a separate document from the search warrant. The affidavit must state facts under oath which establishes probable cause to believe that certain crime-related evidence is located in a certain place at a certain time.

C. Affiant

An affiant is a person who swears under oath that the information contained in the affidavit is true. This is usually an officer.

V. STATUTORY GROUNDS FOR A WARRANT

An officer may obtain a warrant to search for any crime-related evidence. The following are the specific types of crime-related evidence which the statute discusses under § 16-3-301, C.R.S. (2008):

A. Stolen or embezzled property.

B. Property which is to be or has been used in the commission of an offense (e.g., burglary tools).

C. Property which is illegal to possess (e.g., controlled substances, illegal weapons).

D. Property which is evidence in a later criminal case (e.g., clothes worn during the crime, documents proving residency in premises).

E. Property which may be seized under any state statute (e.g., gambling devices or records).

F. Property which is kept, stored, maintained, transported, sold, dispensed, or possessed in violation of a state statute, under circumstances involving a serious threat to public safety or order, or to public health (e.g., untaxed liquor or cigarettes).

G. Property which would help locate someone named in an arrest warrant.

VI. ADVANTAGES OF A SEARCH WARRANT

It is always best to get a search warrant when a search is based on probable cause unless an emergency (life threatening) exists. Moreover, even in the case of emergencies, it is advisable to "freeze" the scene once the emergency is addressed and then obtain a warrant, if at all possible. There are a number of advantages when the officer takes the necessary steps to obtain a search warrant.

A. Alternative Legal Theories

If another basis for a search is ruled unlawful (e.g., consent, incident to arrest, etc.), a warrant will nevertheless validate the search.

Example:

Officers, investigating a call of a car observed in a neighborhood "running all day" discovered the dead body of Hebert's wife in the trunk. Officers were then sent to establish a surveillance on Hebert's residence, during which they observed nothing suspicious or out of the ordinary. After observing the house for approximately 45 minutes, officers contacted Hebert, who was inside the house, and transported him to police headquarters. A detective later determined that a search of the house was necessary "to see if there were any other victims, injured or dead" inside the house. Officers then entered the house without a warrant and found crime-related evidence. The officers then secured the house and obtained a search warrant. The Colorado Supreme Court held that the warrantless entry of the house was not justified based on the emergency doctrine because the claim of an immediate crisis was only "theoretical" and was unsubstantiated by any concrete facts. However, after striking information in the affidavit that contained "fruits" of the illegal entry, the court nevertheless found that the warrant was supported by probable cause, which validated the subsequent search of the house. *People v. Hebert,* 46 P.3d 473 (Colo. 2002).

B. Presumption of Legality

A warrantless search is presumed to be unreasonable and unlawful. When a defendant challenges a warrantless search in court, the state bears the burden of establishing that the search was reasonable, based upon one of the narrowly defined exceptions to the warrant requirement. However, a search with a warrant issued on probable cause is presumed to be reasonable and lawful. Therefore, a defendant who challenges the search later in court bears the burden of establishing some defect in the warrant or the manner in which the warrant was obtained.

C. Common Sense Interpretation

When officers conduct warrantless search *they* must justify every aspect of their searches in court. Under cross-examination by a defense attorney their every word and action is put under a "legal microscope" to find some deficiency or error. However, when a warrant has been obtained, the court normally looks within the "four corners" of the document and determines in a non-technical, common sense reading "whether the issuing magistrate had a substantial basis for issuing the search warrant rather than whether the reviewing court would have found probable cause in the first instance." *People v. Gall,* 30 P.3d 145 (Colo. 2001).

The Colorado and United States Supreme Courts have, on many occasions, condemned "hyper technical" interpretations of warrants and affidavits by the lower courts. In one case, the United States Supreme Court explained the approach the lower courts should take in determining the sufficiency of a warrant or affidavit:

> "[T]he Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants . . . must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by non-lawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting." *United States v. Ventresca,* 380 U.S. 102 (1965).

Similarly, the Colorado Supreme Court has recognized that search warrants, and affidavits in support of search warrants, are to be tested in a common sense and realistic fashion. This approaches recognizes the fact that officers often operate in novel circumstances under various pressures including time

constraints, and unintentional and immaterial mistakes may be made. Highly technical attacks on warrants and affidavits are therefore disfavored. *People v. McKinstry,* 843 P.2d 18 (Colo. 1993).

Examples:

Although the warrant to search records of Roccaforte's business did not on its face limit the search related to fuel and tax fraud, the accompanying affidavit defined the scope and limited the evidence to documents related to fuel tax fraud. The Colorado Supreme Court concluded that the authority of the warrant must be read within the context of the affidavit. *People v. Roccaforte,* 919 P.2d 799 (Colo. 1996).

A deputy's affidavit averred that, while he believed the bright light he had seen was a "grow light" and that the plants he observed were similar in shape, color, and outline to marijuana, he was unable to make a positive identification. The Colorado Court of Appeals concluded that the affidavit demonstrated probable cause, commenting that affidavits in support of the issuance of a warrant should be interpreted in a common sense fashion. *People v. Oynes,* 920 P.2d 880 (Colo. App. 1996).

D. Close Cases Go to the Officer

When probable cause is questionable, a court which reviews the evidence will give the benefit of the doubt to the defendant when a warrant has not been obtained. However, when officers obtain warrants, the courts give the benefit of the doubt to the officers. The United States Supreme Court, in discussing this issue, instructed lower courts:

> "Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants." *United States v. Ventresca,* 380 U.S. 102 (1965)

Example:

Officers investigating a homicide presented an affidavit which stated the following facts: the victim was seen at her residence the night before a body matching her description was found in her parked, running car on Valencia Street; the victim was found wearing only one shoe, had oil on the back of her pants, and her glasses were askew on her head; the night before the body was found a neighbor observed Hebert backing the victim's (his wife) car into the garage; a neighbor told police that it was unusual for

Hebert to drive his wife's car and unusual for him to back it into the garage; the evening before the body was discovered Hebert told a friend that his wife, who had gone shopping, was missing; and witnesses reported that the victim's car was observed on Valencia Street "running all day." Although a "close case," the Colorado Supreme Court concluded that the affidavit established probable cause to search Hebert's house: "Thus the timeline, [Hebert's] unusual activity, the fact that [the victim] was last seen – according to [Hebert] - at the residence only one hour after [Hebert's] unusual action, and the victim's physical state within the trunk all support a reasonable inference that criminal activity occurred at the home and supply the necessary nexus linking [Hebert's] home to criminal activity." *People v. Hebert,* 46 P.3d 473 (Colo. 2002).

A deputy's affidavit averred that, while he believed the bright light he had seen was a "grow light" and that the plants he observed were similar in shape, color, and outline to marijuana, he was unable to make a positive identification. The Colorado Court of Appeals concluded that the affidavit demonstrated probable cause, commenting that doubts concerning the existence of probable cause should be resolved in favor of the warrant in order to further the policy of encouraging police officers to obtain search warrants. *People v. Oynes,* 920 P.2d 880 (Colo. App. 1996).

E. Applicability of the Good Faith Exception

The purpose of the "exclusionary rule" (i.e., the rule requiring suppression of evidence when an officer obtains evidence in violation of a suspect's constitutional rights) is to deter police misconduct. Therefore, "where a police officer relies in good faith on a facially valid warrant, the purpose of the exclusionary rule is not furthered by the suppression of relevant and probative evidence." *People v. Gall,* 30 P.3d 145 (Colo. 2001). Based on this rationale, Colorado created a statutory "good faith exception" to the exclusionary rule.

1. The Statute

Colorado's "good faith exception" statute, as set forth in § 16-3-308, C.R.S. (2008), provides that:

a. Evidence obtained that is otherwise admissible shall not be suppressed if the court determines that it was obtained as the result of a "good faith mistake" by an officer.

b. "Good faith mistake" means a reasonable judgmental error concerning the existence of facts or law which, if true, would be sufficient to constitute probable cause.

c. "Technical violation" means a reasonable good faith reliance upon a statue which is later ruled unconstitutional, a warrant which is later invalidated due to a good faith mistake, or a court precedent which is later overruled.

d. It is the "public policy" of the state that, when evidence is sought to be suppressed based upon the conduct of an officer, that officer may assert that his or her conduct "was taken in a reasonable, good faith belief that it was proper," and in such instances the evidence so obtained is not subject to suppression.

e. It is "prima facie evidence" that the conduct of an officer was performed in the "reasonable good faith belief that it was proper" if the officer establishes that the evidence was obtained pursuant to and within the scope of a warrant.

2. Application of the Statute

In situations in which an officer obtains a warrant, and that warrant is later determined to lack probable cause or be otherwise deficient, the "good faith" exception may nevertheless validate the search. The statute, in effect, creates a presumption that the officer was acting in good faith if he or she was acting pursuant to a warrant:

> "Police officers are not appellate judges. The determination by an appellate court that a warrant is invalid does not mean a police officer's reliance upon that warrant was objectively unreasonable. The courts encourage officers to obtain warrants before invading individual privacy, and it is police misconduct that the exclusionary rule seeks to deter. Hence, both by operation of precedent and common sense, a warrant that has failed appellate scrutiny can nonetheless form the basis for good faith execution by a reasonable police officer. Only if no reasonable officer would have relied upon that warrant should we defeat that officer's good faith and hence the good faith exception." *People v. Altman,* 960 P.2d 1164 (Colo. 1998).

Examples:

Officers learned that Altman had purchased hydroponic growing equipment, which is commonly used for indoor marijuana cultivation. The equipment was transported in a rental car to a residence, although the officers determined that the occupant of the residence had two other cars registered to him which were parked at that residence. The

officers also learned that the electrical usage at the residence had been two to three times higher than that for surrounding residences, and two to three times higher than the previous resident's usage. Based on these facts, which were set forth in an affidavit, the officers obtained a search warrant due to their suspicion that marijuana was being cultivated inside the residence. A search revealed a 96-plant marijuana "farm." Although the Colorado Supreme Court questioned whether the affidavit established probable cause, it nevertheless concluded that it was not a "bare bones" affidavit, and, "giving credence to [the officer's] experience and training and considering all of the facts indicating possible criminal activity, we find his reliance upon the affidavit to be reasonable." *People v. Altman,* 960 P.2d 1164 (Colo. 1998).

A body was discovered on a Pueblo ranch in May 1995, and the coroner's examination revealed that he had been shot in the head with a .22 caliber firearm. The victim's girlfriend told police that the victim and Young left Texas together and were driving to New Mexico to see the victim's brother. She described the victim's truck and indicated that the victim had a .22 caliber revolver with him when he left. The victim's brother told police that Young and the victim had been at his house in May 1995, and that Young told him that he had pawned several items in order to purchase drugs which he planned to take to a ranch in Pueblo, where he had worked previously. The brother told police that Young and the victim had left and were headed to Estes Park, and that the victim had his .22 revolver when they left. Officers confirmed that Young had previously worked on a ranch in Pueblo, that he had a "violent past," that he had a severe drug problem and he was known to carry weapons. Officers also confirmed that Young had been seen in Estes Park in May 1995 and that he owned a truck described by the victim's sister and brother. Based on this information, which was included in an affidavit, officers obtained a warrant to search Young's truck and discovered crime-related evidence. The Colorado Court of Appeals assumed for purposes of its analysis that the affidavit failed to establish probable cause to search the truck. However, "because the officers' reliance on the warrant was objectively reasonable, the good faith exception to the exclusionary rule applies, and the trial court's ruling denying defendant's motion to suppress must be sustained." *People v. Young,* 987 P.2d 889 (Colo. App. 1999).

3. Limitations to the Good Faith Exception

The good faith exception applies in situations in which it was objectively reasonable for an officer to rely on the warrant. However if no reasonable officer would have relied upon the warrant, the objective good faith is absent and the good faith exception does not apply. The courts have defined four situations in which the good faith exception is inapplicable:

a. where the issuing magistrate or reviewing judge was misled by a knowing or recklessly made falsehood;

b. where the issuing magistrate wholly abandoned his or her judicial role;

c. where the warrant is so facially deficient that the officers cannot reasonably determine the particular place to be searched or things to be seized; and

d. where the warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.

United States v. Leon, 468 U.S. 897 (1984); *People v. Altman,* 960 P.2d 1164 (Colo. 1998)

Examples:

An affidavit alleged in conclusory fashion that an informant had seen methamphetamine carried into a barn near Randolph's residence and had seen an individual smoking methamphetamine in Randolph's trailer. The affidavit also alleged that the informant knew that Randolph had sold marijuana in the past. The affidavit also listed five separate buildings on Randolph's property but did not state any information connecting criminal activity to each of those buildings. The Colorado Supreme Court held that the affidavit was conclusory or "bare bones," and that the officers failed to corroborate the details in the affidavit or narrow the search with particularity. The court concluded that the officer's reliance on such a facially deficient affidavit was unreasonable, and the good faith exception was therefore inapplicable. *People v. Randolph,* 4 P.3d 477 (Colo. 2000).

Officers obtained a search warrant based upon an affidavit which the trial court later determined contained three intentional false statements or statements made with reckless disregard for the truth.

In upholding the suppression of the evidence obtained as a result of the search pursuant to the warrant, the Colorado Supreme Court held that "the affidavit submitted in support of this warrant could not support objectively reasonable reliance by [the officer] because it was partially based upon his own recklessly made falsehoods. Moreover, we agree with the trial court's determination that [the officer] knew or should have known that the warrant could not support a probable cause determination." The good faith exception was therefore inapplicable. *People v. Kazmierski,* 25 P.3d 1207 (Colo. 2001).

Officers obtain a warrant based on information that was approximately one month old. The Colorado Supreme Court held that the information was stale under the circumstances of this case, and that the "good faith" exception did not cure this deficiency. The court noted that because the affidavit was devoid of any information indicating current illegal activity at the defendant's house, official belief in the existence of information showing current illegal activity at that residence was objectively unreasonable. *People v. Miller*, 75 P.3d 1108 (Colo. 2003).

A warrant affidavit included stale allegations of criminal activity and information from a confidential informant with no additional evidence corroborating the reliability of that information. The Colorado Supreme Court held that the affidavit was "bare bones" and it was objectively unreasonable for the officers to have relied upon it. As such, the good faith exception did not apply. *People v. Pacheco*, 175 P.3d 91 (Colo. 2006).

VII. DRAFTING THE WARRANT

Drafting a warrant is usually simple and normally merely involves the filling in of the spaces on the warrant. The applicable statute (section 16-3-304) and Criminal Rule 41 require that a warrant state:

A. "the premises, person, place or thing to be searched."

B. "the property to be searched for, seized or inspected."

C. "the grounds or probable cause." (Usually incorporated by the affidavit.)

D. "the names of the persons whose affidavits or testimony have been taken in support thereof."

If any of these items are missing, the warrant will be invalid.

Example:

An officer prepared an affidavit for a search warrant for Donahue's farm, where drugs were hidden. The officer described the areas to be searched by photos and hand-drawn maps. However, he failed to attach to the search warrant the separate page he had prepared that specified the items to be seized. The court examined only the "four corners" of the search warrant and found it defective because it failed to describe the specific items to be seized." *People v. Donahue,* 750 P.2d 921 (Colo. 1988).

ATF agents prepared a search warrant for a Montana ranch that failed to identify any of the items intended to be seized, although the affidavit did so. The United States Supreme Court held that the warrant was invalid because it failed to particularly describe the things to be seized. *Groh v. Ramirez*, 540 U.S. 551 (2004).

If, during or after the authorization of a warrant, an officer realizes that there is a mistake in the warrant, the officer should ask the issuing judge to cross out the mistaken portion, write in the proper words, initial, date, and time the changes.

Example:

Officers wanted a warrant to search 1312 Oak Street. Unfortunately, the warrant (and affidavit) read 1213 Oak Street. At the time the warrant was issued the judge crossed out the incorrect address and wrote in the correct one. The officer then swore to the accuracy of the corrected, amended affidavit. The court ruled that a "judicial officer issuing a search warrant has the right to alter, modify, or correct that warrant . . . This is particularly true where, as here, the correction is made before any search has begun, and the person seeking the alteration is the same one who sought the warrant initially and will be serving it." *People v. Watson,* 668 P.2d 965 (Colo. App. 1983).

VIII. DRAFTING THE AFFIDAVIT

The affidavit is a sworn statement explaining to the judge why there is probable cause to believe crime-related evidence is located in a certain place. Every officer must understand that courts can consider only what is written within the "four corners" of the affidavit in deciding whether there is probable cause. That is, information which officers have, but do not include in the affidavit, is worthless. *People v. Brethauer,* 482 P.2d 369 (Colo. 1971).

Just like the warrant, the affidavit must state the particular person or place to be searched, and the property to be seized. Crim. P. 41. This section discusses many of the problems which have arisen when officers write the affidavit.

A. The Particular Place

Courts require that officers state in their affidavits probable cause to believe evidence is in a specified, particular place. "[U]nlike probable cause to arrest, which merely entails sufficient grounds to believe that a crime was committed and that the suspect committed it . . . probable cause for a search implicitly requires both sufficient grounds to connect the sought after items to a crime and grounds to believe that those items will be located in the place to be searched at the time of the search." *People v. Gall,* 30 P.3d 145 (Colo. 2001).

Examples:

An officer stated in his affidavit that an informant told him that the informant had "observed four pounds of marijuana wrapped in newspaper and white-powdered speed packaged in one once plastic baggies at 2018 Ogden." 2018 Ogden is an apartment building. The officers obtained a warrant to search the apartments of the suspects. The court ruled that "the affidavit must support a finding of probable cause as to each separate place to be searched." Because there was "nothing in the affidavit to indicate specifically where in the multiple-occupancy structure the drugs were located" there was no probable cause to search the apartments. Therefore, the evidence was suppressed. *People v. Arnold,* 509 P.2d 1248 (Colo. 1973).

The victim reported that a rare Rolex watch had been stolen from his home. Within a few hours of the burglary, the victim saw an identical Rolex on the arm of a man in a restaurant. The victim learned the man's identity, i.e., Green, from the restaurant bartender and promptly reported the sighting to the police. The Rolex Yacht-Master watch was valued at $20,000, and it was estimated that there were probably only five other watches of the same style in the Colorado Springs area. The Colorado Supreme Court held that under the facts alleged in the affidavit and the reasonable inferences drawn from the facts, probable cause existed to search Green's residence. *People v. Green,* 70 P.3d 1213 (Colo. 2003).

During an undercover drug buy, a broker told the undercover officer that he needed to go elsewhere to obtain the drugs from his source. The officer followed the broker to the defendant's property, where the broker drove to the garage, went inside, then returned to his truck and drove back with the drugs to meet the officer. The Court of Appeals held that there was insufficient probable cause to search the residence, as none of the observed activities occurred at or were associated with the residence. *People v. Eirish,* 165 P.3d 848 (Colo. App. 2007).

An affidavit for a search warrant stated that crime-related evidence was located in an apartment at 3161 Madison in Boulder. The affidavit then described a second residence in greater detail at 664 Tantra Drive, noting that the officers actually visited that residence. Each page of the affidavit also contained the annotation, "Search Warrant: 3161 Madison N302," and the warrant presented with the affidavit identified the premises to be searched as "3161 Madison, Apt. N302." The warrant also specifically incorporated by reference the affidavit. The trial court concluded that the affidavit failed to identify or request a warrant to search Gall's apartment because the specific apartment number was not included in the body of the affidavit. However, the Supreme Court held that "when the warrant and annotation are considered along with the statement in the body of the affidavit identifying the defendant's address as 3161 Madison, there can be no doubt that the affiant effectively identified apartment N302 at 3161 Madison Avenue as the defendant's residence, one of the two residences for the search of which the affidavit provided probable cause." *People v. Gall,* 30 P.3d 145 (Colo. 2001).

B. The Particular Property

For each item of property to be seized as listed in the warrant, the affidavit must establish probable cause that the item is in the place to be searched.

Example:

Officers legally intercepted and opened letters containing cocaine which were addressed to a certain address. The officers permitted a controlled delivery, and then obtained a warrant for the residence. The warrant generally sought all narcotics and paraphernalia. The officers found and seized the two envelopes and other drug-related evidence. The court, in suppressing the other evidence discovered stated, "this affiant officer swore he had probable cause to search for various items, when in fact he did not have probable cause. At defendant's preliminary hearing, the officer testified that he did not have probable cause to believe there were narcotics paraphernalia or material evidence at defendant's residence, other than what was contained in the two letters . . . ." *People v. Glavey,* 530 P.2d 491 (Colo. 1975).

C. Informants

Any time an officer bases the establishment of probable cause on what someone else has said (hearsay), the officer must be careful to include information relating to the source of the information in the affidavit. The bottom-line is that the officer must convince a court via the affidavit that the informant is giving truthful and reliable information about a crime or the

location of crime-related evidence. (This issue is discussed at length in the **PROBABLE CAUSE** chapter). In order to prove this to a court, the officer must consider the following factors when writing the affidavit.

1. Reliability of the Informant

"Reliability" of the informant is a statement of the truthfulness or credibility of the informant. When officers draft affidavits for search warrants they must explain why the informant is reliable or truthful. If the informant is a citizen-informant, fellow-officer, or dispatcher it is very easy to prove reliability by simply stating the person's name and status. On the other hand, it is much more difficult to prove to a court that an unreliable informant has given truthful information about a crime. Therefore, every attempt must be made in the affidavit to show that the apparently unreliable informant is in fact "reliable."

a. Types of Informants

The following is a list of informants from most reliable to least reliable. The less reliable an informant is, the more likely a court is to require officers to get more information to "corroborate" the informant's statement.

(1) Fellow Officers

Information obtained from fellow officers is nearly always considered to be reliable. *People v. Leahy,* 484 P.2d 778 (Colo. 1970).

(2) Citizen-Informants

Citizen-informants whose names are listed in the affidavit are considered to be reliable. *People v. Glaubman,* 485 P.2d 711 (Colo. 1971).

(3) Criminal-Informants

Informants who are criminals or who associate with criminals are generally not reliable informants. In order for a court to believe them, the officer must normally:

a. explain prior situations where the informant's information has proven to be reliable;

b. explain how the informant incriminates himself or herself in making a statement;

c. explain how the officer corroborated the informant's statements by independent investigation.

(4) Confidential Informants

A confidential informant is an informant whom the officer knows but whose identity is not revealed in the affidavit. Any time probable cause is based upon the statement of confidential information the officer must establish in the affidavit that:

The informant has given prior reliable information; or

The officer has obtained corroboration for the informant's story.

(5) Anonymous Informants

An anonymous informant is an informant who will not reveal his or her identity to officers. In order to establish probable cause based on information from an anonymous source the officer must obtain corroboration that is sufficient to persuade a court the anonymous information is accurate.

b. Stating Reliability in the Affidavit

An officer must explain in the affidavit why the informant is reliable. It is simply not enough for an officer to state in the affidavit that the informant is reliable. *See People v. Aragon,* 529 P.2d 644 (Colo. 1974).

Example:

An officer stated in his affidavit: "During the month of February, 1981, your affiant received information from a previously reliable source who identified numerous persons involved in the illegal manufacture sales or distribution of methamphetamine, a controlled substance." The court ruled that this paragraph was worthless in the determination of probable cause because "the facts stated in the affidavit do not establish that the informant is reliable. The mere assertion of reliability is insufficient." *People v. Turner,* 660 P.2d 1284 (Colo. 1983).

(1) Prior Instances of Reliability

The most common method of proving the reliability of informants (especially the informant who is "confidential") is to explain in the affidavit what the informant has done in the past to prove him or herself. To establish reliability in this way, an officer must state specifically what the informant has done.

Example:

An officer stated in his affidavit that he had known the informant "for approximately two years, and said informant has given reliable information on at least three prior occasions." The court ruled that this statement was insufficient to satisfy the court that the informant was reliable. Therefore, the evidence discovered in the search was suppressed. *People v. Perschong,* 506 P.2d 1232 (Colo. 1973).

In order to establish previous reliable conduct of an informant, an officer should consider including the following factors.

(a) Arrests – Indictments – Convictions

The informant has given information which resulted in arrests, indictments, or convictions; be sure to state that in the affidavit. *People v. Arnold,* 527 P.2d 806 (Colo. 1974).

(b) Similarity of Crime

If the crime is the same as, or similar to, the crime which the informant gave prior information about, state that information in the affidavit. *People v. Dailey,* 639 P.2d 1068 (Colo. 1982).

(c) No Unreliable Information

The fact that the informant has never provided untruthful or unreliable information is also an important factor. If this is the case, state it in the affidavit. *People v. Dailey,* 639 P.2d 1068 (Colo. 1982).

(d) Other Specific Information

Sometimes an officer has other specific information which might help a judge determine that the informant is reliable. If such information exists, state it in the affidavit.

(2) Declarations Against Penal Interest

When informants admit that they committed crimes, this fact will help establish the informant's reliability. *United States v. Harris,* 403 U.S. 573 (1971); *People v. Henry,* 631 P.2d 1122 (Colo. 1981)

(3) Providing Detailed Information About the Crime

Since a court must consider the "totality of the circumstances" in deciding whether there is probable cause, a highly detailed statement from an informant may allow a judge to conclude that the informant had access to reliable information about the criminal activity. *People v. Meraz,* 961 P.2d 481 (Colo. 1998).

(4) Other Ways to Boost Reliability

An officer may boost an informant's reliability in a number of ways.

(a) Traditional Methods

For example, a traditional method of boosting reliability in narcotics cases is to require an informant to conduct "controlled buys" of narcotics under the supervision of officers.

(b) Creative Methods

There are other rarely used ways to help boost an informant's credibility. These ways are limited only by the officer's creativity. The following is an example of a creative approach to boosting the informant's credibility.

Example:

An unreliable confidential informant told officers some very important information about the

suspect's criminal activity and told the officers where crime-related evidence was located in the home. In order to boost the informant's reliability, the officer told the informant that, if his information was untrue, he would be prosecuted. Further, the officer recorded the conversation. These factors impressed the court that the informant was telling the truth.

Another way to "boost" an informant's credibility is to take the informant to the magistrate and let the magistrate decide if he or she is reliable. If you use this alternative, you should strongly consider the following suggestions.

i. The informant's statement should be stated on a separate sheet of paper and appropriately marked so it can be incorporated into an affidavit.

ii. The statement should be written in the first person, that is, "I saw, heard, smelled, etc."

iii. The officer should prepare his or her own affidavit in support of the warrant and describe how the information was obtained from the informant.

iv. After the judge questions the informant, the informant should sign under the statement, "I swear under penalty of perjury that this statement is true."

v. Underneath the informant's signature, the magistrate should sign below the following statement, "I have examined (informant's name or other identifying information) under oath and find him/her to be truthful."

2. Personal Knowledge

The second factor in the establishment of probable cause based upon an informant's statement is establishing that the informant is speaking from first-hand knowledge, and not upon hearsay, rumor, or other unreliable sources. An offer must therefore state in the affidavit how the informant

obtained the information. In order to satisfy this requirement an officer should always state that the informant personally "saw," "heard," "smelled," etc. the crime-related evidence.

3. Protecting the Identity of Informants

If the informant wishes to remain anonymous, an officer should state, in the affidavit, the reasons the informant must remain anonymous (e.g., "disclosure of the identity of the informant will impair his/her future usefulness to law enforcement and will endanger his/her life").

Example:

Officers obtained a search warrant based upon an anonymous caller's report that Siegl was growing marijuana. Siegl requested a veracity hearing to determine the validity of the warrant and a court order requiring the disclosure of the informant's identity. The trial court reviewed the officers' notes and found the notes were authentic and the informant existed. The Colorado Court of Appeals concluded that Siegl failed to establish a good faith basis for questioning the informant's truthfulness because an accused must offer more than his or her bald assertion that the informant does not exist or that the informant's information must be false. *People v. Siegl,* 914 P.2d 511 (Colo. App. 1996).

D. Experience

The judge may consider an officer's experience, knowledge, or expertise in determining probable cause, if it is spelled out in the affidavit. *United States v. Ortiz,* 422 U.S. 891 (1975). An officer-affiant should always include his or her pertinent experience and that of any witness-informants. Remember that the judge is limited to what is in the affidavit when determining whether probable cause exists.

Example:

An apartment complex manager went into an apartment, where she saw no evidence of residential use. She did observe Styrofoam coolers lined with tin foil, a number of doughnut-shaped objects on railings inside the cooler covered by a mold-like substance, cases of canning jars, coolers containing soil, an air conditioner and humidifier operating at full capacity (in March), and three ultraviolet growing lights, one of which was in use. The court held that an affidavit containing this information, plus a statement detailing the particular investigative experience and knowledge of an officer with respect to the process of manufacturing and cultivating mushrooms, established probable cause for the issuance of a search warrant. *People v. Atley,* 727 P.2d 376 (Colo. 1986).

Compare with:

During an undercover drug buy, a broker told the undercover officer that he needed to go elsewhere to obtain the drugs from his source. The officer followed the broker to the defendant's property, where the broker drove to the garage, went inside, then returned to his truck and drove back with the drugs to meet the officer. The Court of Appeals held that there was insufficient probable cause to search the residence, as none of the observed activities occurred at or were associated with the residence. The court rejected the notion that probable cause was established based on the officer's knowledge that it was common for drug dealers to keep evidence of their drug dealings in locations used as storage facilities, including residence. *People v. Eirish*, 165 P.3d 848 (Colo. App. 2007).

E. Staleness

In order for a court to issue an order to search, the court must be given a reason to believe the crime-related evidence is still present in the place where it is said to be.

Example:

An officer stated in an affidavit, "Within the last 24 hours I have received information from [an informant] that he had seen marijuana . . . inside the apartment where a Ray Bauer lived . . . ." The officer never stated when the informant saw the evidence. The court ruled that the affidavit must state facts concerning where, how and when the informant received the information. Therefore, the evidence was suppressed. *People v. Bauer,* 552 P.2d 512 (Colo. 1976).

1. Types of Evidence

Whether probable cause has "disappeared," however, depends to a great extent upon the type of evidence in question. If the evidence naturally disappears quickly (e.g., baggie of drugs), probable cause will, likewise, be short-lived. On the other hand, if the evidence is of the type which naturally does not disappear (e.g., books and records), the officer will likely have probable cause for a longer period of time.

Examples:

Wickham's companion stabbed the victim while Wickham assisted. The two men then stole the victim's ATM card, wallet, a cell phone and pager, two VCR's and his stereo equipment. After police found the victim's body, Wickham was identified in ATM surveillance videos withdrawing funds from the victim's bank

account. Police then obtained a warrant to search his house for items stolen from the victim. Sixteen days after the murder, Wickham was arrested and his house was searched pursuant to the warrant. The Colorado Court of Appeals noted that the police did not link Wickham to the crime until he was identified ten days after the body was discovered, and it was only after he was identified as a suspect that probable cause was established to obtain a search warrant for his home. In addition, while the items sought by the warrant were easily disposable, there was reason to believe that Wickham still had them in his possession since officers had checked pawn records and found no signs that the items had been pawned. *People v. Wickham,* 53 P.3d 691 (Colo. App. 2001).

Cullen committed a murder, and approximately eight months later officers obtained probable cause to believe he was the killer. The officers obtained a warrant to search Cullen's residence for items utilized in the kidnapping/murders and scientific evidence such as hair, fiber, blood and fingerprints. The court ruled that the "affidavit did not list items which are consumable or readily disposable, such as narcotics or stolen property." Therefore there was probable cause to believe these crime-related items were present. Evidence seized under the warrant was admissible. *People v. Cullen,* 695 P.2d 750 (Colo. App. 1984).

Compare with:

The victim of a burglary told police that Erthal probably stole the property which included some "power-assisted carpentry tools." The officer went to Erthal's carpentry shop and saw "tools similar to those reportedly taken." Additionally, the officer noticed that Erthal's tire tracks "were similar to" those left at the scene of the burglary. About two months later the officer obtained a search warrant and seized evidence from Erthal's shop. The Colorado Supreme Court ruled that the evidence was not admissible at trial: "Due to the lapse of nearly two months between the deputy's observation of saw blades in Erthal's shop and the issuance of the warrant, there was no probable cause to believe that stolen goods were in the shop at the time the warrant was executed." *People v. Erthal,* 570 P.2d 534 (Colo. 1976).

A warrant affidavit recited information from an anonymous informant that, on December 9, 2002, he smoked methamphetamine at Miller's home that Miller had just finished manufacturing there. The informant also stated that Miller kept methamphetamine manufacturing supplies in his kitchen cabinets.

The affidavit also recited another informant's information that on or near January 6, 2003, Miller was manufacturing methamphetamine at a location other than his home. The Colorado Supreme Court held that the warrant for the defendant's home was stale as the information relating to that residence was about a month old. *People v. Miller*, 75 P.3d 1108 (Colo. 2003).

2. Continuous Course of Conduct

If the officer can show in the affidavit that the suspect is engaged in a continuous course of conduct, the information will not be stale even though it is impossible to show that the exact evidence is still present in the location to be searched.

Examples:

Masters was identified as a homicide suspect in large part based on his drawings depicting surprise attacks, gruesome death scenes and scenes of violence and sex, which were similar to the way the victim had been murdered. A forensic psychologist advised officers that it was likely that Masters would have continued to produce evidence of violent sexual fantasies after the crime. Officers therefore obtained a warrant to search Masters's residence for such materials. The Colorado Court of Appeals held that there was probable cause to believe that the materials would be found in Masters's home, and police were seeking evidence of Masters's "continued violent sexual fantasies to corroborate the psychologist's recent, not stale, theory of the case." *People v. Masters,* 33 P.3d 1191 (Colo. App. 2001), *aff'd* 58 P.3d 979 (2002).

Officers had probable cause to believe that Ball had been selling drugs between April 2 and April 23. The officers obtained a search warrant on April 30. The trial court ruled that the information was stale. However, the Colorado Supreme Court reversed, ruling that, because the "activity was of a continuous nature . . . illegal drugs probably were present in the defendant's residence when the warrant was issued." *People v. Ball,* 639 P.2d 1078 (Colo. 1982).

An affidavit detailed multiple drug transactions between the defendant and the confidential informant and stated that defendant had invited the informant to return to the home later to buy more cocaine. The Colorado Court of Appeals noted that the invitation to return was an indication that the drug dealing activities at the defendant's home were ongoing and could be expected to continue.

Thus, the court concluded that probable cause continued to exist when police executed the warrant 7 days after it was issued. *People v. Russom*, 107 P.3d 986 (Colo. App. 2004).

F. Corroboration

When an informant is unreliable, does not speak from personal knowledge or the information may be stale, the officer must obtain corroboration to support the information they have.

Examples:

Officers received an anonymous letter that Gates and his wife had $100,000 worth of drugs in their basement. The letter also stated that the Gateses were going to Florida to pick up more drugs and would drive back to Illinois with the drugs in the trunk. After the officer surveilled the Gateses activities and determined that the letter accurately predicted their movement, the officer obtained a warrant to search the Gates' car and home. The United States Supreme Court ruled that the officers corroboration of the details in the letter provided the judge with probable cause to issue the warrant. Therefore, the drugs in the house and car were admissible. *Illinois v. Gates,* 462 U.S. 213 (1983).

Note: This landmark case, which abandoned the two-pronged "*Aguilar-Spinelli*" test and created a "totality of the circumstances" test, has been adopted by the Colorado Supreme Court. *People v. Pannebaker,* 714 P.2d 904 (Colo. 1986). The importance of corroborating information under the new test cannot be overstated.

An anonymous caller reported to the sheriff that she had been in Seigl's house, she had seen large overhead lights on the second floor, she had been told by the tenant that the tenant and the owner of the house grew marijuana in the house, and she could smell a strong odor of marijuana in the house. The informant also verified the informant's description, obtained the electric bills from the house which showed a sudden and substantial increase in electric use during the most recent summer months, and checked on the ownership of the vehicles parked at the house. Thereafter, the officers obtained a search warrant. The Colorado Court of Appeals concluded that, by corroborating the tip of unknown veracity, the officers had established probable cause. *People v. Siegl,* 914 P.2d 511 (Colo. App. 1996).

Compare with:

An affidavit in support of a search warrant contained the following information: an anonymous informant stated to police that the marijuana was being sold at Titus's address; the informant had observed a large number of visitors to the address who stayed for short periods of time and had recorded license plate numbers and descriptions of the vehicles; and the informant also stated that she had smelled the odor of burning marijuana from the house. Although police confirmed that the license plate numbers reported matched the vehicle descriptions, attempts by a police informant to buy marijuana from Titus were unsuccessful. The Colorado Supreme Court upheld the trial court's determination that no probable cause existed to support the issuance of the search warrant for Titus's residence, since the corroborating evidence that the vehicles had the correct license plates attached did not establish that the owners of the vehicles were involved in illegal activity. *People v. Titus,* 880 P.2d 148 (Colo. 1994).

G. Misstatements and Omissions

A defense attorney may attack affidavits which allegedly contain misstatements or omissions.

1. Misstatements

Normally, misstatements by an officer or informant must be removed from the affidavit by a reviewing judge. If the remaining information contained in the affidavit does not establish probable cause, the evidence will be suppressed.

a. Misstatements by Informants

If a defendant can convince a court that something that the informant stated in the affidavit is probably untrue, the informant may have to be disclosed and may have to testify about the information.

Example:

An officer stated in his affidavit that the informant was in Dailey's home between May 10 and May 12, 1981, and that Carol Anderson lived in that home and was selling cocaine. However, the defense established that Carol Anderson did not live in the residence in question between May 10 and 12, 1981. The court therefore ruled that the informant must be

disclosed to testify about his statement to the officer. *People v. Dailey,* 639 P.2d 1068 (Colo. 1982).

However, the fact that the affiant's statement may differ to some degree from an informant's verbatim statement will not necessarily make the affiant's statement intentionally or recklessly false. More is needed to establish intentional falsity. *People v. Wilson,* 819 P.2d 510 (Colo. App. 1991).

b. Misstatements by Officers

An officer who intentionally or recklessly misstates the facts may cause evidence to be suppressed. *Franks v. Delaware,* 438 U.S. 154 (1978). At the very least, the portion of the affidavit which contains the misstatements will be stricken from the affidavit, and a determination then will be made whether the affidavit, as amended, states probable cause. *People v. Hampton,* 587 P.2d 275 (Colo. 1978). An officer who intentionally or recklessly misstates facts in an affidavit may not later rely upon the "good faith" exception. *People v. Kazmierski,* 25 P.3d 1207 (Colo. 2001).

Examples:

An officer presented an affidavit in support of a search warrant stating that the defendants had purchased known precursors to methamphetamine over a period of five months; that the materials were taken to a particular residence; that one of the defendants was observed by police driving a car while smoking something in a clear glass pipe; that another of the defendants was a former police officer who was terminated from duty while a SWAT team stood nearby; that the same defendant had a number of arrests for assault and marijuana cultivation, he had admitted to methamphetamine use at the time of that arrest, and officers found drug paraphernalia in the residence where marijuana was being cultivated at the time of the arrest. The trial court determined that the statements regarding the previous arrests for assault the reference to the SWAT team and the size of the bottles containing the precursor materials were all false and were made by the officer in reckless disregard for their truth. The Colorado Supreme Court upheld the trial court's decision to strike those statements from the affidavit and concluded that the redacted affidavit failed "to provide a nexus between the purchase of legal ingredients that could be methamphetamine precursors and illegal activity in the defendant's home." *People v. Kazmierski,* 25 P.3d 1207 (Colo. 2001).

An officer told a magistrate that a confidential reliable informant had provided the officer with accurate information on two prior occasions in order to establish the informant's reliability. When the court found that this fact was not true, the court suppressed the evidence. *People v. Massey,* 495 P.2d 1141 (1972).

Compare with:

A police officer requested a warrant to search the defendant's house, based on what he believed to be a finding of ether in defendant's car. This was granted by the magistrate because ether is used to manufacture methamphetamine. The substance in the car, however, was found to be rubbing alcohol. The Colorado Supreme Court held that the officer's initial determination that the container held ether was reasonable "and nothing in what he saw or smelled suggested that he should question that opinion or take further steps to verify it." Therefore, the search warrant was upheld based on the "good faith" exception. *People v. Young,* 785 P.2d 1306 (Colo. 1990).

Although there were some inconsistencies in the testimony of informants included in the affidavit regarding whether anyone was living at the residence in question, the trial court correctly determined that such inconsistencies were not sufficient to establish either that the officer or the informants made false statements intentionally. *People v. Dunkin,* 888 P.2d 305 (Colo. App. 1994).

Genrich claimed that certain statements in the officer's affidavit were contradicted in other written data in the possession of officers. The Colorado Court of Appeals affirmed the trial court's ruling that Genrich had failed to support his motion with fact-specific affidavits. Furthermore, the appellate court determined that any misstatements concerning information known about the bombs were interpretative in nature and relatively insignificant. *People v. Genrich,* 928 P.2d 799 (Colo. App. 1996).

2. Omissions

Omitting from the affidavit information, which the judge should know in assessing whether or not probable cause exists, can also cause evidence to be suppressed. If the omission relates to a particular statement in the affidavit and makes that statement misleading, the reviewing judge must "strike" the statement and then decide whether the rest of the affidavit shows probable cause. If the omission makes the entire affidavit "substantially misleading," then the entire affidavit will be rejected and any evidence recovered based on its execution will be suppressed.

Examples:

The failure of a search warrant affidavit to list every absent indicator of indoor marijuana cultivation was not a material omission which rendered the search warrant affidavit substantially misleading. The affidavit stated that windows of the defendant's office were covered with plastic and condensation had occurred on that plastic, and that two key indicators of indoor marijuana cultivation were a high degree of humidity, evidenced by the condensation on the windows, and the unusually high rate of electrical consumption. *People v. Wilson,* 819 P.2d 510 (Colo. App. 1991).

A reserve police officer who had been a social guest in Sundermeyer's home told police that he was growing marijuana in his greenhouse. The next day, officers confirmed the report when they saw the marijuana through the transparent greenhouse glass. Thereafter, they drafted a search warrant affidavit based on their personal observations However, the police omitted that they initially learned of the marijuana from the reserve officer who was a visitor in the defendant's home. The Colorado Supreme Court found that the failure to state that police first learned of the marijuana from the reserve officer was not substantially misleading to the judge who issued the warrant. The omission therefore did not render the warrant invalid. *People v. Sundermeyer,* 769 P.2d 499 (Colo. 1990).

Affidavits supporting search warrants recounted reports of numerous interviews with the victims; the crime scene investigation; responses to the publication of a composite drawing of the suspect, including that of a friend of Page who reported that Page acted suspiciously after the shootings; an analysis comparing tread marks from the crime scene with Page's motorcycle; and a statement by a citizen who had seen a gun at Page's home. The affidavits did not include information concerning the number of

drawings of the suspect, other tips received, or inconsistent statements from the victims concerning the color of the motorcycle. The Colorado Court of Appeals concluded that the omissions from the affidavits did not make the affidavits misleading as to the existence of probable cause. *People v. Page,* 907 P.2d 624 (Colo. App. 1995).

An eleven year old child reported that Fortune had sexually abused him. The child's father told police that the child was capable of fabrication, but that he believed the child was telling the truth. The child's tendency to fabricate was left out of the search warrant affidavit. The Colorado Supreme Court held that the evidence of the child's tendency to fabricate would not have significantly affected the probable cause determination and that it was not "contrary evidence" which would require corroboration or a showing of the victim's credibility. *People v. Fortune,* 930 P.2d 1341 (Colo. 1997).

An undercover officer participated in a controlled drug buy with the broker. Following the purchase of drugs by the broker from the defendant, a warrant was obtained to search the defendant's premises. The affidavit did not include the following facts: the broker was a convicted methamphetamine cook and dealer, the broker possessed drugs when he initially met with the undercover officer, police officers only observed the broker go directly to the garage without speaking to any other person, including defendant. The Court of Appeals held that even if these facts were true, their omission did not render the affidavit substantially misleading. *People v. Eirish*, 165 P.3d 848 (Colo. App. 2007).

In 2007, a number of businesses in Yuma, Colorado, reported that counterfeit cash had been used at their establishments. A search warrant affidavit identified the defendant as a suspect based upon her use of some of the bills found to be counterfeit. She also had counterfeit bills in her possession when she met with the police on two occasions. The defendant claimed that the affidavit was misleading because it omitted the fact that she initiated the meetings with the police, and that she brought large sums of money to show them and only a small number of bills were actually counterfeit. The Colorado Supreme Court held that the omitted information did not render the affidavit substantially misleading as to the existence of probable cause. *People v. Kerst,* 181 P.3d 1167 (Colo. 2008).

H. Other Information

Officers should always err on the side of providing more than enough information in their affidavits. It is impossible to provide "too much" probable cause. Also, it is advisable to provide relevant photographs, diagrams, and other materials, and to refer to them in the affidavit.

IX. DESCRIBING THE PLACE TO BE SEARCHED

Officers must state the specific place or places to be searched in the warrant *and* the affidavit. The main reason for this requirement is that the Fourth Amendment states:

> ". . . [N]o warrants shall issue but upon probable cause, supported by oath or affirmation, and *particularly describing the place to be searched . . .*"

The following is a discussion of the places to be searched and how they should (and should not) be described.

A. Multi-Unit Premises

The main problem relating to specifically describing areas to be searched relates to the failure of officers to state which particular unit of a multi-unit structure is to be searched. Officers must be careful before seeking a warrant to establish exactly what unit or units are to be searched, and then must be careful to describe that particular unit. As stated by the Colorado Supreme Court:

"The courts are generally agreed that where a structure is divided into several occupancy units, or is a multi-unit dwelling and there is no common occupancy of the entire structure by all of the tenants, a search warrant which merely describes or identifies the larger multiple-occupancy structure and not the particular subunit to be searched is insufficient to meet the constitutional requirements of particularity of description." *People v. Avery,* 478 P.2d 310 (Colo. 1970).

Examples:

An informant told officers that he had seen and purchased marijuana at a residence identified as 3740 South Delaware, which was a multi-family house. The officers obtained a warrant to search the house and discovered narcotics in various areas inside the house. However, the Colorado Supreme Court held that the affidavit and warrant failed to particularly describe the place to be searched. Therefore, the warrant was invalid and the evidence discovered was not admissible. *People v. Alarid,* 483 P.2d 1331 (Colo. 1971).

Officers obtained a warrant to search 1045 12th Street. The building was a single family residence but had a mailbox with many names on it. The house was used as a "rooming house." The officers searched the entire house and discovered incriminating evidence. The court ruled that, because the warrant did not specifically describe the rooms to be searched the warrant was invalid and the evidence was therefore suppressed. *People v. Avery,* 478 P.2d 310 (Colo. 1970).

Police obtained a warrant to search a single-story home occupied by the defendant's father. After entering the home to execute the warrant, one of the officers approached the back bedroom, and the defendant's mother said that the room was the defendant's, and that she only entered it to do his laundry. However, the door to the bedroom was open. The Court of Appeals held that the facts known to the officers established that the defendant's father - the person whose unlawful activities formed the basis for the search warrant - had ready access to defendant's bedroom, and therefore, the search of the defendant's bedroom for the contraband identified in the search warrant was constitutionally reasonable. *People v. Martinez*, 165 P.3d 907 (Colo. App. 2007).

Compare with:

An affidavit for a search warrant stated that crime-related evidence was located in an apartment at 3161 Madison in Boulder. The affidavit then described a second residence in greater detail at 664 Tantra Drive, noting that the officers actually visited that residence. Each page of the affidavit also contained the annotation, "Search Warrant: 3161 Madison N302," and the warrant presented with the affidavit identified the premises to be searched as "3161 Madison, Apt. N302." The warrant also specifically incorporated by reference the affidavit. The trial court concluded that the affidavit failed to identify or request a warrant to search Gall's apartment because the specific apartment number was not included in the body of the affidavit. However, the Supreme Court held that "when the warrant and annotation are considered along with the statement in the body of the affidavit identifying the defendant's address as 3161 Madison, there can be no doubt that the affiant effectively identified apartment N302 at 3161 Madison Avenue as the defendant's residence, one of the two residences for the search of which the affidavit provided probable cause." *People v. Gall,* 30 P.3d 145 (Colo. 2001).

B. Other Areas

Usually if there is probable cause to believe crime-related evidence is in the area to be searched, officers may search anywhere in that area. The following

is a brief discussion of problem areas relating to the search of areas described (or not described) in the warrant.

1. Other Structures on the Premises

If officers seek only to search a certain structure on the premises, they may normally not search other areas of the premises.

Examples:

Officers had probable cause to believe Weisenberger had crime-related evidence on his premises. They obtained a search warrant to search his residence, and when they did not find the evidence inside the residence the officers decided to search the chicken house behind the residence. The officers found the evidence inside the chicken house. The Colorado Supreme Court ruled that, because the chicken house had not been described in the warrant, the officers were not authorized to search it. Therefore, the evidence was suppressed. *People v. Weisenberger,* 516 P.2d 1128 (Colo. 1973).

An affidavit alleged that an informant had seen methamphetamine carried into a barn near Randolph's residence and had seen an individual smoking methamphetamine in Randolph's trailer. The affidavit also alleged that the informant knew that Randolph had sold marijuana in the past. The affidavit sought a warrant to search two of Randolph's trailers, his barn, and "all out buildings and all motor vehicles located on the property." In holding that the warrant was overbroad in its geographic scope, the supreme court stated, "The affidavit listed at least five separate buildings without connecting the alleged criminal activity to each of those buildings. At most, the affidavit alleged criminal activity in the barn and Randolph's trailer. In addition, nothing in the affidavit indicated common ownership of the property by Randolph." The evidence seized following the search was therefore suppressed. *People v. Randolph,* 4 P.3d 477 (Colo. 2000).

2. Vehicles on the Premises

Courts are reluctant to permit officers to search vehicles located on premises even when the warrant authorizes a search of premises. Normally, an officer should obtain a second warrant if there is probable cause to believe a vehicle on the premises contains crime-related evidence.

Examples:

Officers seeking an individual wanted on an outstanding arrest warrant discovered narcotics on the premises while they were searching. Officers left and obtained a warrant authorizing a search of the premises and "all vehicles" parked on the property. Upon returning to execute the warrant, police discovered a van parked in the driveway that had not previously been there. A search of the van revealed approximately 1,000 pounds of marijuana. The Colorado Supreme Court held that the language of the search warrant authorizing search of "all vehicles" was not impermissibly broad because the place to be search (i.e., the van) was sufficiently described so as to allow an officer to locate the object of the search with reasonable diligence. *People v. Juarez,* 770 P.2d 1286 (Colo. 1989).

Officers obtained a warrant to search a mountain cabin. After searching the cabin and discovering marijuana the officers searched Singleton's car, which was parked on the premises. The court ruled that the warrant did not authorize the search of the vehicle. Therefore, the evidence discovered in the car was suppressed. *People v. Singleton,* 516 P.2d 428 (Colo. 1973).

Note: Even if the warrant does not specifically authorize the search of a vehicle on the premises, an alternate theory, such as the automobile exception, might justify a search without the vehicle being described in the warrant.

Example:

During the course of a search conducted pursuant to a search warrant of Lee's residence, yard and garage, officers seized a vehicle parked behind his residence. A semi-automatic weapon was later found inside it. Statements by a witness had indicated that a gun was kept in a place accessible only by key, located in or near the rear yard. The Colorado Court of Appeals affirmed the trial court's ruling that there was probable cause to believe that a weapon might be found in the vehicle and that the warrantless seizure was proper because there was a practical risk that the vehicle would be unavailable if the police did not seize it during the search. *People v. Lee,* 914 P.2d 441 (Colo. App. 1995).

3. Closed Containers

If closed containers are located in the area described in the warrant and these containers could hold the crime-related evidence, the containers may be searched even if they are not particularly described in the warrant. If the container is "sealed" in some fashion, it is advisable to seize the container and then obtain a separate warrant authorizing a subsequent search.

Examples:

During the course of an investigation of a conspiracy to murder two of Gall's supervisors, officers obtained a warrant authorizing a search for writings, journals, and other information relating to the use of explosives. While executing the warrant, officers seized hundreds of written documents as well as two desktop model computers and five laptop computers. Additional warrants were later obtained to search the hard drives of the computers for evidence of the suspected conspiracy. In upholding the seizure of the computers, the Colorado Supreme Court held that the computers "were reasonably likely to serve as 'containers' for writings, or the functional equivalent of 'written or printed material,' of the type enumerated in the warrant." The court also approvingly noted that, rather than attempting to search those "containers," they were merely seized and additional warrants were obtained for a later search: "For various policy reasons, the removal of a sealed container, which may amount to an 'over-seizure,' is not only authorized but preferred in limited circumstances, including where 'the sorting out of the described items from the intermingled undescribed items would take so long that it is less intrusive merely to take that entire group of items to another location and do the sorting there.'" *People v. Gall,* 30 P.3d 145 (Colo. 2001).

Officers had probable cause to believe that Kelly had explosives and weapons in briefcases. The officers obtained a warrant to search Kelly's vehicle and searched all of the briefcases in Kelly's car. In two of seven briefcases the officers found papers which were used to convict Kelly of theft. The Arizona court ruled that because the warrant authorized the search of the vehicle the search of all of the containers therein was justified. Therefore, the evidence was admissible. *State v. Kelly,* 636 P.2d 1533 (Ariz. 1981).

4. Use of Diagrams or Pictures

If it is very difficult to describe the place to be searched, consider supplementing the warrant and affidavit with maps, diagrams, or photographs to specifically identify the place to be searched. Attach these exhibits to both the warrant and the affidavit, and specifically refer to them in the warrant and affidavit.

C. Proofreading

Always proofread the description of the place to be searched to make sure it is accurate, and to make sure the description is identical in the warrant and affidavit. It is easy to make a mistake, especially in an address. If you do not catch the error beforehand, you can be sure a defense lawyer will catch it later.

X. DESCRIBING THE PROPERTY TO BE SEIZED

Officers may seek a warrant to search for any evidence which is connected in any way to a crime. However, officers must state the specific property to be seized in the warrant and affidavit. The main reason for this requirement is that the Fourth Amendment states:

> . . . [N]o warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

The following is a discussion of persons or things to be seized and how they should (and should not) be described.

A. Describing Types of Property

Certain property is difficult to describe with "particularity." This problem usually occurs because officers are not able to get a specific description of the property.

B. Overbreadth

Sometimes officers list the items to be seized in such broad terms that there is no "meaningful restriction" upon what evidence may and may not be seized. The following are examples of descriptions which have and have not been ruled overbroad.

1. Overbroad Descriptions

An officer had probable cause to believe that Papez stole $7,000 worth of property from the victim's office. The officer listed the property as follows in the warrant: "electronic computers, calculators, lamps, vacuum cleaner, phone recorders." Nothing in the warrant identified the items by brand name, serial number, color, size of any other identifying detail. Although this list was an impermissibly general search warrant, the warrant was "saved" because the affidavit contained sufficiently specific information to satisfy the particularity requirement of the Fourth Amendment. *People v. Papez,* 652 P.2d 619 (Colo. App. 1982).

Note: Always make sure the property list in the warrant and the affidavit is the same.

2. Not Overbroad

Slusher was served a search warrant with an attached four-page affidavit prior to the search of his home. The warrant stated only that the property to be seized was property "which is or has been used as a means of committing a criminal offense; or the possession of which is illegal; or which would be material evidence in a subsequent criminal prosecution." While the Colorado Court of Appeals found the warrant invalid on its face because it did not particularly describe the items to be seized, it concluded that the attached accompanying affidavit cured the generality defect of the warrant. The particular description of the items to be seized was detailed on the last page of the affidavit and Slusher was thereby on notice as to what property the officers were entitled to seize. *People v. Slusher,* 844 P.2d 1222 (Colo. App. 1992).

Agents investigating fuel tax fraud obtained warrants to search for all records of Roccaforte's business. The trial court ruled that the records seized must be suppressed, finding that the "all records" warrants were overly broad because the allegations of fuel tax fraud implicated only a discrete part of the business. The Colorado Supreme Court reversed, finding that the breadth of the warrants was permissible because the warrants were reasonably designed to secure the evidence for which there was probable cause, since the alleged fraud was widely implicated throughout the business operation. *People v. Roccaforte,* 919 P.2d 799 (Colo. 1996).

Officers obtained a warrant to search for and seize "any and all narcotics and dangerous drugs as defined by the applicable Colorado statutes, the possession of which is illegal," and "all implements, paraphernalia, articles, papers and records pertaining to, or which would be evidence of, the illegal use, possession or sale of narcotics and or dangerous

drugs." The court ruled that this description was not overbroad. *People v. Leahy,* 484 P.2d 778 (Colo. 1970).

3. Indications of Ownership

Often in order to prove a case the prosecutor must show that the defendant actually possessed or owned the evidence related to the crime. In order to prove this fact officers often seek indications of ownership or possession through a warrant.

Example:

Hart's car collided with a truck and was later found abandoned. An officer impounded the car, and when Hart went to retrieve it the officer advised him to return with the driver. He never did. However, since the officer observed numerous personal items in the automobile which he believed would indicate the driver's identity, he prepared an affidavit to search for evidence of identification. The warrant authorized the "seizure of all evidence which may lead to the true identity of the driver of said vehicle." In upholding the warrant, the court noted that the language of the warrant was necessary to meet the practical problem of piecing together evidence of identity from a number of possible sources, and was sufficient to restrict the police from engaging in an exploratory search into, for instance, door panels and upholstery. *People v. Hart,* 718 P.2d 538 (Colo. 1986).

Here are examples of types of "ownership/possession" evidence that officers should consider listing in warrants and affidavits:

a. Premises

Utility bills, personal letters, insurance policies, rental/sale agreements deeds, photographs, etc.

b. Vehicles

Registration certificates, driver's license, insurance cards, etc.

C. Proofreading

Before you go to the judge, carefully check the description of the items to be searched for. Make sure it is accurate, and that the descriptions in the warrant and affidavit are identical. Watch for mistakes in serial numbers, VINs, and other such identifying information. A mistake can be easy to miss, but it may

provide a suspect's only hope later on. The best approach is to read the descriptions in one document aloud while someone reads the other.

XI. PRESENTING THE WARRANT AND AFFIDAVIT TO THE COURT

After drafting the warrant and affidavit an officer must take the documents to a judge.

Note: Never, never assume that the magistrate will correct the mistakes in your warrant or affidavit. You, and only you, are responsible for the accuracy and legality of your documents.

A. The Oath

After the judge reads the warrant and/or affidavit and decides that there is probable cause to search, the judge usually administers an oath to the officer. The officer then swears the truthfulness and accuracy of the information in the affidavit.

Example:

An officer seeking a warrant was told that all the judges were out of town and that a substitute judge, who was 70 miles away, would not be available until the next day. Because the officer could not swear to the affidavit before a judge, he had the clerk swear him in and then acknowledge his signature. The affidavit and proposed warrant were then faxed to the judge and the warrant was granted. The Colorado Supreme Court held that, although swearing-in before a clerk did not conform to the technical requirements of Crim. P. 41(c), the evidence seized under the non-conforming warrant did not require suppression where departure from the rule was justified by a showing of good cause. *People v. Fournier,* 793 P.2d 1176 (Colo. 1990).

B. Questioning by the Judge

If there is any question about the warrant or affidavit, the judge may ask the officer some questions. These questions may help the judge in his or her decision; however, these questions and answers cannot be used to establish probable cause. *People v. Padilla,* 511 P.2d 480 (Colo. 1973). This rule is commonly referred to as the "four-corners" doctrine. That is, the magistrate and reviewing courts are confined to the "four-corners" of the documents presented. If probable cause exists, but is not reflected in these documents, the other information is useless.

The only thing to do if information during the questioning arises which establishes probable cause but is not already included in the affidavit is the following:

1. The officer writes a separate, new affidavit including these facts. The second affidavit should specifically "incorporate" the first affidavit.

2. The officer writes in the missing details on the warrant or affidavit. The officer and the judge then should initial and date the addition or change.

C. Preservation of the Warrant and Affidavit

After the judge has signed the documents, the officer should place the affidavit and a copy of the warrant in an envelope. The officer should then seal the envelope and place his or her initials, badge number, date and time on the envelope. The envelope must then be delivered to the court clerk.

XII. SERVICE AND EXECUTION OF THE WARRANT

After the judge has authorized the search warrant, officers may serve it upon the place to be searched. The following are the legal issues involved in the execution of the warrant.

A. Time Limitations

Section 16-3-305(6), C.R.S. (2008), states that "A search warrant shall be executed within ten days after its date (of issuance)."

B. Forcible Entry

An officer may forcibly enter premises to execute a warrant only after knocking, "announcing," and waiting a "reasonable" time for a resident to respond, unless certain specific circumstances exist. This "knock and announce" principle is part of the Fourth Amendment "reasonableness" inquiry. *Wilson v. Arkansas,* 514 U.S. 927 (1995). However, in cases involving exigent circumstances, as when there is a threat of physical violence or evidence would be at risk of destruction in the event of an announced entry, a no-knock entry may be permissible. Advance approval is usually required for "no-knock" entries.

Example:

A search warrant affidavit alleged that the defendant was known to carry a gun in a holster and to have a shotgun by his front door because he was paranoid that someone was going to kill him. Based on this information, the police requested that the search warrant be an immediate entry

warrant for the safety of the officers. The Court first noted that to justify a no-knock entry, the police must have an objectively reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile. Here, the court held that because the warrant alleged specific facts indicating that the officers might reasonably be in danger if they were required to knock and announce their entry, there were sufficient exigent circumstances to justify the no-knock authorization. *People v. Russom*, 107 P.3d 986 (Colo. App. 2004).

Note: This issue is covered in detail in Chapter 3, **SEARCH AND SEIZURE – PREMISES.**

C. Displaying the Warrant

After entry, officers must show the warrant to a resident and give him or her a copy. *People v. Papez*, 652 P.2d 619 (Colo. App. 1982). If no one is at home, the officer should leave the copy of the warrant in a conspicuous place.

Note: Rarely, if ever, should an officer show a resident the *affidavit* or give the resident a copy.

Examples:

Prior to the execution of a search warrant a police officer informed the people near the front porch that a search warrant had been issued. However, the officers did not have the warrant when entry was made. Thirty minutes later, the officer with the search warrant arrived. The Colorado Supreme Court held that presentment of a search warrant prior to commencing the search is not an absolute constitutional requirement, although it is encouraged to avoid violence and noncompliance. *People v. Gifford*, 782 P.2d 795 (Colo. 1989).

See also People v. McKinstry, 843 P.2d 18 (Colo. 1993)(it is not constitutionally required to give the defendant a copy of the search warrant prior to the commencement of a search).

D. Searches and Seizures

Officers may search areas described in the warrant where the evidence may be located and may seize any crime-related evidence which they see in those areas.

1. Searches and Seizures of Persons

An officer may normally not search persons present at the scene, but may usually seize (detain) persons present who are associated with the areas searched.

a. Seizures of Persons

Officers, while executing a search warrant, may normally detain persons present who are associated with the premises.

Example:

Officers, who had a search warrant to search Summers's house, saw Summers come out of his home. The officers detained him and many others in the house while the officers searched the house. After the search was completed, in which crime-related evidence was discovered, Summers was arrested. In a search incident to arrest, the officers discovered narcotics on Summers's person. The United States Supreme Court ruled that is was proper to detain Summers during the search of the home. Therefore, the evidence discovered in the search incident to arrest was admissible. *Michigan v. Summers,* 452 U.S. 692 (1981).

Officers investigating a gang-related drive-by shooting obtained a warrant to search for deadly weapons and evidence of gang membership. In light of the high degree of risk of searching a residence suspected of housing at least one armed gang member, a SWAT team was used to secure the residence before the search. Officers detained the several individuals found in the home with handcuffs while they executed the search warrant. The United States Supreme Court held that the detention with handcuffs during the length of the search (2-3 hours) was permissible under the circumstances. *Muehler v. Mena,* 544 U.S. 93 (2005).

b. Searches of Persons

Normally a person present at the scene may not be searched unless the person is included in the warrant.

Example:

Officers, while serving a warrant to search a bartender and bar, frisked about a dozen patrons of the bar. An officer,

during the frisk of Ybarra, felt and seized contraband. The Court ruled that officers may not pat-down persons present during the execution of a search warrant unless the officers can state a specific reason why they feared for their safety. Therefore, the evidence discovered on Ybarra's person was inadmissible. *Ybarra v. Illinois,* 444 U.S. 85 (1979).

Officers executed a search warrant at a residence and found cocaine, handguns, rifles, shotguns, and knives. As the search was in progress, Martinez drove up to the residence and walked to the front door. Before he could enter the home, an officer drew his gun, ordered Martinez to stop and raise his hands, and then drop to his knees. Martinez began to comply but then made a sudden movement toward his pocket. The officer again ordered Martinez to raise his hands, and then handcuffed and frisked him. The Colorado Supreme Court concluded that under these circumstances, where the police were conducting a search with guns and drugs present and a third person approached, the officer "could not possibly know whether [he] was armed without performing a pat-down search." The frisk was therefore justified. *People v. Martinez,* 801 P.2d 542 (Colo. 1990).

Note: The Colorado Supreme Court reached the identical result in *People v. Hardrick,* 60 P.3d 264 (Colo. 2002) , even though the officers had not discovered firearms during the execution of the search warrant: "When there is an ongoing search or arrest and a third party voluntarily arrives at the scene, it is unreasonable to ask an officer to simply send the interloper away from the immediate area and hope that he is not setting himself up for an ambush. It is equally unreasonable for the officer to allow the third party into the volatile situation without insuring that the party is not armed."

2. Searches for and Seizures of Evidence

Officers may search anywhere in the area described in the warrant where the crime-related evidence may be located.

a. Premises

Officers should be careful when searching premises to search only areas described in the warrant and only for evidence described in

the warrant. If vehicles or outbuildings need to be searched, they should also be described in the warrant.

b. Closed Containers

While searching premises, an officer may search closed containers which could logically hold the evidence described in the warrant.

Example:

Officers searching for documents, under authority of a warrant, opened a leather pouch and found cocaine and paraphernalia. The court ruled that, because the documents could have been found in the pouch, the search was proper and the evidence admissible. *People v. Hearty,* 644 P.2d 302 (Colo. 1982).

A search warrant authorized officers to search an apartment for marijuana and LSD, and also "such vessels, implements, and furniture used in connection with the manufacture, production, storage, or dispensing of such drugs." Officers found a purse in a bedroom of the apartment which belonged to a juvenile who was a guest in the apartment. The Colorado Supreme Court concluded that the purse is fairly characterized as a "vessel" which could be used to store drugs, and therefore its search was authorized by the warrant. *People v. D.F.L.,* 931 P.2d 448 (Colo. 1997).

c. Business Records

Always be careful to search for and seize only those records authorized by the warrant.

Example:

Officers obtained a warrant to search for Tucci's business records between January 1, 1970 and February 10, 1971. The officers seized not only those records but also some records from 1969. The trial court suppressed all of the evidence because the officers' search far exceeded the scope of the warrant. The Colorado Supreme Court ruled that the officers "executing the warrant were trying in good faith to obtain documents relating to the prescribed period." The court further stated that "although the search was not as carefully or thoroughly conducted as it might have been, we cannot say that it was exploratory." Therefore, the records authorized by

the warrant were admissible. *People v. Tucci,* 500 P.2d 815 (Colo. 1972).

d. Plain View Seizures

While properly searching for evidence described in the warrant, officers may seize other evidence if they recognize it as crime-related when they see it.

XIII. RETURN AND INVENTORY

At the completion of the search, an officer must list the property seized and give a copy to a resident or leave the inventory in a conspicuous place. This inventory must be "made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present." Crim. P. 41. If they are not present, inventory the property in the presence of another officer. The original copy of the search warrant and inventory must then be taken to the court clerk according to departmental policy.

XIV. SUGGESTED TECHNIQUES

Always consider obtaining a warrant to search when the (only) basis for your search is probable cause. Always obtain a warrant to search premises and closed containers when your only legal theory for the search is probable cause.

A. Drafting the Affidavit

1. When drafting an affidavit, err on the side of including too much information. It cannot hurt and it may help a great deal.

2. The most common mistake officers make in writing an affidavit is to state conclusions instead of facts (e.g., "the informant is reliable"). Always state facts, not conclusions.

3. Do not substitute forms and checklists for good sense. If you understand probable cause you will not need the checklists as much.

4. Always try to get your legal advisor to look over your affidavit before you see the judge.

B. Proofreading

Always proofread the warrant and affidavit to make sure they state what you want them to say, and to ensure that there are no technical mistakes.

C. Execution of the Warrant

Except as it relates directly to your personal safety, you should consider the following suggestions when executing a warrant.

1. Forcible Entry

It is very difficult to justify a forced entry of premises to execute a search warrant unless you knock, announce, and wait a reasonable time before entry.

2. Detention of Persons Present

Avoid detaining persons present in the residence unless they are obviously residents who are directly related to the evidence sought.

3. Searches of Persons

Avoid searching persons present unless the warrant authorizes it. If you frisk any of those present, be prepared to state specific reasons for your belief that they may be armed.

4. Searches for Evidence

Search only those areas authorized by the warrant and where the evidence described in the warrant could be located.

Chapter 9

STATEMENTS

I. INTRODUCTION

This chapter discusses the importance of taking statements and the legal and practical aspects of interviewing and interrogation.

II. IMPORTANCE OF GETTING A STATEMENT FROM A SUSPECT

A suspect's statement relating his or her version of the facts surrounding an offense is often **very critical** to the success of the state's case. Even if the suspect makes only self-serving statements which are of no value at trial, or are legally inadmissible, the state is no worse off than if no statement were taken at all. It is therefore important to keep in mind that a suspect's statement:

is almost always very helpful; and

is never harmful.

A. Admissions and Lies

If the suspect committed the crime, **EVERYTHING** he or she says about the offense **MUST** be either an admission or a lie. These admissions and lies often make the difference between conviction and acquittal.

1. Admissions

An admission is **anything** the suspect says that ties him or her in any way to an element of the crime. It is sometimes difficult for an officer to know at the time of the interview what issues will be important or disputed by the defendant at trial. Sometimes, for example, because of the loss of evidence through suppression or missing witnesses, the only way a prosecutor can prove an element beyond a reasonable doubt is by the suspect's admissions. By asking a suspect about all elements and all possible defenses, the suspect will have to admit most (or, at least, many) aspects of the state's case, thereby aiding the district attorney immeasurably in proving the case at trial. Often, a suspect will not understand that his or her admission is as good as a confession.

Examples:

The driver of the robbery "getaway car" denies that he was involved in the robbery, but admits that he drove the car.

The rapist admits during an interview that he had intercourse with the victim, but says it was consensual. This admission may save a case in which the victim cannot identify the suspect or has injuries indicating that her contact with the suspect was forceful and not consensual.

2. **Lies**

Lies, even minor ones, can be devastating to the defendant. Not only does a defendant's lies demonstrate the extent of his or her actual guilt, but a juror who is shown that the defendant lied in a statement will often not believe anything the defendant says when he or she testifies.

Example:

A rape suspect tells an officer that he never saw the victim before. However, the state can establish through forensic evidence (e.g., pubic hair transfer, DNA, etc.) that the suspect had intercourse with the victim. By initially asserting lack of knowledge or alibi, the suspect closes the door on other, more viable, defenses at trial (e.g., consent).

B. Tying the Suspect to the Crime

A suspect's statement is one of the few ways he or she can be tied to the crime. If you will analyze how a case is investigated and prosecuted, you will realize that there are very few ways a criminal is tied to his or her crime.

1. Eyewitnesses.

2. Evidence found on the suspect which came from the crime (e.g., victim's blood or pubic hair, stolen property, etc.).

3. Evidence left at the scene by the criminal (e.g., fingerprints, DNA, etc.).

A statement is one of the most powerful ways to tie the suspect to the crime because it comes from the suspect's own mouth.

C. Predictability

A suspect's statement gives predictability to the state's case. In order to properly prepare a case, the district attorney must know what the likely defense will be. When a suspect gives a statement, he or she is forced to assert a defense at trial which is consistent with that statement. To do otherwise, the defendant has to admit at trial that he or she lied in the initial statement. The district attorney, then, can put all of the state's efforts into rebutting the statement.

Example:

A robbery suspect gives an alibi and an alibi witness's name. The officers alertly and immediately go see the alibi witness, who denies being with the suspect at the time of the robbery. The suspect is now caught in his own lie.

When a suspect is caught in his or her web of lies and admissions he or she has to testify at trial either:

1. that the officer is lying; or,

2. that the officer misunderstood what the suspect meant.

D. Effectiveness of an Early Statement

A suspect who is questioned immediately after apprehension will never be able to think up as good a story as he or she will later upon learning what incriminating evidence the state has and what the weaknesses of the state's case are. Even more importantly, the officer who does not take a statement from a suspect removes a very valuable weapon from the prosecutor's arsenal at trial.

The question (which is frequently asked of the defendant) is: "Why didn't you tell the officer that story?" However, a prosecutor cannot ask this question unless the defendant gave **some** story to the officer, and the officer took the steps necessary to insure that the statement is admissible at the trial. The legal reason is that, if the officer does not obtain a suspect's version of the incident, the officer has, in effect, asserted the suspect's right to silence for him or her. And, of course, a prosecutor may never convey to a jury, in any way, that the suspect asserted his or her Fifth Amendment rights. *People v. Cole,* 584 P.2d 71 (Colo. 1978).

Example:

Quintana crouched behind a display rack. A second suspect was found hiding behind a counter. The store had been ransacked and a bag of coins was located on a desk. Quintana was not questioned. At trial, Quintana offered the defense of duress by claiming the he was forced by the suspect to commit the crime. In order to rebut this defense, the prosecutor asked questions and argued to the jury that, if Quintana has been forced to commit the crime, then why did he not tell the police at the time of his arrest. The Colorado Supreme Court ruled that the references to Quintana's post-arrest silence was reversible error, and his conviction was "thrown out." *People v. Quintana,* 665 P.2d 605 (Colo. 1983).

E. Defenses Available

The naïve are always amazed when a defendant "gets off" even when the case against him or her appears to be "air tight." The experienced prosecutor and officer know that there has never been a case that a competent defense attorney could not think up a good defense to sway at least one juror.

Example:

Officers obtain a confession from the murder suspect but fail to ask him about his mental state that might rebut a defense of insanity. Later, the defense attorney presents a psychiatrist who testifies that the suspect was insane at the time of the crime, and other witnesses testify that the victim was a bum who needed killing.

Result: acquittal.

Getting a good statement usually forces the defense attorney to choose a less plausible defense than he or she would like, in order to present a defense that is consistent with the defendant's earlier statement to police.

F. Disproving the Defense

The state must not only prove the elements of the crime beyond a reasonable doubt, but it must also **disprove** any defense that is asserted by the defendant. Every seasoned prosecutor knows that it is typically far easier to prove the elements of the crime than to disprove, beyond a reasonable doubt, the suspect's defense. This become more true when the prosecutor does not have notice, through the suspect's statement to police, what the defense is likely to be.

A good defense attorney will usually concede the strong points of the state's case. The attorney will then "hammer away" at, and introduce evidence directed at, the weaknesses. Because the state's burden of proof is so high to contradict these defenses, the jury is often forced to find the defendant not guilty. A good officer can help the prosecution by determining what defense is likely to be offered at trial based upon the suspect's statement and then asking the suspect questions which will help to rebut that defense (or at least tie the suspect in tightly to some story).

Example:

An officer arrests the suspect for possession of a stolen vehicle. The officer does not bother to take a statement at the time of the arrest. At trial, the defendant testifies that John Jones owed him $500.00 and gave the car to the defendant as collateral. The defendant then says Jones left town but was supposed to come back soon. Had the officer "locked" the suspect into this story from the time of the arrest, further investigation could have been conducted to either locate Jones and prove the statement to be a lie, or establish that there was no John Jones in the first place. Without such an opportunity, the prosecutor is left without any information to "impeach" the defendant's story, and the defendant may likely be acquitted.

G. Juror Predisposition

A common myth about the criminal justice system is that jurors cannot wait to find a defendant guilty of a crime. Rarely is this true. Actually, the opposite is usually the case; jurors are predisposed to acquit the defendant. If you think about it, the reasons are obvious.

1. The juror is disgusted with the crime in general, but has a very difficult time pointing a finger at a particular individual and saying, "You're guilty." Nearly every prosecutor has heard a jury who has just acquitted a defendant say "We knew he was guilty but there wasn't enough evidence."

2. Most competent defense attorneys are adept at:

   a. Portraying the state as big and powerful and the defendant as the poor and defenseless underdog.

   b. Making the state's witnesses the real villains, including (and sometimes especially) the officers who investigated the case.

   c. "Clouding" the real issues by making the jurors decide on the basis of compromise and emotion rather than facts.

Statements obtained from the suspect help eliminate any excuses to acquit, as they are lies or admissions from the suspect's own mouth.

H. Suppression of Other Evidence

Often, due to evidentiary and constitutional rules, evidence is suppressed. When this occurs, the state may be forced to dismiss the case unless a portion of the defendant's statement fills the gap left by the suppressed evidence.

Example:

Officers arrest the murder suspect. Later, they search the suspect's briefcase without a warrant and find a gun inside. Fingerprints are later lifted from the gun and ballistics tests establish that the bullets found in the victim's body came from the gun. However, the gun is suppressed because the officers failed to obtain a warrant. If officers had taken a statement and the suspect had admitted the shooting (e.g., in self defense) the suppression may not be fatal to the state's case.

I. Leaving the Questioning for Detectives

Too often, the street officer feels that taking statements is the job of detectives trained in the art of interrogation. The problems with this attitude are:

1. In many types of cases there is only a slim chance that a detective will talk to the suspect before an attorney is appointed. Once the suspect gets an attorney, there is almost no chance of obtaining a statement from the suspect.

2. Many suspects want to talk, or give their side of the story, at the time they get caught. However, they often change their minds later when they know they are going to jail and they realize that talking will only hurt them.

   Note: If you are prohibited by your department from taking statements in certain types of cases, do not discuss the crime with the suspect. If you converse with the suspect about the crime prior to advising them of their rights *(Miranda)* not only will that statement, but perhaps a later statement, may be ruled inadmissible in court.

J. Officer's Ignorance of the Facts

An officer should always try to find out everything he or she can about a crime before taking a statement. An officer should, however, never refrain from taking a statement because he or she knows little or nothing about the

crime. Often, for example, an officer will arrest a suspect on an arrest warrant and know nothing about the facts of the offense. Even if nothing is known about the crime, the officer should warn the suspect, get a waiver and inquire about the suspect's participation. Even a question like, "What's this all about?" or "What's your side of the story?" will often get an important response.

Note: If you get statements from suspects picked up on warrants from other states, you will not only be a hero in those states but also take some nice paid "vacations" to go testify.

K. Details

Whether you are very familiar with the facts of the case or completely ignorant of the facts, it is not difficult to get important details from a "talking" suspect if you know the elements and likely defenses of the crime. You will also be much more successful in obtaining a detailed statement if you assure the suspect that you are very interested in and believe the story being told to you.

Getting as many details as possible (where, when, who, why, what) is very important, not only in tying the suspect tightly into his or her story, but also preventing the suspect from later testifying that the officer misunderstood what the suspect said.

Example:

Bardwell robbed a 7-11 and Clovis drove the getaway car. After their arrest, Bardwell admitted that he committed the robbery, that Clovis drove the car, and that they had planned the robbery. Clovis admitted that he drove and that Bardwell robbed the store. Officers, however, never asked Clovis if they had planned the robbery. At their joint trial both confessions were introduced. Clovis took the witness stand and testified that he did not know Bardwell was going to rob the store. He (Clovis) thought Bardwell was just going to steal food. Both Clovis and Bardwell were convicted of the robbery. However, Clovis's conviction was reversed because, since Bardwell never testified, Clovis was unable to exercise his Sixth Amendment right to cross-examine Bardwell on his statement that *they* had planned the robbery. The court stated that "the clear inference of [Clovis's] confession is his knowledge that Bardwell was going to rob the market. However, as we pointed out, the interrogator did not 'nail down' the defendant, thus allowing leeway for defendant's strategy at the trial." *State v. Clovis,* 618 P.2d 245 (Ariz. App. 1980).

Note: Always keep all of the elements of the crime being investigated in mind when questioning a suspect. Also, if multiple suspects confess, confront each with the other's statement to see if he or she changes the statement or agrees with the other statement.

L. Obtaining More Than One Statement

If the suspect committed the crime, he will rarely give the same detailed denial twice. There will always be inconsistencies. The extent of the inconsistencies will depend upon what information the officer has obtained to contradict the prior statement given.

Example:

A witness told an officer that his motorcycle had been recently stolen and that the suspect was sitting on it talking to some friends. The officer confronted Morse and asked him where he had obtained the motorcycle. Morse said he had purchased it from a friend of one of the men he was talking with. The officer then asked the "friend," who denied any knowledge about the sale. The officer then returned to Morse and confronted Morse with what the friend said, and Morse then said he found the motorcycle in the desert. The officer later confirmed that the motorcycle had in fact been stolen. Here, because Morse had provided two inconsistent statements about where he had obtained the motorcycle, a conviction was almost assured. *State v. Morse,* 617 P.2d 1141 (Ariz. 1980).

M. Determination of Innocence

Unless the facts are overwhelming against a suspect, an officer should always consider the possibility that the suspect is innocent. Never be closed minded. Many times a plausible explanation by a suspect has resulted in the release of the suspect by an honest and professional officer.

N. Taped, Written, Oral Statements

There is no difference between the *admissibility* of a taped, written, or oral statement. However, as a practical matter, taped and transcribed statements will, of course, be *much stronger and more persuasive* evidence against the accused. A suspect need not consent to, or even have knowledge of, the recording in order for the recording to be admissible. *United States v. White,* 401 U.S. 745 (1971): *People v. Velasquez,* 641 P.2d 943 (Colo. 1982).

In addition, the Colorado Court of Appeals has held that the prosecution is under no duty to reduce to writing statements made to witnesses during interviews. *People v. Raibon,* 843 P.2d 46 (Colo. App. 1992). Keep in mind,

however, that the prosecution is obligated to disclose all statements made by the suspect as part of automatic disclosures required by the rules of criminal procedure. Also be mindful that failing to document and preserve a suspect's statements (or any other statement, including your own) increases the likelihood that your credibility will be attacked as to that statement and may decrease the persuasive effect of the particular statement being offered.

Note: One of the most valuable investments an officer can make is in a pocket tape recorder.

O. Practical Problems

There are a number of practical problems in the taking of a statement. The problems in order are :

getting the suspect to talk;
getting the suspect to talk about the crime;
keeping the suspect talking.

1. Getting the Suspect to Talk

Some people are really good at striking up a conversation with anyone. These are normally people who are confident and can make the other person feel worthwhile. An important point to remember is that if any hard feelings developed as a result of the stop, arrest, etc., do not try to talk to the suspect. Get a "friendly" officer to come and talk to the suspect.

2. Getting the Suspect to Talk About the Crime

Many officers think that suspects do not want to talk about the crime. This is often not true. Suspects usually want to explain their side of the story. Many times their story will either be totally unbelievable or their excuse will sound very weak, but almost always the suspect wants to get it off his or her chest.

3. Keeping the Suspect Talking

It is very important that an officer keep the suspect talking. The best way to do this is to be genuinely interested in the story. Sympathize with the suspect. Never convey to the suspect that the conduct being described was reprehensible. The suspect will try to make you believe that if you were "in his shoes" you would have done the same thing.

4. Documenting

The first moment you get a chance, document exactly what the suspect said to you. Better yet, audiotape and/or videotape the conversation if possible.

P. Suggested Techniques

1. Understand that the taking of a statement may be the most important piece of evidence at trial.

2. Get a tape recorder. If your department will not purchase it for you, buy one yourself. Tape everything you say to a suspect and what he or she says to you (subject to your District Attorney and Departmental policies) and provide the tape to the district attorney when the case is filed. If you do not obtain a tape recorded statement, write down a short summary of the suspect's statement. Show it to the suspect and ask him if the writing represents a true statement of what the suspect said. If the suspect says "yes," ask the suspect to initial the paper.

3. Never, never think someone else is going to get a statement. Unless your department prohibits you from taking a statement, always find out what the suspect's story is.

4. Document everything in your reports.

5. If you are uncomfortable about the practical aspects of getting a statement, talk to the detectives and others in your department who are good at it. Everyone has a different style, but almost anyone will tell you that if you are sincerely interested in the suspect's story the suspect will want to tell it to you.

6. Never assume anything. Try to pretend that you will have to take an exam on what the suspect said. Did you cover the elements and defenses or at least "tie them in" to a story?

7. The purpose of taking a statement is to get all information relating to the crime. Think of the suspect as a witness; if he or she committed the crime, he or she was a witness.

III. THE EXCLUSIONARY RULE

When an officer takes a statement in violation of a suspect's rights the statement and all evidence gathered as a result of the statement is not admissible in court. An officer violates a person's rights when he or she takes a statement when the suspect:

Gives an involuntary statement (*see* Section IV);

Has been unconstitutionally seized (*see* **SEARCH AN SEIZURES – PERSONS**);

Is in custody and makes a statement in response to questioning without waiving his or her Fifth Amendment *Miranda* rights (*see* Section V).

A. Searches

If an officer conducts a search based upon a statement in violation of a suspect's rights, the evidence seized may be suppressed. However, tangible, physical evidence discovered following a *Miranda* violation, as opposed to an involuntary statement, will not be suppressed.

Examples:

While investigating the defendant for violation of a temporary restraining order, agents arrested him, then asked about the location of his weapon. The defendant had not been fully advised of his *Miranda* rights, nor had he executed a valid *Miranda* waiver at this time. However, he told the police where the weapon was, and it was recovered. The United States Supreme Court held that the failure to give a suspect the *Miranda* warnings prescribed by did not require suppression of the physical fruits of the unwarned but voluntary statements. *U.S. v. Patane*, 542 U.S. 630 (2004); *see also People v. Dunlap*, 124 P.3d 780 (Colo. App. 2004) (discovery of a weapon).

The defendant was interrogated, during which time he invoked his right to counsel. The interrogation then continued, and the defendant made various incriminating statements. Toward the end of the interrogation, the defendant consented to a swab of his mouth for DNA. The Colorado Supreme Court held that because the swabs of the defendant's mouth were not collected in violation of the Fourth or Fifth Amendment, and instead merely followed a *Miranda* violation, the physical evidence was admissible. *People v. Bradshaw*, 156 P.3d 452 (Colo. 2007).

The defendant was interviewed by two police officers, although he had previously invoked his right to counsel. During this questioning, the defendant described the area in which the victim's body was located and drew the officers a map to help them find the body. The Court of Appeals held that the physical evidence was not required to be suppressed, despite the *Miranda* violation. *People v. Gosselin*, 205 P.3d 456 (Colo. App. 2008).

Note: Under some circumstances, evidence obtained as the result of a violation of a suspect's constitutional rights may be admissible if the prosecution can establish that the discovery of crime-related evidence was obtained from a source "independent" of the constitutional violation, or if the evidence would have been "inevitably discovered" through other independent investigative avenues. However, these are difficult theories to establish and tend to be avenues of last resort in efforts to save otherwise inadmissible evidence.

B. Seizures

When an officer unconstitutionally seizes a suspect, any statement taken after the seizure may be inadmissible.

Example:

The officers arrested Davis, without a warrant and in his home, and transported him to the police department, where they placed him in an interrogation room, gave him a *Miranda* warning, and obtained his signature on a written form waiving his *Miranda* rights. The Colorado Supreme Court held that even if the defendant's arrest was unlawful, his subsequent statements at the station, following valid Miranda warnings, were admissible. *People v. Davis*, 187 P.3d 562 (Colo. 2008).

Compare:

Officers obtained an arrest warrant for Moreno based upon a complaint that Moreno stole some property. Unfortunately, the complaint did not state how the officer knew Moreno committed the theft. Moreno was thereafter arrested and he provided a statement. The court ruled that Moreno was seized unconstitutionally because the complaint failed to state whether the officer spoke from personal knowledge of the information. Therefore, the statement obtained as the result of the illegal seizure was suppressed. *People v. Moreno,* 491 P.2d 575 (Colo. 1971).

C. Statements

When an officer takes a statement in violation of a suspect's rights, any statement taken after that statement is in danger of being suppressed. The court reasons that once the "cat is out of the bag," the suspect's future statements are tainted by the original violation.

Example:

Officers suspected that Corbett had shot the victim but they did not have reasonable suspicion to detain him. The officers picked him up and detained him anyway. During the questioning Corbett denied involvement in the shooting but admitted that he owned a 12-guage shotgun, and that his friend owned a 20-guage shotgun (the same type used in the murder). The officer then said he thought Corbett was the killer, advised him that he was going to conduct ballistics tests, and left. Four hours later Corbett went to the sheriff's officer and repeated his earlier statements. The court ruled that Corbett's admissions and the officer's taunt "could well have pressured [Corbett] to give the later statements and to submit to further questioning." All statements were suppressed. *People v. Corbett,* 547 P.2d 1264 (Colo. 1976).

This does not mean an officer should just give up on talking to a suspect who has been unlawfully questioned earlier. An officer might be able to get an admissible second statement if the first statement is voluntary, and there is some intervening event that "attenuates the taint" of the first, unwarned, statement. Often, a valid *Miranda* advisement and waiver prior to the second statement is considered a sufficient attenuating event.

Examples:

Two officers went to the home of a teenage boy (Elstad) during the investigation of a burglary. While one of them took Elstad's mother into the kitchen to explain why they were there, the other officer sat with Elstad in the living room and, in the course of conversation, asked him about the burglary. Elstad admitted he had been at the scene. The statement was suppressed because no *Miranda* advisement had been provided prior to the admission. Subsequent statements, that were obtained after a proper *Miranda* advisement, were also suppressed on the theory that, by making the prior unwarned statements, the subsequent statements were tainted because the "cat was out of the bag." The United States Supreme Court agreed that the first unwarned statement was inadmissible. However, it ruled that since the first statement was voluntary the later statement was admissible even though Elstad had been not been told that the first statement could not be used against him. *Oregon v. Elstad,* 470 U.S. 298 (1984).

Taylor was stopped and detained by police while his car was searched incident to the arrest of his girlfriend. During the search officers found a small black case, and Taylor admitted that it contained a small quantity of cocaine. After his arrest Taylor was transported to jail and, during routine intake procedures, he was asked if he had ingested any illegal substances. Taylor admitted he had used cocaine earlier in the day.

Later, Taylor was taken to an interview room by a detective and, for the first time, was advised of his *Miranda* rights. Taylor then made additional admissions. Although the Colorado Supreme Court held that Taylor's initial pre-*Miranda* statements were inadmissible, his post-*Miranda* statements would be admissible so long as both his pre- and post-*Miranda* statements were voluntary. The court found that, under the totality of the circumstances, defendant's statements to police were voluntary, and his post-*Miranda* statements were therefore admissible. *People v. Taylor,* 41 P.3d 681 (Colo. 2002).

Hamilton, suspected of stealing a VCR from his roommate, was at the residence when an officer arrived to investigate. The officer and the roommate discussed the robbery in front of Hamilton, and the officer then turned to Hamilton and asked, "What's happening here between you and [the roommate]? Hamilton made an incriminating statement, and only then was given a *Miranda* advisement. He then made three more incriminating statements, which were suppressed by the trial court as the illegal product of Hamilton's initial unwarned statement to the officer. The Colorado Supreme Court reversed the suppression of Hamilton's subsequent statements. The court adopted the *Elstad* approach to the extent that the subsequent statements would be admissible only if the first unwarned statement was voluntary and the subsequent statements were preceded by a valid waiver of *Miranda* rights. The case was returned to the trial court to determine whether Hamilton knowingly and voluntarily waived his rights. *People v. Hamilton,* 831 P.2d 1326 (Colo. 1992).

Compare with:

Jones was being questioned following his illegal arrest, and confessed to officers. His confession was interrupted by an officer asking him if he would repeat his statement on videotape. Jones agreed, and while the officers were setting up the video equipment they discovered a warrant for Jones's arrest for an unpaid fine on a municipal matter. Without verifying the warrant's existence or talking to Jones about it, officers re-*Mirandized* him and videotaped his second confession 15 minutes later. The trial court suppressed Jones's statement as the product of an illegal arrest. The prosecution appealed, claiming that the second statement was admissible because the passage of time between the confessions and the discovery of the arrest warrant attenuated the taint of the illegal arrest. The Colorado Supreme Court disagreed, finding that neither factor, either alone or cumulatively, contributed anything to the issue of whether Jones's second statement was a product of his own free will. *People v. Jones,* 828 P.2d 797 (Colo. 1992).

In the situation in which a suspect has provided an "unwarned" statement, an officer should do all possible investigation and collect all possible evidence before obtaining a second statement. That evidence should also be obtained without using the information obtained from the first "tainted" statement. That way, even if the court will not accept the suspect's statements, the evidence gathered will nevertheless remain "untainted" and should be admissible.

D. Suggested Techniques

The most important thing an officer must remember is that statements, searches, and seizures are usually intertwined. A constitutional mistake in one area can greatly affect the other areas, and the admissibility of evidence. It is very important, therefore, to understand not only the laws regarding statements, but also the laws of search and seizure.

IV. VOLUNTARINESS

In order to be admissible in court, a suspect's statement must have been "voluntarily" given. "Involuntary statements are excluded from evidence 'not because such confessions are unlikely to be true, but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours . . . is a system in which the State must establish guilt by evidence independently and freely secured . . .'" *People v. Freeman,* 668 P.2d 1371 (Colo. 1983).

When a suspect challenges the voluntariness of a statement, the prosecution bears the burden of establishing by a preponderance of the evidence that the suspect made the statement voluntarily. "Critical to any finding of involuntariness is the existence of coercive governmental conduct, either physical or mental, that plays a significant role in inducing a confession or an inculpatory statement." *People v. Valdez,* 969 P.2d 208 (Colo. 1998). In determining whether a statement is made voluntarily, the courts look to the "totality of the circumstances." Among the factors that the courts consider are:

whether the defendant was in custody;
whether the defendant was free to leave;
whether the defendant was aware of the situation;
whether the police read *Miranda* rights to the defendant;
whether the defendant understood and waived *Miranda* rights;
whether the defendant had an opportunity to confer with counsel or anyone else prior to or during the interrogation;
whether the statement was made during the interrogation or volunteered later;
whether the police threatened the defendant or promised anything directly or impliedly;

the method or style of the interrogation;
the defendant's mental and physical condition just prior to the interrogation;
the length of the interrogation;
the location of the interrogation; and
the physical conditions of the location where the interrogation occurred.

People v. Medina, 25 P.3d 1216 (Colo. 2001).

A. Conduct of the Officers

The law relating to an officer's conduct while taking a statement is that the statement "must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." *People v. Parada,* 533 P.2d 1121 (Colo. 1975). However, the law requires a causal connection between police misconduct and the statement. In other words, the conduct of the police must *play a significant role* in inducing a confession or an inculpatory statement.

1. Physical Abuse

Physical abuse immediately before or during the taking of a statement will likely result in the court ruling that a statement was involuntary.

Example:

Tom offered to sell stolen money orders to an undercover agent. Tom and the agent met in a motel room wired for sound. When Tom pulled a gun on the agent, officers entered, knocked Tom down, struck him, and shoved the barrel of a shotgun in Tom's face. As an officer read Tom his rights, other officers cursed and threatened to kill him. Tom was then handcuffed, a towel was placed over his head, and he was placed in a chair. Tom was advised again, whereupon he waived his rights and gave a statement. Under these circumstances, the Arizona court ruled that the statements obtained were involuntary. *State v. Tom,* 613 P.2d 842 (Ariz. 1980).

Note: If a suspect gets "roughed up" or injured during an arrest, always allow the situation to "cool down." Then have a "friendly" officer attempt to take a statement.

2. Threats

Threats made by officers in order to obtain a statement may result in the suppression of the statement.

Examples – Statements Voluntary

While executing a search warrant officers detained Miranda-Olivas and his girlfriend. Miranda-Olivas initially made an incriminating statement but later denied any involvement in drug trafficking. Officers then confronted him with his prior statements and told him that it was important to tell the truth. After speaking with Miranda-Olivas's girlfriend, who provided additional information incriminating Miranda-Olivas, officers again confronted him, told him they thought he was lying, and stated that they "didn't want to see [the girlfriend] get drug into this thing if she is not actively involved." Miranda-Olivas then made incriminating statements. In reversing the trial court's finding that the statements were involuntary, the Colorado Supreme Court recognized that "the deliberate exploitation of a person's weaknesses by psychological intimidation can, under certain circumstances, constitute coercion rendering a statement involuntary." However, here the officer's reference to the girlfriend was made while urging Miranda-Olivas to tell the truth; the officers statements were not a threat to arrest the girlfriend but rather an attempt to ascertain the truth. The court recognized that "police encouragement to a defendant to tell the truth does not amount to coercion." *People v. Miranda-Olivas,* 41 P.3d 658 (Colo. 2001).

Quinn was convicted of introducing alcohol into the jail based on a confession and corroborating evidence. Quinn claimed that she made the confession involuntarily because she was in danger of losing her job as a deputy sheriff if she did not cooperate. The court of appeals held, however, that Quinn's experience as a deputy sheriff, together with the fact that she was never threatened with losing her job, was enough to support the finding that she voluntarily confessed. *People v. Quinn,* 794 P.2d 1066 (Colo. App. 1990).

Fury and his wife, who was a passenger in the automobile, were involved in an eluding that resulted in a traffic collision. The two traded places in the car before the police arrived and then initially stated to the officer that the wife was the driver of the vehicle. However, after being told by the officer that it was a crime to give misinformation to a police officer Fury admitted that he was in fact the driver of the vehicle. The court of appeals upheld the trial court's determination that Fury's statement was given voluntarily, holding that an officer's statement to a suspect that it is illegal to give out misinformation to the police does not constitute a threat undermining the voluntariness of the suspect's subsequent statements. *People v. Fury,* 872 P.2d 1280 (Colo. App. 1993).

Officers serving a search warrant advised Fox of his *Miranda* rights, which Fox exercised by demanding the presence of a lawyer before questioning. Officers then opened a safe found in the residence that contained contraband. Fox then asked what was going to happen to his girlfriend, and was told by officers that she was going to be jailed. Fox replied, "Why? Everything there is mine." The officer then asked "You mean the cocaine and the money are yours?" Fox replied "Yes. The cocaine and the money are all mine." Under these circumstances the Colorado Court of Appeals ruled that Fox's statements were voluntary because Fox, and not the officers, raised the issue of his girlfriend's status. *People v. Fox,* 691 P.2d 349 (Colo. App. 1984).

The defendant was interrogated for making bomb threats. During this interrogation, detectives told the defendant that the bomb threats could be charged as a state or federal offense, that the FBI takes bomb threats very seriously, and that the punishment upon conviction would be much more severe if the charges were brought at the federal level. The detectives also asked questions of the defendant, "Do you want to ruin your life on a stupid prank ... [?] Do you want to lose your children?" The court found that, under the totality of the circumstances, any threats or promises did not play a significant role in inducing the defendant to confess, thus her statements were not involuntary. *People v. Blessett,* 155 P.3d 388 (Colo. App. 2006).

Examples – Statements Involuntary

Officers investigating an incident of child abuse identified the child's father, Medina as a suspect. Medina was later ordered not to have contact with the child while the investigation was proceeding. Medina testified that he was told by officers that "if one person wasn't named as a claimed suspect (i.e., Medina or the child's mother), if one person wasn't found at fault, that they were going to take [the child] from both of us." Medina then went to police headquarters and gave a statement. After providing the statement Medina asked the detective whether he could see his son, and the detective replied "You didn't help anything . . . why should I." The following day Medina returned to the police station to provide another statement because "this way at least [the child] will be with [the child's mother]." Medina then confessed to shaking the child. The Colorado Supreme Court upheld the trial court's finding that Medina's statements were involuntary because the police conduct was calculated to cause Medina to believe that: (1) unless he confessed, the detective would cause the child to lose

his mother and (2) if he did confess the mother and child would be together and the detective would help Medina to be reunited with them. The court concluded that the statements amounted to improper threats which, in light of Medina's emotional and psychological condition, played a significant role in inducing Medina's incriminating statements. *People v. Medina,* 25 P.3d 1216 (Colo. 2001).

An officer stopped Thomas because of an altered temporary sticker. Thomas appeared nervous and the officer asked for permission to search him and his vehicle. Thomas consented, and a pat-down search uncovered a pot pipe in his pocket. The officer told him that he was not under arrest, that he was just being detained, and if nothing else was found on him or in the car he would only receive a ticket for possessing paraphernalia. The officer asked Thomas if he possessed any drugs and Thomas replied that he had pot in his pack. The officer then said, "You'd better not be lying to me" and Thomas then admitted that he had cocaine in his pack also. Taking all of these factors into consideration, the Colorado Supreme Court found that the statements made by Thomas were not voluntary, but in response to the coercive conduct of the officer. *People v. Thomas,* 839 P.2d 1174 (Colo. 1992).

McIntyre was suspected of sexually abusing his son. During the police interview, the officer first brought up the recent death of McIntyre's brother. When McIntyre became despondent, the officer threatened him with immediate arrest, a $50,000 bail, and a long prison term. McIntyre, at this point, gave the police a written confession. The statement was later suppressed because it was involuntary in light of the officer's threats. *People v. McIntyre,* 789 P.2d 1108 (Colo. 1990).

See also People v. Corley, 698 P.2d 1336 (Colo. 1985)(detective's threat to immediately incarcerate a suspect if handwriting exemplars were not provided rendered involuntary the suspect's subsequent statement that she only knew how to print).

3. Mental Coercion

The use of psychological ploys in order to get the suspect to tell the truth will sometimes result in "coercion" that renders a suspect's statement involuntary.

Example – Statement Involuntary

Freeman was arrested after a reverse-sting operation in which Freeman sold stolen cars to undercover officers after first killing the owners of the cars. While being interviewed the officers employed a version of the "Mutt and Jeff" technique (good cop/bad cop), they misrepresented the results of forensic testing and minimized the penalty Freeman faced if convicted. The officers also threatened to arrest his brother if Freeman did not make a statement regarding the murders. Freeman eventually replied, "turn my brother loose," and then made incriminating statements. The Colorado Supreme Court held that, based upon the totality of the circumstances, Freeman's confession was involuntary. *People v. Freeman,* 668 P.2d 1371 (Colo. 1983).

Examples – Statements Voluntary

Valdez was arrested for sexual assault and was transported to the police station for questioning. He was advised of and waived his *Miranda* rights, and then provided evasive responses to the officer's questions. After 20 to 25 minutes the officer became frustrated because he felt Valdez was being "deceitful," and he left the room. A short time later another officer entered the room and resumed with the questioning, and Valdez then made incriminating statements. The trial court found Valdez's statements involuntary in part because the first officer was angry and confrontational with Valdez. However, the Colorado Supreme Court disagreed, and held that an officer's "angry and confrontational demeanor does not render a defendant's statements involuntary in the absence of a causal connection between the two." The court reasoned that, although the officer's demeanor was confrontational, Valdez was not intimidated by the officer's demeanor, and that demeanor did not play a significant role in obtaining Valdez's statements. *People v. Valdez,* 969 P.2d 208 (Colo. 1998).

While in police custody Stephenson denied all responsibility for the murder and accused his wife of shooting the victim. After police told him they did not believe him Stephenson asked for a cigarette break and then said he would tell "everything." He then made incriminating statements. He later claimed that those statements were involuntary because he was questioned at the police station; he was "badgered" by police; the police claimed to have "independent evidence" that he shot the victim; and the police characterized the confession as an "opportunity" which Stephenson claimed was an implied promise of leniency in return for confessing. However, the Colorado Court of Appeals held that, under the totality of the circumstances, the police conduct was not coercive and did not play a significant role in inducing the

statements. *People v. Stephenson,* 56 P.3d 1112 (Colo. App. 2001).

Grant, a juvenile, was arrested and *Mirandized* in the presence of his mother, and then provided a statement to police. When the officer expressed disbelief regarding the truthfulness of the statement Grant asked to speak to the officer alone and, with permission of his mother, was taken to a separate room where Grant confessed. Police officers later obtained a second statement, again taken outside the presence of Grant's mother with her permission, where Grant made additional admissions. Although the officer made no promises or threats, he did tell Grant that if he were responsible for the murders being investigated it would be "extremely tough on him to live with." The Colorado Court of Appeals held that Grant was properly advised of and waived his rights, and the officer's use of the "soft technique," while potentially coercive, was made after Grant agreed to tell what happened. *People v. Grant,* 30 P.3d 667 (Colo. App. 2000).

See also People v. Gennings, 808 P.2d 839 (Colo. 1991)("soft technique" of informing suspect that her responses to polygraph results were deceptive and then encouraging suspect to talk to the officer about her problems, while psychologically coercive, did not play a significant role in overbearing suspect's will as to have caused the statements to be involuntary).

Criminal charges were filed against Officers Blackford and Sapp based upon statements they made during the course of an internal affairs investigation. The officers testified that they believed that they could have been fired if they had refused to give statements. The Colorado Supreme Court concluded, however, that the law enforcement agencies did not play a significant role in creating the officers subjective beliefs that they would be fired. Therefore, the officers' belief was not objectively reasonable and the statements were voluntary. *People v. Sapp,* 934 P.2d 1367 (Colo. 1997).

Example – Voluntary and Involuntary Portions of One Statement

Officers questioned the defendant about the death of her boyfriend. Well after an hour into the questioning, the defendant was first advised of the victim's death. The defendant was clearly shaken by this news and broke into uncontrollable sobbing. Her answers thereafter were emotional reactions that were only partially coherent. The questioning itself was persistent, argumentative, suggestive of answers, and mischaracterized what the defendant

had previously said. The court held that the pre-disclosure statements were voluntary because there was no evidence of coercion. However, the court held that the post-disclosure statements were involuntary because the officer took advantage of the defendant's emotional state and used tactics that were psychologically coercive. *People v. Humphrey*, 132 P.3d 352 (Colo. 2006).

The courts have also addressed statements provided to police in the context of a polygraph examination. Generally, a polygraph examination is not, in and of itself, inherently coercive.

Example:

Hutton underwent a polygraph examination pursuant to an investigation of sexual assault. The examination was conducted at the examiner's office, and Hutton was not in custody and was not represented by an attorney. Prior to the examination Hutton was advised of his *Miranda* rights, which he waived. Following the polygraph procedure, during a post-exam interview, the examiner informed Hutton that he believe some of the responses were deceptive. Hutton then made an incriminating statement. The trial court suppressed those statements, finding that the examiner's post-examination statement to Hutton was coercive. The Colorado Supreme Court reversed, however, concluding that Hutton's statements were voluntary despite the examiner's statement. The court found no coercive circumstances surrounding the procedures used, and that Hutton knowingly waived his *Miranda* rights. *People v. Hutton,* 831 P.2d 486 (Colo. 1992).

4. Promises

Courts have traditionally held that "direct or implied promises, however slight" will result in the suppression of a subsequent statement. *See, e.g. People v. Parada,* 533 P.2d 1121 (Colo. 1975)(officers made an implied promise to a suspect in a welfare fraud investigation by saying, "we are not here necessarily to try and get you in trouble. We are here to straighten out if you have in fact been employed"). However, recent courts no longer employ a "per se rule" regarding threats and promises, but rather analyze the effect of such threats or promises within the totality of the circumstances to determine whether the police conduct played a significant role in inducing the statements.

Examples:

During an interrogation of Wickham, officers made two statements which could be interpreted as promises, first by saying "Keep on telling me, this is what's going to help you, bud," and later, "I can't help you and go to bat for you if I know I don't get all the story because I can't put myself on the line knowing that I don't know all the facts." The detective also suggested that Wickham's companion, when arrested, would implicate Wickham and that he therefore had one last chance to respond to the detective's questions. The Colorado Court of Appeals found that the detective's statements, while arguably promises, did not play a significant role in inducing the statements where the totality of the circumstances revealed that Wickham was mentally and physically healthy during the interrogation, he was not intoxicated, he was educated, he had prior experience with the criminal justice system, and the police provided him with breaks, beverages and cigarettes during the interview. *People v. Wickham,* 53 P.3d 691 (Colo. App. 2001).

See also People v. Close, 867 P.2d 82 (Colo. App. 1993)(an officer's reference to defendant's unblemished record did not constitute an implied promise of leniency where the officer's entire response to defendant's question about his possible criminal exposure was particularly neutral and indicated clearly that the court would make that determination).

a. Clearing Paper

In almost any organization, one of the primary departmental objectives is to "clear paper." For officers, this often means the "solution" of crimes. In order to solve these crimes, officers sometimes tell a criminal that they will not prosecute him or her if a confession is provided. This practice is very dangerous, because officers are "agents of the state" and their promises can later become binding upon prosecutors. *See People v. Manning,* 672 P.2d 499 (Colo. 1983)(statement by detective that "they cannot prosecute you for this," in light of surrounding circumstances, constituted promise not to prosecute defendant for any crimes that she might admit during ensuing interview, upon which defendant reasonably relied).

Example:

A detective tells a suspect who was caught at the scene of a burglary that if he confesses to his other crimes to "clear

cases" the detective will not charge him with those other crimes. The suspect then confesses to a number of other burglaries. As a result of these leads the detective finds out the suspect committed a murder. Because the detective promises that the suspect would not be prosecuted, the state may be prohibited from prosecuting the suspect for the murder, unless the prosecution can establish that the evidence regarding the murder was obtained independently from the suspect's statements.

b. The Initiator

A consideration for the court is "who initiated the promise or the "deal"? If it was the suspect who proposed the deal, it is more difficult to later contend that the statement was a result of an officer's promise. However, if officers initiate the conversation on the issue, the court may be more inclined to rule that the statement was a product of the promise or deal.

Examples:

Officers serving a search warrant advised Fox of his *Miranda* rights, which Fox exercised by demanding the presence of a lawyer before questioning. Officers then opened a safe found in the residence that contained contraband. Fox then asked what was going to happen to his girlfriend, and was told by officers that she was going to be jailed. Fox replied, "Why? Everything there is mine." The officer then asked "You mean the cocaine and the money are yours?" Fox replied "Yes. The cocaine and the money are all mine." Under these circumstances the Colorado Court of Appeals ruled that Fox's statements were voluntary because Fox, and not the officers, raised the issue of his girlfriend's status. *People v. Fox,* 691 P.2d 349 (Colo. App. 1984).

Ferguson and his wife were arrested for murder. Ferguson asked the officers what was going to happen to his wife. Police told Ferguson, in effect, that if the guilty person were found it would be unnecessary to hold others. The Arizona court held that Ferguson's subsequent statements were voluntary because Ferguson initiated the conversation about what was going to happened to his wife, and because the arrest of his wife was not a sham because his wife had been with Ferguson since the murder and unknown fingerprints were found on an item associated with the murder. *State v. Ferguson,* 579 P.2d 559 (Ariz. 1978).

c. Promise Not to Prosecute

A promise not to arrest or prosecute in exchange for a statement will result in suppression of the statement.

Example:

Michael Manning, a three-year old boy, disappeared. When Michael's mother would not tell authorities where Michael was she was held in contempt of court and put in jail. When officers could not find Michael, an officer visited Manning in her cell and told her, "I am going to interview you as a witness in this thing. Because I am not going to advise you of your rights, they cannot prosecute you for this." Manning then said, "Mikey's dead." Later she gave a full statement implicating her boyfriend in the murder. The Colorado Supreme Court held that Manning reasonably relied on the officer's "implied promise" in making her statement. Therefore, her statements were not admissible against her at trial. *People v. Manning,* 672 P.2d 499 (Colo. 1983).

Compare with:

Prior to a police interview without *Miranda* warnings, Bowman was told that he was not under arrest, would not be arrested at the conclusion of the interview, and was free to leave at any time. Although he refused to answer one particular question, he answered others, making incriminating statements. The court of appeals found Bowman's statements voluntary under the totality of the circumstances. Nothing in the record suggested that he was coerced into making the confession by the detective's statement that he would not be arrested at the interview's conclusion. Moreover, the court determined that he understood his right to refuse to answer any questions because he exercised that right. *People v. Bowman,* 812 P.2d 725 (Colo. App. 1991).

Elagnaf, a known drug user, was in jail awaiting deportation on an immigration violation when he was approached by officers wanting information on a targeted drug dealer. The officers promised that they would help Elagnaf with his INS problems in exchange for his cooperation in their drug investigation. Elagnaf discussed his previous cocaine purchases from the dealer, and sought to later have those statements suppressed when he was tried on unrelated drug

charges several months later. The court of appeals determined that Elagnaf's statements were voluntary and not the result of police coercion. The court considered it significant that the interviewing officers told Elagnaf that they did not intend to prosecute him for any previous criminal activity at the time they solicited his cooperation. Moreover, there was nothing in the record to indicate that they considered him to be a suspect in a particular crime. *People v. Elagnaf,* 829 P.2d 484 (Colo. App. 1991).

d. Promises During Plea Negotiations

Promises made as part of a plea agreement are not inherently coercive or improper. A guilty plea is not invalid whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction of a more serious crime. There is nothing inherently coercive or improper in requiring a defendant to provide information, make statements, or testify truthfully in other proceedings as a term of a plea bargain. *People v. McCormick,* 881 P.2d 423 (Colo. App. 1994).

See People v. Butler, 929 P.2d 36 (Colo. App. 1996)(defendant's statement to police as part of a plea bargain that was later used to impeach his testimony after the defendant withdrew his guilty plea was not involuntary, even though the statement was given in exchange for a promise of a lesser punishment).

e. Promise to Obtain Counseling

Often, the criminal defendant has psychological problems that the perceptive officer can readily recognize. An officer's sincere conversation about, or offer to get, counseling will usually not result in suppression of an otherwise voluntary statement.

Example:

Bookman was arrested for murder and was properly advised of his *Miranda* rights, which he waived. Three hours later a detective asked Bookman about his mental stability and offered psychiatric help. Bookman said he wanted help. A different detective then asked, "was it an accident" and Bookman replied "Yes." He then gave a confession. The trial court ruled that Bookman gave his statement because he was "seeking relief from agonizing thoughts of the events related." The Colorado Supreme Court agreed that the

statement was not involuntary, especially in light of Bookman's many contacts with the criminal justice system. *People v. Bookman,* 646 P.2d 924 (Colo. 1982).

f. Promise to Relate Cooperation to Powers That Be

It is very dangerous to tell a suspect that you will tell a judge, prosecutor, parole officer, or other such state agent that the suspect "cooperated" in exchange for a statement. However, while such promises to relay a suspect's cooperation becomes a factor to consider within the totality of the circumstances in determining whether a statement is voluntary, courts tend not to suppress resultant statements when this is the only voluntariness problem.

Examples:

After being arrested and advised of his *Miranda* rights, and during subsequent questioning, Joyce was advised by the interrogating police officer that he did not believe that Joyce was telling the truth. The officer further indicated that Joyce's level of cooperation would be reported to the district attorney's office. Thereafter, Joyce admitted to committing the offense. The Colorado Court of Appeals found that Joyce's confession was voluntary because the atmosphere surrounding Joyce at the time he made his inculpatory statements was not such that would establish the existence of coercive governmental conduct, physical or mental, sufficient to induce an involuntary confession or inculpatory statement. *People v. Joyce,* 878 P.2d 48 (Colo. App. 1994).

After advising York of his *Miranda* rights and obtaining a waiver, a detective told him that the minimum bond that he could place on York was $15,000, "that this would be the only time I would be of any help to him in this whole investigation, if he wanted to level with me at this time I would see that his cooperation did appear in my report, and would reach the proper people, meaning the Judge and jury, and what have you." The detective also told York that he believed he had a strong case against York "and I would like to have his cooperation and would like to have the truth at this time." The Colorado Supreme Court later determined that the officer's promises in exchange for the "truth" and "cooperation" did not make York's confession involuntary. *People v. York,* 537 P.2d 294 (Colo. 1975).

g. Promise to Treat Fairly

A promise to treat the suspect fairly will usually not result in suppression of a statement, unless the officer implies that fair treatment is conditioned on giving a statement.

Example:

Brewer, an armed and dangerous escapee, was located in a house. A police special services unit surrounded the house and a police negotiator contacted Brewer by telephone. In an effort to have Brewer peacefully surrender, the negotiator told Brewer, among other things, that he would be treated fairly. The court of appeals held that the officer's promise to treat the suspect fairly was not an improper inducement that produced an involuntary statement. *People v. Brewer,* 720 P.2d 583 (Colo. App. 1985).

5. Deceit, Dirty Tricks, Etc.

It is improper for an officer to misrepresent the amount of evidence the police have against the suspect. *People v. Cooper,* 731 P.2d 781 (Colo. App. 1986). An officer runs a risk that statements obtained by using this tactic will be suppressed. However, courts have been reluctant to suppress if this is the only factor, within the totality of the circumstances, suggesting involuntariness. *See People v. Wickham,* 53 P.3d 691 (Colo. App. 2001)(while not condoning "the detectives conduct in misrepresenting the scope of the charges defendant faced and the extent of his knowledge concerning fingerprint evidence, this conduct nevertheless does not compel a conclusion that defendant's statement was involuntary"); *People v. Villarreal,* 131 P.3d 1119 (Colo. App. 2005) (the defendant's statements were not involuntary simply because the officers did not tell her that they were executing a search warrant on her residence while they were interviewing her at the police station).

Example:

The victim was sexually assaulted at her nursing home, and testing revealed the presence of DNA that was consistent with the defendant's. After learning the test results, a police officer told the defendant, "we found your semen in her." At that point, the defendant confessed. The defendant claimed that the confession was involuntary because the officer falsely told him that his semen was found in the victim, when in fact the DNA evidence only indicated that the defendant's DNA was consistent. The Court of

Appeals first noted that the statement regarding the DNA was not wholly inaccurate, because the defendant's DNA was consistent with the DNA evidence found in the victim. In any event, the court held that even if the statement had been a misrepresentation, under the totality of the evidence, the statement was otherwise voluntary. *People v. Klausner*, 74 P.3d 421 (Colo. App. 2003).

Officers interrogated the defendant in connection with a robbery and shooting at a convenience store. During the interrogation, the officers told the defendant that a video from the convenience store showed he was there and that a witness had already identified him as the perpetrator; both of these statements were false. The Court of Appeals held that these misrepresentations alone did not render the statement involuntary. *People v. Speer*, 216 P.3d 18 (Colo. App. 2007).

6. Length of Interrogation

Lengthy interrogation without breaks may cause a court to rule that the suspect's will was overborne, thereby rendering the statement involuntary. The length of an interrogation must therefore be considered within the totality of the circumstances of any interrogation. While there are no hard and fast rules regarding the duration of an interrogation, it is advisable to periodically offer breaks and refreshments to suspects, and honor such requests from suspects. *See, e.g., People v. Wickham,* 53 P.3d 691 (Colo. App. 2001)(5-hour interrogation was not involuntary; suspect was given breaks, beverages, and cigarettes); *People v. Lopez,* 946 P.2d 478 (Colo. App. 1997)(30-hour interrogation over five days not involuntary where statements obtained were not the product of coercive tactics).

7. *Miranda* Warnings

Whether *Miranda* warnings are given is one factor in the totality of circumstances that courts consider in determining whether a statement was made voluntarily. The giving of a *Miranda* warning alone will not necessarily result in a ruling that a statement was voluntary. However, the giving of a *Miranda* advisement can often be an important factor in establishing voluntariness. *See, e.g., People v. Roybal,* 55 P.3d 144 (Colo. App. 2001)(defendant statements were not involuntary where he was advised and waived his *Miranda* rights on six separate occasions and the police employed no coercive tactics); *People v. Branch,* 805 P.2d 1075 (Colo. 1991)(failure to advise defendant of his *Miranda* rights prior to a court-ordered competency examination does not automatically render a suspect's statements involuntary; it is only one factor to

consider when determining voluntariness under the totality of the circumstances).

8. Coercion Under Emergency Circumstances

There is probably not a court in the country that has had to rule on the propriety of "coercion" used in order to possibly save a life. If the issue were presented to Colorado courts, however, these courts would probably not be offended by "mild" forms of coercion such as promises, deceit, browbeating, etc. However, it is likely that the court would not tolerate physical coercion.

Note: *See also* the Section V(I) regarding **Emergency Rescue Questioning.**

B. Condition of the Suspect

Generally, the courts are very reluctant to rule that a statement is involuntary based solely on the condition of the suspect. However, if the condition of the suspect is weakened, either physically or emotionally, and if the officers conduct themselves improperly the courts may suppress the statement if there is a causal connection between the two.

1. Injury

A statement taken from a badly injured suspect may be ruled involuntary if officers, in any way, overbear the suspect's will.

Examples:

Mincey was seriously injured in a gunfight with narcotics agents. He was taken to the intensive care unit, where he was medicated and in great pain. A homicide detective visited Mincey a few hours after his arrival and obtained a statement. The United States Supreme Court ruled that the statement was involuntary because "Mincey was weakened by pain and shock, isolated from his family, friends and legal counsel and barely conscious, and his will was overborne." *Mincey v. Arizona,* 438 U.S. 385 (1978).

Compare with:

Miller was questioned five hours after his admittance to a hospital following a serious accident. The Colorado Court of Appeals found that he was alert, resting, and not on medication. The court further determined that no promises or threats were made and that Miller willingly cooperated in the interview. Based on these facts,

Miller's statements were held to be voluntary. *People v. Miller,* 829 P.2d 443 (Colo. App. 1991).

Statements made by DeBoer to detectives while hospitalized were found to be voluntary in light of testimony that, despite having been given morphine earlier, she was alert, attentive, and articulate. Since there was further expert testimony that the morphine would not have affected DeBoer's ability to think, speak, and understand the situation, the court found no evidence of coerciveness. *People v. DeBoer,* 829 P.2d 447 (Colo. App. 1991).

2. Intoxication or Withdrawal

The courts are reluctant to rule a statement involuntary based solely upon intoxication or withdrawal, unless the suspect's altered mental state prevented him or her from comprehending the nature of his or her actions.

a. Intoxication

The mere fact of intoxication alone does not automatically render statements involuntary. *People v. Martin,* 30 P.3d 758 (Colo. App. 2000). However, if intoxication takes away the suspect's "self-protective instincts" the court may rule that the statement was involuntary. *People v. Fordyce,* 612 P.2d 1131 (Colo. 1980).

Examples:

Cardenas called the police to report a homicide. When the police arrived, he admitted killing the victim after an evening of drinking, using drugs, and an altercation. Before his first confession, Cardenas was advised of his *Miranda* rights, which he waived. The officer noted that Cardenas appeared intoxicated but not incoherent. Cardenas then made a second statement at police headquarters, which was also preceded with a written *Miranda* advisement. When asked by the detective whether he was under the influence of narcotics, drugs, or alcohol, Cardenas replied "Yes." He thereafter made additional incriminating statements. The Colorado Court of Appeals later found that, although Cardenas was under the influence of alcohol and drugs when he made both statements, there was no evidence in the record that either statement was obtained through the use of threats, violence, promises, or improper influence. "On the contrary, there is ample evidence to support the trial court's finding that defendant's statements were voluntary, including defendant's

own statement that his confession was voluntary." *People v. Cardenas,* 25 P.3d 1258 (Colo. App. 2000).

When the arresting officer arrived at the scene of an automobile accident, Veloz was "stumbling around" in a nearby field. Veloz approached the officer and made spontaneous statements. After being advised of his rights, Veloz indicated that he understood his rights and made further inculpatory statements. The court of appeals concluded that both the spontaneous statements and the statements made after questioning were voluntary and not inadmissible merely because Veloz was intoxicated. *People v. Veloz,* 996 P.2d 146 (Colo. App. 1997).

Note: The issue of intoxication may not only bear upon whether a suspect's statement is voluntary, but also upon the issue of whether the suspect voluntarily waived his or her Fifth Amendment rights. *See* Section V(E)(1).

b. Withdrawal

Examples:

After making incriminating statements to police, Harrison claimed that his statements were involuntary because he was suffering from symptoms of heroin withdrawal and the police used coercive techniques to make him confess. However, the Colorado Court of Appeals held that Harrison had been in custody in another state for 12 days, and the detective who interrogated him testified that he did not appear to be suffering from withdrawal. In fact, Harrison told him that his mind was "pretty clear." The court therefore concluded that the statement was voluntary. *People v. Harrison,* 58 P.3d 1103 (Colo. App. 2002).

The defendant, while being interrogated at the jail, was withdrawing from heroin. Doctors and officers testified that his symptoms were minor and that he "appeared to be in control of himself and his surroundings." The Arizona court ruled that the statement was voluntary. *State v. Steelman,* 585 P.2d 1218 (Ariz. 1978).

3. Emotional Problems

Emotional or mental problems of a suspect are a factor the courts will consider when deciding whether a statement is voluntary. If the suspect

can show that the officer took advantage of the suspect's emotional instability, by overreaching or manipulation, the statement may be ruled involuntary.

Examples:

Connelly killed a young girl in Denver. About nine months later "the voice of God" told him that he had to confess. Connelly accosted a Denver officer and confessed his crime. Later, a psychiatrist testified that the voice told Connelly he had to confess or commit suicide. The Colorado Supreme Court held that the confession was involuntary because it was not truly the product of "rational" and "free" will. However, the United States Supreme Court rejected this test, stating "absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law." The statement was therefore admissible. *Colorado v. Connelly,* 479 U.S. 157 (1986).

See also People v. Whalin, 885 P.2d 293 (Colo. App. 1994)(incriminating statements made by a defendant suffering from a personality disorder and other emotional problems attributable to Ganser's syndrome, were not involuntary absent coercive conduct on the part of the police).

Rhodes walked into a police station and told the desk officers that she had killed a man and needed to see a particular officer about it. After the officer arrived and asked her what she wanted Rhodes again told him that she had killed a man. Rhodes later tried to suppress these and other statements on the basis of a psychiatrist's opinion that an unconscious psychotic process had compelled her statement. The Colorado Supreme Court reversed, however, and, based upon the decision in *Colorado v. Connelly*, found that the statement was voluntary. *People v. Rhodes,* 729 P.2d 982 (Colo. 1986).

Officers responding to a call of a knifing saw Smith leaving the scene in her car. A witness told an officer that Smith was the assailant, and the officer chased and then stopped her. She was arrested and advised of her *Miranda* rights, taken to the police station, and left in a holding cell. While there, Smith expressed sorrow and anger. In response to her question about the victim's status, a detective told Smith that the victim had died. Smith then became upset and made incriminating statements. The trial court found the statements to be involuntary, noting that the effect on a normal person of learning that the victim had died would be so

traumatic as to overbear a person's will. The Colorado Supreme Court disagreed, stating, "simply because the defendant became upset when she learned that the victim had died was not a sufficient basis for the trial court's conclusion that her statement was involuntary." *People v. Smith,* 716 P.2d 1115 (Colo. 1986).

Compare with:

McIntyre was called in for questioning based on allegations that he was sexually abusing his son. At the time, McIntyre was also seeing a therapist due to psychological problems. The interviewing police officer admitted knowing of the therapy at the time of the interview. When McIntyre denied any wrongdoing, the officer threatened him with immediate arrest, a large bail, and a long prison term. McIntyre eventually confessed. The court held that, due to the threats and McIntyre's mental condition at the time, the statement made was involuntary. *People v. McIntyre,* 789 P.2d 1108 (Colo. 1990).

Officers questioned the defendant about the death of her boyfriend. Well after an hour into the questioning, the defendant was first advised of the victim's death. The defendant was clearly shaken by this news and broke into uncontrollable sobbing. Her answers thereafter were emotional reactions that only partially coherent. The questioning itself was persistent, argumentative, suggestive of answers, and mischaracterized what the defendant had previously said. The court held that the post-disclosure statements were involuntary because the officer took advantage of the defendant's emotional state and used tactics that were psychologically coercive. *People v. Humphrey*, 132 P.3d 352 (Colo. 2006).

a. Juveniles

The fact that a suspect is a minor is one factor that bears upon the issue of whether a statement is made voluntarily. However, the status as a minor is not determinative on the issue; the court must consider that fact within the totality of the circumstances to determine whether the statement was made voluntarily. *People v. Blankenship,* 30 P.3d 698 (Colo. App. 2000).

4. Jail Conditions

Uncomfortable surroundings and slight health problems do not make a confession involuntary.

Example:

Valdez was arrested for sexual assault and was transported to the police station for questioning. He was advised of and waived his *Miranda* rights, and then provided evasive responses to the officer's questions. After 20 to 25 minutes the officer became frustrated because he felt Valdez was being "deceitful," and he left the room. A short time later another officer entered the room and resumed with the questioning, and Valdez then made incriminating statements. Although the supreme court noted that Valdez was hungry and tired during the interrogation, those factors did not support a conclusion that his statements were involuntary. "While the use of physical punishment such as the deprivation of food and sleep can be a supporting factor for a conclusion of involuntariness . . . the circumstances of this interview do not support such a conclusion. Valdez arrived at the police station shortly before the interrogation began at 8:20 p.m. The interrogation lasted only an hour and twenty minutes, ending at approximately 9:40 p.m. If Valdez was hungry and tired during this period of time, it was through no fault of the police." *People v. Valdez,* 969 P.2d 208 (Colo. 1998).

C. Suggested Techniques

Before taking a statement an officer should consider the following suggestions relating to voluntariness.

1. Find Out About Emotional Problems

If there is any question about the suspect's emotional stability, get the problem out in the open right away. If the suspect is nervous, upset, alcoholic, mentally ill, etc., it is usually best to talk to the suspect about it. When you have done that, you might want to suggest that the suspect can either talk about the crime (give his or her side of the story, etc.) or wait awhile.

2. Threats

Never threaten to do anything if the suspect does not talk, or does not tell you what you want to hear.

3. Promises

Promises made to a suspect cause more trouble to officers (especially detectives) than any other voluntariness factor.

a. Tell the suspect that you cannot make any deals or promises.

b. If you tell the suspect you are going to do something for him or her (e.g., get cigarettes, talk to the judge, bond reduction, etc.) do not tie the promise to the suspect's cooperation. If at all possible, tell the suspect that your promise is not tied to the suspect's statement.

c. Ask the suspect before the statement whether the suspect is making the statement because of any promises or threats.

   1. If the suspect says "yes," do not fail to respond. Ask more questions and get the problem straightened out.

   2. Get everything in writing, or on tape, if at all possible.

V. MIRANDA WARNINGS

The Fifth Amendment to the United States Constitution states that a person "shall not be compelled in any criminal case to be a witness against himself . . . ." The United States Supreme Court held in *Miranda v. Arizona*, 384 U.S. 436 (1966) that a prosecutor may not use a person's statements stemming from "custodial interrogation" unless the person is warned as follows:

> "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."

The three "triggering" circumstances requiring a *Miranda* advisement therefore are (1) a "custodial" setting; (2) "interrogation" by a (3) law enforcement official.

A. Custody

A suspect's answers to questions will not be admissible in court if the suspect is in "custody," unless he or she has been warned and has waived those rights. On the other hand, if the suspect is not in custody, a voluntary statement will be admissible, even though no warnings have been given. In determining whether an individual has been subjected to "custodial" interrogation, the relevant inquiry is "whether a reasonable person in the suspect's position would consider herself deprived of her freedom of action in a significant way at the time of the interrogation." *People v. J.D.*, 989 P.2d 762 (Colo. 1999).

If a suspect has been formally arrested, he or she is, of course, in "custody" and must be advised prior to questioning. There are, however, many

situations where an officer might wonder whether the suspect should be warned. The following discusses those factors which the courts feel are important in determining whether the suspect was in custody at the time of questioning. The topic is also covered at length in Chapter 2, **SEARCH AND SEIZURE – PERSONS**.

One thing to remember as you look at these factors is that the more "comfortable" you can make the suspect feel, the more likely the court is to find that the suspect is not in custody. If you treat a suspect as if he or she is just a witness, a finding of "custody" is much less likely.

Note: Many inexperienced officers will ask at this point, "Why not just always give *Miranda* warnings whether or not a suspect is in custody? A suspect will usually waive his rights anyway." This statement is probably true in at least 80% of the cases. However, in the most important cases (serious offenses, "experienced" criminals, white collar offenders, etc.) the suspect tends to assert his or her rights when *Miranda* rights are given. However, if there is any question about whether the suspect is in "custody," and the officer desires to insure the integrity of the suspect's statements (i.e., make sure they are admissible in court) an officer should err on the side of providing an advisement.

1. What Objective Indications of Custody Were Present

Custody is an "objective" test (what happened) rather than a "subjective" test (what the officer or the suspect was thinking). The "formula" for determining whether a suspect is in "custody" is whether a reasonable person in the suspect's position would consider himself deprived of his freedom of action in a significant way at the time of the interrogation. Among the objective indications of custody are the drawing of a weapon, handcuffing or moving a suspect around, etc. The determination of what constitutes "custody" is highly dependent upon the facts of individual cases. The following examples may therefore provide insight as to how courts resolve this issue.

Examples – Custody

The defendant, who was an employee suspected of theft from an employer, was taken into a 15 x 15 foot room at the workplace and the only persons in the room were police officers and the employee. Questioning lasted for about 30 minutes and was accusatorial from the start. No *Miranda* warnings were given and the defendant's statements were made in response to considerable prodding by the officers. The employee was never informed that he was free to leave the room. The Colorado Supreme Court held

that the employee was in custody at the time of the questioning, and that he should have been advised pursuant to *Miranda* prior to questioning. *People v. La Frankie,* 858 P.2d 702 (Colo. 1993).

An officer, while executing a search warrant, saw the defendant run into the woods. The officer drew his weapon and pursued the defendant, who was found crouched behind a tree Without re-holstering his weapon, the officer asked the defendant who he was and what he was doing there. The defendant then told the officer that there were marijuana plants growing in the area. The office took the defendant by the arm, and the defendant then led him to the plants. The officer then holstered his weapon. The Colorado Supreme Court stated that *Miranda* warnings were required because the use of the gun involved a degree of force "more traditionally associated with concepts of 'custody' and 'arrest' than with a brief investigatory detention. *People v. Breidenbach,* 875 P.2d 879 (Colo. 1994).

Hamilton, suspected of stealing a VCR from his roommate, was at the residence when his roommate called the police to investigate. The officer and the roommate discussed the robbery in front of Hamilton, and the officer then turned to Hamilton and asked, "What's happening here between you and [the roommate]?" Hamilton made an incriminating statement, and only then was given his *Miranda* advisement. Since an assessment as to whether a person is in custody is a factual question, the Colorado Supreme Court considered the following facts dispositive: (1) Hamilton confessed to his roommate prior to the officer's arrival; (2) the roommate called the police while Hamilton was there; and (3) the conversation between the roommate and the officer about Hamilton's confession took place in his presence. Thus, the court found that a reasonable person in Hamilton's position would not have considered himself free to leave the house when the officer directed the initial question to him. *People v. Hamilton,* 831 P.2d 1326 (Colo. 1992).

While officers were in a hotel room, Mack knocked on the door. Mack voluntarily consented to a body search, and officers found marijuana, $120 in cash, the key to another room, and a set of car keys. Mack was detained for the purpose of issuing a citation for possession of marijuana. Based on the detention, the court found that Mack was in "custody" for *Miranda* purposes. *People v. Mack,* 638 P.2d 257 (Colo. 1981).

Moore was escorted by police officers to his apartment, where six officers were conducting a search. When he entered the apartment,

three officers drew their guns. The officers then re-holstered their guns and showed him a copy of the search warrant. Moore was then told that he was not under arrest and that he could leave at anytime. However, he was instructed that if he was going to stay, he should sit on the recliner. Moore sat on the recliner for the duration of the thirty-five minute search. The court concluded that, under these circumstances, Moore was in "custody." *People v. Moore,* 900 P.2d 66 (Colo. 1995).

Dracon was taken in a police car to the police station at approximately 9:45 a.m. She remained at the station until 4:45 p.m. and was questioned two different times for a total of approximately three hours and forty five minutes. The court concluded that she was in "custody." *People v. Dracon,* 884 P.2d 712 (Colo. 1994).

The court found that the defendant, who was being questioned about his wife's death, was in custody under the following circumstances: the defendant was asked to accompany police officers to the station for questioning, but he was transported in the back of a police car to a non-public area of the station; he was directed to wait in a small, closed-door interview room; the defendant was never told he was not under arrest, or that he was free to leave; and, the defendant was subjected to aggressive interrogation by multiple officers who expressed doubts regarding his truthfulness, discounted his denials, confronted him with potential evidence of his guilt, and accused him of committing murder. *People v. Elmarr,* 181 P.3d 1157 (Colo. 2008).

Examples – No Custody

Gennings, a police officer suspected of sexual assault, voluntarily participated in a polygraph examination that was performed at police headquarters by a civilian examiner. He made an incriminating statement during the post-examination interview, and later sought to suppress it at trial. The Colorado Supreme Court held that Gennings was not in custody during and after the polygraph exam. He was an experienced police officer voluntarily participating in the polygraph upon the advice of his attorney. Furthermore, he was aware that he was at the police station for the limited purpose of taking the exam, and he could have left at any time because the civilian examiner was not empowered to detain him. *People v. Gennings,* 808 P.2d 839 (Colo. 1991).

The defendant was asked to go to the police station to answer some questions about thefts. He was told that he did not have to go,

however, and he was told that he was not under arrest and he could leave the police station at any time. He did go to the station, where he made incriminating statements to the police officers. The officers then drove the defendant back to his residence after the interview. The Colorado Court of Appeals held that the interview was not custodial in nature and that the defendant cold not have reasonably believed that he was in custody. Therefore, *Miranda* warnings were not necessary. *People v. Gillis,* 883 P.2d 554 (Colo. App. 1994).

After an altercation that ended in a stabbing, Rosales went to the hospital for treatment. Police officers came to the hospital and interviewed Rosales while he was sitting in the waiting room of the hospital. The court found that Rosales was not in custody for *Miranda* purposes. *People v. Rosales,* 911 P.2d 644 (Colo. App. 1995).

Officers went to Howard's residence to investigate allegations that he had sexual contact with his sister. There, they asked, rather than directed him to talk, his freedom of movement was not restrained, he was not placed under any physical restraint, the duration of the contact was brief, and the detective was polite, honest, and did not attempt to intimidate Howard. The Colorado Supreme Court held that the encounter was non-custodial. *People v. Howard,* 92 P.3d 445 (Colo. 2004).

The Colorado Supreme Court held that the defendant was not in custody when he led police to the site where he buried his wife's body because: 1) the defendant had originally invited the officers to his home; 2) the officers encouraged him to tell the truth and warned him of the consequences of lying; 3) the defendant was unrestrained before and after he identified the location of the body; 4) the officers were reasonable, respectful, inquisitive, and un-abrasive; 5) the defendant was the one who suggested that they go to the burial site; and 6) the officers repeatedly told the defendant while driving to and from the site that he was free to go. *People v. Hankins*, 201 P.3d 1215 (Colo. 2009).

2. What Information the Officer Has – Focus, Probable Cause

Many officers think that if they have probable cause, or if the investigation "focuses" on the suspect, then the suspect must be warned prior to questioning. However, both the United States and Colorado Supreme Courts have made clear that "custody," not "focus," is the standard for determining when *Miranda* warnings are required. *See Beckwith v. United States,* 425 U.S. 341 (1968); *People v. Black,* 698

P.2d 766 (Colo. 1985). *See, e.g., People v. Minjarez*, 81 P.3d 348 (Colo. 2003) ("The mere existence of an arrest warrant, a police officer's undisclosed plan to take a suspect into custody, or a police officer's firm but unstated belief in the defendant's culpability do not, by themselves, establish that a defendant is in custody for *Miranda* purposes").

3. How Accusatory the Questioning Was

This factor is very important and is completely under the control of the officer. The officer who wants to keep the questioning non-custodial should always adopt the "can you help me?" attitude, rather than the "why did you kill her" approach.

Examples:

Horn voluntarily went to the police station for questioning and, although the interrogating officer repeatedly told him he was free to go, Horn was placed in an interrogation room, was questioned for 30 minutes, and was accused of lying. The officer also suggested Horn take a polygraph test and said that no matter what his responses were, Horn would be charged. The court held that the interrogation should have been preceded by a *Miranda* advisement because it was conducted in a custodial setting which was "accusative from the outset." *People v. Horn,* 790 P.2d 816 (Colo. 1990).

The victim of a burglary told a detective that she thought Johnson had committed the burglary-theft. A plain-clothed female detective went to Johnson's place of employment and asked Johnson if he would step outside. Once outside, the detective identified herself and asked him if he had seen anything unusual at the victim's residence. When Johnson said "No," the detective asked if Johnson would take a lie detector test. Johnson then said, "I guess I might as well tell you I did it." The detective then advised Johnson and received a detailed confession. The supreme court remanded the case to the trial court to make a determination of whether Johnson was in custody, based upon "the officer's tone of voice and general demeanor; the manner in which the defendant was escorted out of his place of employment; the officer's response to any questions by the defendant; and the defendant's verbal or non-verbal response to any directions given to him by the officer." *People v. Johnson,* 671 P.2d 958 (Colo. 1983).

The defendant met with officers in an interview room at the hospital. The defendant was seated in a chair away from the door, and two officers sat between him and the door. Although the

officers began the questioning in a conversational tone, their tone grew more accusing and confrontational. One officer told the defendant that the "medical evidence" contradicted his story, and that it would be better for the defendant to talk to the police now and be honest about what happened. The Colorado Supreme Court held that under these circumstances, the interview was custodial. *People v. Minjarez*, 81 P.3d 348 (Colo. 2003).

4. How Long the Questioning Lasted

A short session of non-accusatory questioning is very unlikely to be ruled custodial (unless other custodial factors are also present). On the other hand, questioning sessions which are very lengthy (especially without breaks) will often cause a court to rule that the questioning was custodial even when other non-custodial factors are present. *See, e.g., People v. Pascual*, 111 P.3d 471 (Colo. 2005) (court found encounter custodial where length of the detention lasted over 9 hours).

5. Where the Questioning Occurred

The place where the questioning took place can be an important factor in determining whether the suspect was in custody.

a. Jail or Prison

The prison or jail setting is always custodial if the suspect is being questioned regarding the crime for which he or she is incarcerated.

Example:

Robledo, a juvenile charged with first degree murder, made several incriminating statements to a counselor at the juvenile detention center where he was being held. The Colorado Supreme Court suppressed Robledo's statement because no *Miranda* warnings were given prior to the statements being elicited. Since the counselor was a state employee and was required to report back to the district attorney's office, the court determined that he was acting as an agent of a law enforcement agency. As such, he was required to give Robledo a *Miranda* advisement prior to questioning him. *People v. Robledo,* 832 P.2d 249 (Colo. 1992).

However, when a suspect is incarcerated in a jail or prison setting and questioned about a crime other than that for which he or she is in custody for, a different standard of "custody" is applied. Instead of the traditional "free to leave"

standard for custody, the courts apply a "restriction" standard that, in a prison setting, implies a change in the surroundings of the prisoner that results in an added imposition on his or freedom of movement. *People v. Dennison,* 918 P.2d 1114 (Colo. 1996). According to the court in *Dennison*, four factors must be considered when determining whether a person who is interrogated while incarcerated is in "custody," including (1) the language used to summon the individual; (2) the physical surroundings of the interrogation; (3) the extent to which the individual was confronted with evidence of his or her guilt; and (4) any additional pressure exerted to detain the individual.

J.D., a juvenile who was detained in a detention center in Nevada for a probation violation, spoke to authorities in Colorado regarding an armed robbery that occurred in Colorado. At the outset of the conversation, an officer offered to "do what [he could]" to dismiss other charges against J.D. for resisting arrest, obstructing and criminal mischief. Regarding the armed robbery, the officer assured J.D. that under Colorado law she could be charged as an adult, but if she cooperated "there would be minimal or no charges brought." No *Miranda* advisement was given prior to the interrogation. The Colorado Supreme Court applied the *Dennison* factors and concluded that (1) J.D. was not summoned but, in fact, initiated the telephone contact that led to the incriminating statements; (2) the interrogation occurred over the telephone while J.D. was in Nevada and without any adverse change in J.D.'s physical surroundings during the interrogation; (3) the officer confronted J.D. with evidence of her guilt; and (4) there was no evidence of any additional pressure that was exerted by police to detain her. She was therefore not in "custody" at the time of her incriminating statements, and a *Miranda* advisement was not required. *People v. J.D.,* 989 P.2d 762 (Colo. 1999).

Note: The court also recognized that a telephone call does not constitute a "custodial" interrogation requiring *Miranda* warnings, because the interrogating officer is not in the physical presence of the accused and cannot, therefore, exercise immediate control over the actions of the accused. *See also People v. J.C.,* 844 P.2d 1185 (Colo. 1993)(investigatory telephone call to a juvenile suspect did not constitute a "custodial" interrogation).

An inmate of the Department of Corrections was murdered in his cell in cell house seven (CH-7). In order to preserve order and evidence and, to facilitate the investigation of the murder, the entire facility was placed on lockdown. Inmates were confined to their cells and were not allowed to report to job assignments. The lockdown applied not only to CH-7, but to all cell houses in the facility. Prison investigators conducted interviews of a large number of inmates, most of whom had been housed in CH-7. The individual inmate interviews were conducted in various offices or rooms in an administrative building which was located some distance and across the prison yard from CH-7. Each inmate who was interviewed was handcuffed at CH-7, escorted by a guard or guards to the administrative building, released from handcuffs, interviewed while free from restraints, re-cuffed following the interview, and then escorted back to CH-7. Parsons, who was ultimately charged with the murder, was treated no differently from other inmates in this regard. No *Miranda* advisement was provided prior to the interrogation of Parsons, or any of the other inmates. Under these circumstances, the Colorado Court of Appeals held that Parsons was not in "custody" for *Miranda* purposes, inasmuch as no additional restraint was placed upon him in obtaining the statements. *People v. Parsons,* 15 P.3d 799 (Colo. App. 2000).

b. Patrol Car

An officer who "places" a suspect in the officer's car has usually "placed" him or her in custody as well. Rarely will an officer be able to tell a judge that a person who was requested to get into the patrol car was being "temporarily detained" or was just a witness. Therefore, an officer who wishes to avoid giving the *Miranda* warnings should avoid interviews in his or her patrol car.

Note: If you must interview a detainee in your car (e.g., due to weather) tell the detainee that he or she is just being detained briefly, do not lock the detainee in, and let the detainee go after the conversation, if at all possible.

Examples:

An officer responding to an accident asked Garrison to sit in the patrol car. The officer then asked Garrison a number of questions about the accident and Garrison gave some incriminating responses. The court later ruled that it was normal procedure to have a person involved in an accident sit in the patrol car and that this did not "turn investigation into custody." *People v. Garrison,* 491 P.2d 971 (Colo. 1971).

Probasco, a police officer who had killed a suspect, was upset and moved away from the scene to sit in his own patrol car in the company of other officers. In an effort to calm Probasco, the other officers initiated a conversation which resulted in incriminatory statements offered by Probasco. The Colorado Supreme Court found that Probasco was not in custody because a reasonable person in his position would not consider himself deprived of his freedom while sitting in his own patrol car in the company of other officers who were also his friends. *People v. Probasco,* 795 P.2d 1330 (Colo. 1990).

c. Interrogation Room

Interviews which occur in the "interrogation room" often appear custodial to the courts. It is possible, however, for an officer to create a non-custodial atmosphere in the interrogation room. The most important factor is whether the suspect was led to feel that his liberty was significantly restrained, or whether he or she felt free to leave at any time, especially at the end of the interview.

Examples:

Investigators contacted Matheny at his place of employment and asked him to speak with them at the Colorado Springs Police Department. Matheny agreed, and drove himself and one of the investigators to the police station. The police station was a "secure facility," and Matheny had to be escorted to an interview room on the third or fourth floor, where he was told to wait. An investigator told Matheny that he was "free to leave at any time" and that he was "not under arrest." Although Matheny did not ask to leave at any time, police officers entered and left the room numerous times. During the interrogation, which was not preceded with *Miranda* warnings, the officers' general demeanor was polite, and no threats or promises were made to Matheny. He was

arrested at the conclusion of the interrogation, after he made incriminating statements. In reversing the trial court's determination that Matheny was in custody, the Colorado Supreme Court recognized that a "police interrogation at a stationhouse does not necessarily render the interrogation custodial for purposes of the *Miranda* warning." The court concluded that the totality of the circumstances demonstrated that Matheny was not in custody until he was formally arrested following his statement. *People v. Matheny,* 46 P.3d 453 (Colo. 2002).

Lawrence, who was being investigated for willful destruction of big game, voluntarily went to the sheriff's office. When he arrived, the officers did not handcuff or search him. They escorted him to an interview room, where he sat nearest the unlocked door, across a table from the Department of Wildlife officers. Except for brief periods when a third officer stood inside the room near the door, Lawrence had clear access to the door. He was not told that he was under arrest, nor did he ever express any concern that he might be under arrest. At the conclusion of the interview, he was allowed to leave. Under these circumstances, the Colorado Court of Appeals concluded that a reasonable person would not have considered his freedom of action limited in a significant way at the time of questioning. Since he was not in custody, his statements were consensual and the officers were not required to advise him of his rights under *Miranda. People v. Lawrence,* 55 P.3d 155 (Colo. App. 2001).

Gillis was asked to go to the police station to answer some questions about some thefts. He was told, however, that he did not have to, that he was not under arrest, and that he could leave the police station at any time. Gillis did go to the station, where he made incriminatory statements to the police officers. After the interview, the officers drove him back to his residence. Under these circumstances, the court of appeals concluded that the interview was not custodial in nature and that Gillis could not have reasonably believed that he was in custody. Therefore, *Miranda* warnings were not necessary. *People v. Gillis,* 883 P.2d 554 (Colo. App. 1994).

Officers contacted the defendant in connection with false bomb threats made to an elementary school. She voluntarily went to the police station, and when she arrived, the officers told her that she was free to leave at any time. The officers' tone of voice during the interrogation was conversational

throughout, the interrogation lasted only an hour, there was no limitation upon the defendant's movement, and no directions were given to the defendant before she confessed. The court held that the defendant was not in custody for Miranda purposes. *People v. Blessett*, 155 P.3d 388 (Colo. App. 2006).

Compare with:

Trujillo voluntarily went to the police station for questioning and was placed in an interrogation room and questioned for one and a half hours. At no time was he advised of his *Miranda* rights or told that he could leave. The Colorado Supreme Court held that a reasonable person in Trujillo's position would consider himself deprived of his freedom in light of the restrictive setting of the interrogation room. *People v. Trujillo,* 784 P.2d 788 (Colo. 1990).

The defendant was arrested for auto theft and transported to an interview room where he was questioned by police officers for approximately two hours about his gang activities unrelated to the auto theft. The court held that the defendant was in custody, even though he was questioned about offenses other than the one for which he was arrested. However, after the defendant was released from jail, he entered the administrative building to assist the police as a confidential informant. There, he was interviewed by an officer while waiting for other officers to arrange the undercover drug sale. During this interview, the defendant was not restrained and was free to leave at any time. The court held that this interview was non-custodial. *People v. McGlotten*, 166 P.3d 182 (Colo. App. 2007).

d. Public Places

Questioning which occurs in a public place, or at the suspect's place of business, is usually non-custodial.

Examples:

DeBoer, who was suspected of stabbing her boyfriend and then herself, was in the hospital recovering from her wounds when she was initially interviewed by detectives. She made several incriminating statements without a *Miranda* advisement. The Colorado Court of Appeals held that mere confinement to a hospital bed is insufficient to establish

custody. There were no physical restraints on DeBoer at the time of the interview, and the officers made no attempt to restrain her. In determining that she was not in custody, the court also considered the fact that she was interviewed in her hospital room which she shared with another patient. *People v. DeBoer,* 829 P.2d 447 (Colo. App. 1991).

A detective who had a close working relationship with Brewer had many conversations with him about securities frauds. "The meetings between the two were always in such public surroundings as a coffee shop, a hardware store, or a shopping center." The Arizona court found that the admissions made by Brewer at these meetings were admissible, even though no *Miranda* warnings had been given, because Brewer was not in custody. *State v. Brewer,* 549 P.2d 188 (1976).

A non-uniformed officer approached Wilson at a swap meet. He recognized Wilson as a convicted felon and that Wilson was selling a pistol. After questioning Wilson about the gun, the officer arrested him. The Arizona court ruled that the questioning was non-custodial. *State v. Wilson,* 145, 548 P.2d 23 (Ariz. 1976).

An officer was responding to a report of a burglary when he saw the defendant running a few blocks from the crime scene. The officer stopped his vehicle near the defendant, but did not use his overhead lights. In a conversational tone, the officer asked the defendant to come over to him, and then he asked the defendant some questions about his presence in the area. The officer did not display his weapon or make any other show of force. The conversation lasted only a few minutes, and the defendant was not restrained in any way. The court held that the encounter was non-custodial. *People v. Trujillo*, 75 P.3d 1133 (Colo. App. 2003).

Harper was seen running away from a burning car. A bystander tackled him and held him until the police arrived. The authorities learned that the car had been stolen, and that the fire had been set intentionally. Harper was taken to the hospital for further treatment. There, he was asked to explain what had happened to the car; Harper made incriminating statements to the police. The court held that the defendant was not in custody while being questioned in his hospital room, noting that the police were not responsible for Harper's initial detention or his injuries, the police

maintained a conversational tone and did not draw their weapons, intimidate Harper, or tell him that he could not leave the hospital. *People v. Harper*, 205 P.3d 452 (Colo. App. 2008).

e. The Suspect's Home

The suspect's home is probably the least custodial setting possible. Unless other indications of custody are present, the questioning of a suspect in his or her home is almost always non-custodial.

Example:

Gillis was interviewed at his residence, and after he was told that he was not under arrest and that he did not have to submit to any questioning or to a voluntary search of his residence, he made incriminating statements. The court of appeals held that the interview was not custodial in nature and that Gillis could not have reasonably believed that he was in custody when he made incriminating statements at his house. *People v. Gillis,* 883 P.2d 554 (Colo. App. 1994).

The defendant was suspected of burglarizing a city maintenance yard. Officers went to the suspect's home, found stolen property in the suspect's room, and asked the suspect's father if he would question the suspect about the burglary. The suspect later admitted that he committed the burglary and theft. The Arizona court stated, "There is nothing in the record before us to show any restraint on [the suspect]. To the contrary, the questioning took place in [the suspect's] home by his father. [The suspect] was free to leave the scene and refuse to talk to his father at all. The fact that the father questioned the [suspect] is of no importance. There was no restraint placed on the [suspect] and his statements are admissible." *State v. Moreno,* 556 P.2d 14 (Ariz. App.1976).

Police went to the defendant's home to investigate the victim's allegations of sexual assault. They encountered the defendant standing naked in his bedroom, and asked him about the allegations. The court held that this encounter in the defendant's home was non-custodial because: the questioning lasted only five to seven minutes; the officer's gun was holstered; the officer's tone was conversational; there were no threats or promises; the defendant was allowed to get dressed; the officer stood about four to five feet away

from the defendant; the lights in the bedroom were on, and the door was open; the defendant was not handcuffed; the officer never touched the defendant; only one officer spoke with him while in the bedroom; the officer did not block the door; and the defendant was not told that he could not leave. *People v. Wallace*, 97 P.3d 262 (Colo. App. 2004).

However, if other indications of custody are present, the court may rule that the interview was custodial.

Examples:

Two officers went to Cleburn's home to question him about an altercation involving a gun. Since Cleburn and one of the officers were on friendly terms, Cleburn invited them into his house, answered their questions and walked them through his home showing the officers the guns he owned. The Colorado Supreme Court held that a reasonable person in Cleburn's position would not feel he was free to leave where the presence of armed officers inside his home, coupled with the prior friendly relationship, exerted a coercive influence on him. *People v. Cleburn,* 782 P.2d 784 (Colo. 1989).

Three armed officers went to O'Hearn's home at 11:45 p.m., and when she opened the door the officers walked into her living room. The Colorado Supreme Court concluded that O'Hearn was in custody because she was attended by three armed officers and she was told she was not free to leave. *People v. O'Hearn,* 931 P.2d 1168 (Colo. 1997).

f. The Workplace

Example:

The defendant, who was an employee suspected of theft from an employer, was taken into a 15 x 15 foot room at the workplace and the only persons in the room were police officers and the employee. Questioning lasted for about 30 minutes and was accusatorial from the start. No *Miranda* warnings were given and the defendant's statements were made in response to considerable prodding by the officers. The employee was never informed that he was free to leave the room. The Colorado Supreme Court held that the employee was in custody at the time of the questioning, and

that he should have been advised pursuant to *Miranda* prior to questioning. *People v. La Frankie,* 858 P.2d 702 (Colo. 1993).

6. When the Questioning Occurred

The time of the questioning is occasionally a factor in the court's determination of custody. This factor alone will never create a custodial situation, but may do so when combined with other factors. *See Orozco v. Texas,* 394 U.S. 324 (1969)(officers woke suspect in his bedroom at 4:00 a.m. and asked accusatory questions).

7. How Many Officers Were Present

The more uniformed officers present during the questioning, the more custodial the questioning will appear. *See, e.g., People v. Pascual,* 111 P.3d 471 (Colo. 2005) (encounter custodial where 6 officers and 6 patrol cars were present).

Example:

Five plain-clothed officers went to Thiret's home to talk to him about the kidnapping of a girl. The officers parked behind Thiret's car in the driveway and stationed other officers at strategic places around the house. The officers did not give Thiret a *Miranda* advisement, but interviewed him and obtained incriminating statements. The trial court suppressed the statements, partially because of the officers surrounding the house and the fact that Thiret's car was blocked. The supreme court reversed this ruling and sent the case back for a determination of the custody issue, because there was no testimony in the record establishing that Thiret knew these facts. *People v. Thiret,* 685 P.2d 193 (Colo. 1984).

An officer observed Taylor driving and recognized his passenger, whom the officer knew to be wanted on an outstanding arrest warrant. The car was stopped and the passenger was removed from the car, handcuffed, and placed into a patrol car. The officer then contacted Taylor, requested and retained his driver's license, and advised him that he was going to search the car incident to the passenger's arrest. Taylor was escorted to the rear of the car and surrounded by several officers while the search took place, and was physically restrained on one occasion when Taylor attempted to move toward the car. During the search officers discovered a small black case that contained cocaine, which Taylor identified as belonging to him. The Colorado Supreme Court held that Taylor

was in custody for purposes of the Fifth Amendment, and his statements made without the benefit of *Miranda* warnings were inadmissible. *People v. Taylor,* 41 P.3d 681 (Colo. 2002).

8. How Many of the Suspect's Friends/Relatives Were Present

The more of the suspect's friends who are present during an interrogation, the more likely the questioning will be found to be non-custodial.

a. It is usually poor technique to interview a suspect in the presence of his or her friends or relatives, because they will often testify incorrectly about the interview. Unless the interview is taped, do not have friends or relatives around.

b. Also, tactically, an officer must consider whether the presence of a suspect's friends or relatives will be more likely to cause the suspect to "clam-up," lie or tell the truth.

9. What Happened After the Interview

A suspect who is arrested immediately after the interview is more likely to be ruled to have been in custody. If, on the other hand, the suspect is told, "Thank you for your time" and leaves, it is more difficult for the suspect to claim later that he or she was in custody.

Examples:

Investigators asked Parada to come to the office to discuss whether she had committed a crime. After giving an incriminating statement, Parada went home. The court ruled that "as a matter of law, the questioning . . . was not a custodial interrogation" because Parada voluntarily went to the office, testified that she felt free to leave, and in fact left after the interrogation was completed. *People v. Parada,* 533 P.2d 1121 (Colo. 1975).

Compare with:

Officers investigating the death of Elmarr's ex-wife asked Elmarr if he would mind accompanying them to the station to talk. Elmarr rode to the station in the back of an unmarked car, and was taken through a non-public entrance. Elmarr was subjected to a pat-down search upon arrival at the Sheriff's Department and officers gave him a *Miranda*-type advisal that the court found was incomplete. Elmarr was placed in a seven-by-ten-foot interview room and told to stay there until the officers returned, then

questioned him for at least fifty minutes. Elmarr was never handcuffed or overtly restrained, but was never told he was free to leave. He was ultimately allowed to leave, and was not arrested and charged until 20 years later. Nevertheless, the trial court found that Elmarr was in custody. *People v. Elmarr*, 181 P.3d 1157 (Colo. 2008).

10. What the Officer Reports and Testifies

a. Reports

An officer must be careful when writing reports relating to the taking of non-custodial statements. If non-custodial factors were present, document them in your report If custodial factors were present during questioning, by all means report them as well. However, if the interrogation was non-custodial, never report that the suspect was "in custody."

b. Testimony

If the statement obtained was non-custodial, do not allow a defense attorney to "talk you into" saying that the circumstances were custodial. *See, e.g., Orozco v. Texas,* 394 U.S. 324 (1969)(officer testified that Orozco was in custody).

11. Suggested Techniques

If you do not want to give a suspect his or her *Miranda* warnings, you should consider the following suggestions:

a. Avoid interviews with suspects in your car or in the interrogation room.

b. Be courteous and non-accusatory. Your tone of voice and general demeanor can be extremely important in the court's determination.

c. If possible, tell the suspect that he or she is free to leave, is not in custody, and is not being detained.

d. If the suspect can be easily located later, thank him or her after the conversation and say goodbye.

e. Do not order or request the suspect to do anything (e.g., sit, stand, come with you, etc.).

f. Document everything in your reports.

B. Interrogation

If an officer "interrogates" a suspect in custody who has not been warned pursuant to *Miranda,* or who has exercised those rights, the statement will be inadmissible. Generally, interrogation is any question, statement or conduct by an officer that is intended or calculated to elicit an incriminating response. *Rhode Island v. Innis,* 446 U.S. 291 (1980). Many officers think there is a "legal" difference between an "interrogation" and an "interview." The courts, however, do not recognize this distinction.

1. Interrogative Statements by the Officer

The courts have ruled that when an officer makes a statement to a custodial suspect that is intended to get the suspect to say something, the statement is "interrogation." The following are examples of situations where the courts have ruled on the issue of whether an officer's statement constituted "interrogation."

Examples – Interrogation:

After Probasco had shot a suspect, a friend and fellow police officer tried to console him by making conversation. The officer asked Probasco "how his stick and radio wound up on the porch," which elicited an incriminatory statement by Probasco. The court found the officer's question to be "interrogation" within the meaning of *Miranda. People v. Probasco,* 795 P.2d 1330 (Colo. 1990).

Hamilton, who was suspected of stealing a VCR from his roommate, was at the residence when an officer arrived to investigate. The officer and the roommate discussed the robbery in front of Hamilton, and the officer then turned to Hamilton and asked, "What's happening here between you and [the roommate]?" The court concluded that the officer's question amounted to "interrogation." *People v. Hamilton,* 831 P.2d 1326 (Colo. 1992).

Mack was asked by a detective, "Is this your key?" in reference to the key to a hotel room which officers suspected was being used for drug deals. The statement was found to constitute interrogation. *People v. Mack,* 895 P.2d 530 (Colo. 1995).

While executing a search warrant for drugs, officers found a purse and asked "Whose purse is this?." The question constituted interrogation. *People v. D.F.L.,* 931 P.2d 448 (Colo. 1997).

An officer obtained information that Lowe had killed a girl. Officers picked Lowe up and brought him to the police station and, before advising him of his *Miranda* rights asked, "Do you know why you are here?" Lowe then made an incriminating statement and the officer then advised Lowe pursuant to *Miranda.* The court ruled that the officer's initial question to Lowe constituted interrogation without the benefit of a *Miranda* advisement. *People v. Lowe,* 616 P.2d 118 (Colo. 1980).

Shetewi was contacted because he was suspected of striking a pedestrian with his automobile. An officer went to Shetewi's apartment and advised him of his *Miranda* rights, which Shetewi exercised. The officer then began to tell Shetewi about the accident and the results of the investigation. Shetewi than asked, "How is the man?" and the officer responded, "The girl is dead." Shetewi then said, "No, she can't be, I would have stopped. I drove out of [a bar]." The court ruled that the officer's recitation of the facts was conduct intended to elicit a response from Shetewi. Therefore, the statement was obtained in violation of *Miranda* and was inadmissible. *People v. Shetewi,* 679 P.2d 1107 (Colo. App. 1983).

The defendant was stopped for a traffic infraction and subsequently arrested on an outstanding warrant. In the course of booking him into the county jail, officers directed the defendant's attention to signs setting forth items that are illegal to bring into the jail. The officers asked the defendant if he had any of these items and told him it was "best to tell [them] that you have them now because once you get inside the facility, it's a class four felony." The court held that these questions constituted interrogation. *People v. Allen,* 199 P.3d 33 (Colo. App. 2007).

Wood was arrested for murder, and taken to an interview room at the police station. At the beginning of the interview, the detective told Wood that the purpose of the interview was to "just have a conversation," and "to hear Wood's side of the story." Before the detective could proceed with the interview, the conversation became sidetracked when Wood expressed concerns about his personal belongings. While answering Wood's questions, the detective attempted to return to the forms, stating "let me get this going and we'll talk." The detective again indicated "all we want to do now is just hear your side of the story ... about what happened," and stated that his "job is just to investigate and to get both sides of the stories," and the "[o]ne side I don't have is your side." Once Wood was advised of the victim's death, he made incriminating statements, and the detective responded by stating

"that's what we need to hear. That's what we want to talk about, ok?" He then told Wood he would finish with the sheet and then "we'll move on and we'll discuss what happened, ok?" The detective asked Wood "to try and be strong" and encouraged Wood to take his time and collect himself before proceeding. Wood continued to make incriminating statements, including "I killed him," and "he provoked it, it was self-defense, but I didn't mean to take his life." As the detective attempted to advise Wood of his rights, Wood continued to make a number of comments, and the detective reiterated that he wanted "to find out what happened" and "get to the bottom of it," but did not complete the *Miranda* advisement until nearly twenty minutes into the interview. The court held that the detective's statements encouraging Wood to provide a narrative of events as soon as he was able to dispense with some "forms" amounted to the functional equivalent of interrogation. *People v. Wood*, 135 P.3d 744 (Colo. 2006).

Examples – No Interrogation

Andersen was arrested on drug charges and answered routine booking questions, including his home address, as he was being processed into jail. He was ultimately charged with special offender status, an element of which is that the defendant imported a controlled substance into the state. Because the booking slip set forth his home address as Tempe, Arizona, Andersen contended that he should not have been compelled to reveal that information without a *Miranda* advisement. The court ruled, however, that questions pertaining to routine booking, such as name, address, and age, do not normally constitute an interrogation. Thus, even though Andersen's address was relevant to an offense charged, the Colorado Court of Appeals held that it was a proper question during his routine custodial booking and did not require a *Miranda* advisement. *People v. Andersen,* 837 P.2d 293 (Colo. App. 1992).

Officers secretly recorded a conversation between Palmer and his accomplice in the back of a police car by means of a concealed tape recorder. The court found that there was no intention to motivate Palmer to make incriminating statements, but officers merely capitalized on statements that were volunteered. *People v. Palmer,* 888 P.2d 348 (Colo. App. 1994).

After being arrested for burglary and theft, Trujillo asked the police if he could telephone a prospective employer. In the

next office, Trujillo could see the victims recovering their property. He asked the deputy whether "those are the people that they had stolen the things from." The deputy replied "yes," and Trujillo responded, "If I get that job, I'm going to pay them back." The court held that since the officer did not deliberately time Trujillo's phone call to coincide with the presence of the victims, the statements were admissible. *People v. Trujillo,* 710 P.2d 1169 (Colo. App. 1985).

The defendant was arrested, and was therefore in custody. However, the court found that he was not subjected to interrogation where: 1) except for asking if the defendant had been arrested before, the detective did not ask any questions; 2) the exchange was initiated by the defendant; and 3) the detective's statements were an explanation of why the defendant was being interviewed. *People v. Madrid,* 179 P.3d 1010 (Colo. 2008).

2. Volunteered Statements by the Suspect

Volunteered or spontaneous statements are statements made by a suspect which are not in response to interrogation. Volunteered statements made by a suspect in custody are admissible even if the suspect has not been warned of his or her *Miranda* rights or the suspect has been advised and has asserted those rights.

Always make a mental note of any volunteered statement, no matter how unimportant you think it might be. Then be sure to document the statement. If you remember a volunteered statement (or any statement, for that matter) after you have turned in your report, submit an additional report.

Examples:

Rivas, a juvenile, was arrested shortly after witnesses claimed that he assaulted a man with a bat. He was transported to the police station where he was advised of his *Miranda* rights in the presence of his father. Rivas indicated that he wanted a lawyer, and he was then escorted to jail without further questioning. After being placed in the jail cell Rivas changed his mind and stated that he wanted to tell his side of the story. The officer did not initially respond, because the juvenile's father was not present, but after five minutes and several requests by Rivas, including shouting out the officer's name, the officer returned to the jail cell, and Rivas asked him what charges were being filed. The officer responded by reciting the charges, at which point Rivas began talking about the

incident. The Colorado Supreme Court concluded that the officer's truthful response to Rivas's question cannot be objectively characterized as a ploy to evoke an incriminating response, and therefore did not constitute interrogation. Rivas's volunteered statements were therefore admissible. *People v. Rivas*, 13 P.3d 315 (Colo. 2000).

While being transported from the courthouse to the detention center following a motions hearing, Gonzales began to complain about his defense attorney and the judge presiding over the case. He then asked a sheriff's deputy, "Can I be up front with you?" The sheriff replied "Sure." Gonzales then made incriminating statements. The Colorado Court of Appeals concluded that, although the sheriff's deputy knew or should have known that Gonzales was about to make an incriminating statement, he did nothing to compel him to make a statement. "A police officer may allow a suspect to make a statement by expressly voicing his consent or by remaining silent. A response explicitly permitting a defendant to make an inculpatory statement does not rise to the level of police interrogation." *People v. Gonzales,* 987 P.2d 239 (Colo. App. 1999)

Sharpless was stopped for menacing after officers matched his car to the description given by the victim. He was ordered to lie on the ground, and as the officer was handcuffing him Sharpless asked if he could explain what had happened. The officer did not respond, and continued to handcuff him, and then searched the vehicle. Sharpless then made an incriminating statement, and was later charged with felony menacing. The Colorado Supreme Court held that the officer's conduct did not amount to interrogation because there was no express questioning, nor were there any actions on the part of the officer that were reasonably likely to elicit an incriminating response. Thus, the officer's failure to advise Sharpless of his *Miranda* rights did not preclude use of the incriminating statements at the trial. *People v. Sharpless,* 807 P.2d 590 (Colo. 1991).

Ross was arrested on drug charges and given his *Miranda* advisement. He indicated that he wanted to talk to an attorney, and officers ceased all communications. A detective gave Ross his business card and told him to call if he wanted to talk. Ross contacted the detective several days later, and the meeting began with the detective saying "hello," after which the two engaged in small talk. The detective did not ask Ross any questions and, although he was never re-advised of his *Miranda* rights, he made several incriminating statements before offering to become an

informant. The court concluded that the detective's conduct did not amount to interrogation because he asked no questions or engaged in any action reasonably likely to elicit incriminating responses. In addition, evidence showed that the conversation centered around Ross's agreement to become an informant and did not pertain to the alleged crime itself. *People v. Ross,* 821 P.2d 816 (Colo. 1992).

While lying face down on the ground, Requejo said that he threw the knife out the window. He earlier had been asked where the knife was. The court of appeals concluded that the statement was volunteered and not the result of any interrogation. *People v. Requejo,* 919 P.2d 874 (Colo. App. 1996).

Pearson killed the victim and stole his truck. After being arrested, Pearson stated that he wanted to talk to his attorney before making a statement. While being booked Pearson asked one of the officers what time the victim died, because if it was after a certain hour he had an alibi. Pearson then admitted that he had been in the victim's apartment on the day of the murder. The court ruled that Pearson's statements were volunteered and not the result of interrogation. *People v. Pearson,* 546 P.2d 1259 (Colo. 1976).

Officers responded to the scene of a murder where Mullins had killed his ex-wife's husband. While the officers were arresting and handcuffing Mullins, he sated, "I warned that son of a bitch to stay away from her." Later he asked the officer to loosen the handcuffs and stated that he would not run because he "got the guy he wanted." The Colorado Supreme Court ruled that these statements were not in response to any questions by the police, but rather were volunteered by Mullins. The statements were therefore admissible despite the absence of a *Miranda* advisement. *People v. Mullins,* 532 P.2d 733 (Colo. 1975).

Once the police decided to impound the defendant's vehicle and informed him of that fact, he asked them to retrieve his pack. The pack, however, contained cocaine, and the defendant was charged with this offense. The court held that while the defendant was in custody at this point, the police did not pose any question to the defendant that prompted the statement about the fanny pack, nor did they make any statements or take any actions that they should have known were reasonably likely to elicit an incriminating response. *People v. Milligan,* 77 P.3d 771 (Colo. App. 2003).

Following an interview at the hospital, the defendant was arrested for child abuse. He asked to see and speak with his wife, then

made incriminating statements in front of the officers. The court held that these statements were not made in response to police interrogation or its functional equivalent. *People v. Minjarez*, 81 P.3d 348 (Colo. 2003).

Police officers responded to the victim's home to investigate his allegation that the defendant sexual assaulted him. A police officer, who observed the defendant after hearing a report of the incident, stopped his car fifteen feet away from the defendant. When he saw the defendant retrieve a knife from his jacket and put the knife to his throat, the officer asked defendant to drop the knife. The defendant did not do so, so the officer asked, "What are you doing?"; the defendant responded, "I done bad." The court held that the defendant had not been subjected to interrogation when he made this statement. *People v. Vigil*, 104 P.3d 258 (Colo. App. 2004).

3. Non-Testimonial Questions and Answers

The Fifth Amendment is intended to protect a person from his or her own admissions and confessions. "Non-testimonial" statements are admissible even though the suspect is in custody and has not been warned or has asserted his or her rights.

a. Questions Not Intended to Elicit a Communication

Some questions are asked by an officer are not intended to elicit an incriminating response. A common example is information obtained from a suspect during routine booking procedures. *See, e.g., State v. Cozad,* 556 P.2d 312 (Ariz. 1976)(questions to suspect about his address obtained during booking procedures was not interrogation). Responses given by a suspect to these questions are usually admissible.

Examples:

Raglin was detained during a homicide investigation. Although he was advised of his *Miranda* rights, there was no evidence that he voluntarily waived those rights. Later, an officer asked Raglin his name, date of birth, and an explanation as to what happened. Then, out of concern for Raglin's safety, the officer asked whether the blood on Raglin's clothing belonged to him. Raglin then told the officer that it was his blood from a cut on his finger. The Colorado Court of Appeals concluded that neither Raglin's responses regarding his name and date of birth, nor his

explanation as to the source of the blood, constituted interrogation because they were asked merely to establish his identity and determine whether he need medical help, and not to elicit any incriminating responses. *People v. Raglin,* 21 P.3d 419 (Colo. App. 2000).

After arresting Johnson and ascertaining that he had misrepresented his identity, an officer went to the jail to advise Johnson the charges he would be facing. He told Johnson that he knew Johnson's true identity and that he now faced additional charges, including criminal impersonation. Johnson then made incriminating statements. The Colorado Court of Appeals concluded that no interrogation occurred because the officer employed no words or actions that were reasonably likely to elicit an incriminating response. *People v. Johnson,* 30 P.3d 718 (Colo. App. 2000).

Blankenship, a juvenile being investigated for a homicide, was in custody when he was initially questioned, but the questioning was limited to his age, address, and whether he was a runaway. The Colorado Court of Appeals concluded that such identifying information needed for booking and arraignment are not reasonably likely to elicit an incriminating response, and therefore did not constitute interrogation. *People v. Blankenship,* 30 P.3d 698 (Colo. App. 2000).

Compare: People v. Allen, 199 P.3d 33 (Colo. App. 2007) (questions about the presence of contraband did not fall under the booking exception, as they did not relate to basic identifying information).

b. Statements and Actions Which Are Non-Testimonial

Sometimes a suspect may be required to make statements or do things which are "non-testimonial." These are instances where the statement or action will show something, rather than convey verbal information. A common example is voice exemplars, in which a suspect is required to speak certain words used by the perpetrator in order to determine whether a witness can identify the voice. Because the issue is the *sound* of the suspect's voice rather than the *content* of the words spoken, there is no violation of the suspect's right to be free from self-incrimination. *See People v. Shackelford,* 546 P.2d 964 (Colo. App.1976).

Similarly, the refusal of a suspect to submit to roadside examinations, *McGuire v. People,* 749 P.2d 960 (Colo. 1988), or

chemical tests, *Cox v. People,* 735 P.2d 153 (Colo. 1987) in the DUI context do not implicate the Fifth Amendment right against self-incrimination because they involve actions rather than communications.

4. Suggested Techniques

If you have not yet warned the suspect, or the suspect has asserted his or rights, you should consider the following tips relating to the questioning or talking to the suspect.

a. Never talk about the crime or ask questions about the crime to a suspect in custody.

b. Any talk about the crime to someone else (such as a fellow officer) while in the suspect's presence is likely to be treated the same as directly questioning the suspect.

c. Most suspects in custody want to explain their defense to officers immediately after arrest. Unfortunately, some officers warn the suspect and then wait a few minutes (often in transit) before discussing the crime. It the suspect wishes to volunteer statements, simply listen.

d. Some officers do not warn a suspect until they take him or her to the station. They just wait to see if the suspect will talk about the crime in transit. This can be a dangerous technique. If you do this, do not ask the suspect any questions

e. Anything the suspect volunteers about the crime is valuable.

f. Tape record all statements the suspect makes, if possible.

g. Be sure to document in your report **all** statements a suspect makes.

C. Detention Questioning

Miranda warnings are generally not required when questions are asked during detention procedures.

1. Stops on Reasonable Suspicion

An officer who stops a suspect on reasonable suspicion may question the suspect without first providing a *Miranda* advisement. The rationale employed by the courts is that, even though the suspect is not "free to

leave," he or she is not "restrained in a significant way" while being detained on reasonable suspicion.

Note: Of course, if the officer does restrain the suspect in a significant way during the detention (e.g., moving, handcuffing, etc.) the suspect will have been illegally arrested and all statements will be inadmissible as "tainted fruits" of the unlawful arrest.

a. Pedestrians

Examples:

Police detained Young as a robbery suspect after he was seen carrying a gun and a white purse. He was patted down, told there had been a robbery, and asked what was going on. The court found that Young was not in custody because he was detained and questioned on the scene as part of a proper investigatory stop. *People v. Young,* 923 P.2d 145 (Colo. App. 1995).

While attempting to execute an arrest warrant officers approached Loyd and asked his name. Loyd then provided two different aliases. The officer then asked him if his name was Coye Loyd, and Loyd replied, "Okay, man, you got me." The court of appeals ruled that Loyd was being detained and was not in custody at the time of the questioning, and the protections of *Miranda* were therefore inapplicable. *People v. Loyd,* 751 P.2d 1015 (Colo. App. 1988).

b. Vehicles

When a suspect is stopped in a vehicle on reasonable suspicion, the officer may question the suspect for a short period without providing *Miranda* advisements.

Examples:

An officer heard over his radio that two persons in a red two-door Chevrolet just burglarized a construction site. Moments later the officers stopped the car. Upon approaching the car an officer saw acetylene tanks and other welding equipment in the back seat and, after asking questions and receiving evasive replies, the officer arrested the occupants. The court ruled that "the responses to the defendant were made during the investigatory, not the accusatory, stage of this criminal

proceeding, and the *Miranda* warnings were, therefore, not necessary. *People v. Thornton,* 547 P.2d 1278 (Colo. 1976).

Officers stopped Weeams and his accomplice soon after they committed two armed robberies and a murder. The officers had reasonable suspicion to stop the car because the suspects generally matched the descriptions given. An officer asked for identification and Weeams said he had none. The officer than asked to see his billfold and Weeams said it did not belong to him. The officer then seized the billfold and discovered that it belonged to the victim. The court ruled that Weeams was being detained and not arrested at the time of the officer's questions. Therefore, *Miranda* warnings were not necessary and the statement and evidence was admissible. *People v. Weeams,* 665 P.2d 619 (Colo. 1983)

Compare with:

Mangum was implicated by his wife in a double homicide. Officers conducted surveillance and observed Mangum leaving his wife's residence in a car. The officers stopped the car and, while the driver was being questioned about documentation, Mangum agreed to talk with officers outside the car. However, when Mangum learned that the officers were investigating the homicide and wanted him to accompany them to the police station for an interview, Mangum fled. Two officers chased him and ordered him at gunpoint to drop a knife he had put to his throat. He was then maced after he sliced his throat several times, and Mangum again fled. He was again apprehended at gunpoint, ordered to the ground and handcuffed. Another officer told Mangum he was not under arrest and was being handcuffed "for his own protection" and, despite his injuries, he was briefly interviewed before medical care was administered. The officer continued to interview him as he was transported to the hospital for medical treatment, and Mangum made additional incriminating statements. At no time was he advised of his *Miranda* rights. Under these circumstances, the Colorado Supreme Court concluded that a reasonable person in Mangum's position would have felt that his freedom had been curtailed to a degree associated with a formal arrest, and he was therefore in "custody" and not merely being "detained" for investigative purposes. His statements were therefore suppressed. *People v. Mangum,* 48 P.3d 568 (Colo. 2002).

Police received a call reporting that a white, service-type van and a small white vehicle had been parked in the same area of the parking lot for about 30 minutes, and that the occupants were passing a marijuana pipe back and forth. Officers arrived at the location within minutes and they observed a white service van and a smaller vehicle parked in the lot within inches of the van's passenger side. An officer approached the service van and could see that no one was in the driver's seat, but several people were communicating and engaging in some activity in the back of the van. Polander and the other occupants were told to exit the car, patted down for weapons, and instructed to sit on the curb. Having discovered narcotics during the pat-down search, the officers asked for and were granted permission to search the van, where the discovered additional evidence of drug use including a Crown Royal bag that contained suspected cocaine. An officer asked who the bag belonged to, and Polander replied that the bag was hers. She was then arrested and transported to police headquarters. The Colorado Supreme Court held that although "Polander was not confined at the police station, nor did the police draw their guns, use handcuffs, or otherwise demonstrate the kind of force typically associated with an arrest, as distinguished from an investigatory stop . . . Polander was, however, seized and subjected to a question about the ownership of contraband, under circumstances in which it was apparent to all that the police had grounds to arrest the occupants of the vehicle." Under such circumstances, Polander's freedom of action was curtailed to a degree associated with formal arrest and her un-*Mirandized* "custodial" statements were therefore inadmissible. *People v. Polander,* 41 P.3d 698 (Colo. 2001).

2. Traffic Stops

Normally, *Miranda* warnings need not be given prior to questioning during a routine traffic stop, even though the suspect is technically arrested prior to signing the written promise to appear.

Examples:

An officer stopped McCarty on a traffic offense. The officer immediately suspected intoxication and asked the suspect about it. The suspect said he had consumed two beers and had smoked several marijuana "joints." The United States Supreme Court ruled that no *Miranda* warnings were necessary during such a routine

traffic stop, and McCarty's incriminating responses were admissible. *Berkemer v. McCarty,* 468 U.S. 420 (1984).

An officer stopped a motorist on suspicion of drunk driving, asked him to perform roadside sobriety tests, and asked him where he was going and where he had been. The Colorado Supreme Court held that no *Miranda* warnings were necessary, because a person detained pursuant to an ordinary traffic stop is not in "custody" for purposes of *Miranda* unless his or her freedom of action is curtailed to a degree associated with an arrest. *People v. Archuleta,* 719 P.2d 1091 (Colo. 1986).

During a traffic stop, the officer took the defendant's driver's license, told him to remain in the car, and then ordered him and the passenger out of the car so that he could conduct a consensual search. After finding methamphetamine in the car, the officer commented to the defendant: "Come on, I found this ... right in your seat." The court held that the defendant was not in custody during this encounter. *People v. Stephenson,* 159 P.3d 617 (Colo. 2007).

Compare with:

An officer observed Taylor driving and recognized his passenger, whom the officer knew to be wanted on an outstanding arrest warrant. The car was stopped and the passenger was removed from the car, handcuffed, and placed into a patrol car. The officer then contacted Taylor, requested and retained his driver's license, and advised him that he was going to search the car incident to the passenger's arrest. Taylor was escorted to the rear of the car and surrounded by several officers while the search took place, and was physically restrained on one occasion when Taylor attempted to move toward the car. During the search officers discovered a small black case that contained cocaine, which Taylor identified as belonging to him. The Colorado Supreme Court held that, unlike the circumstances of *Berkemer* and *Archuleta,* Taylor was detained for a lengthy period of time in a "police dominated atmosphere where the officers used physical force to control [his] movements." In addition, like *Polander,* Taylor was subjected to questions about ownership of suspected contraband in a situation where it was apparent that the police had grounds to arrest. The court therefore concluded that Taylor was in custody for purposes of the Fifth Amendment, and his statements made without the benefit of *Miranda* warnings were inadmissible. *People v. Taylor,* 41 P.3d 681 (Colo. 2002).

3. On the Scene Questioning

The United States Supreme Court stated in *Miranda* that warnings need not be given before "general on the scene questioning as to facts surround a crime or general questioning of citizens in the fact-finding process." Often, such questioning is of an emergency nature, such as to protect the officers or others.

Examples:

An officer at the scene of an accident asked Wallace, "What happened?" Only Wallace and the officer were present, the officer's inquiry was made in normal tone of voice, and no restraints had been placed upon Wallace. The court ruled that *Miranda* warnings were not required for this kind on the scene questioning. *People v. Wallace,* 724 P.2d 670 (Colo. 1986).

An officer was called to the scene of a murder where the suspect, Mullins, was still present. The officer asked Mullins where the gun was, and Mullins replied that he had thrown it out the window. The court ruled that *Miranda* warnings were not necessary because "the actions of the police in attempting to locate the weapon, in order to protect themselves and the public, was entirely reasonable." Therefore, the statement and weapon were admissible. *People v. Mullins,* 532 P.2d 733 (Colo. 1975).

4. Indications of Custody

If the suspect is being detained, he or she is not in "custody" unless you treat the suspect as if he or she is in custody. The easiest ways to turn detainees into arrestees are to move them, physically restrain them, or order them around (unless there is some compelling safety issue that requires more restraint).

Example:

An officer stopped Gutierrez's truck because it appeared as though he was chasing another vehicle. Gutierrez told the officer that four occupants of the car had broken the windshield of his truck. The officer then ordered Gutierrez to stand beside the patrol car and took his driver's license. The officer later learned over the police radio that four men had reported to police that they had been fired upon. The officer then questioned Gutierrez about the shooting and Gutierrez admitted firing two shots at the four men. The court ruled that Gutierrez could reasonably believe that he was in custody rather than under detention during the questioning because

the officer had taken his license and had ordered him to stand next to the patrol car. The statement given as a result of this custodial interrogation (without *Miranda* warnings) was therefore inadmissible. *People v. Gutierrez,* 596 P.2d 759 (Colo. 1979).

5. Suggested Techniques

If you want to talk to a person and have reasonable suspicion, but not probable cause to arrest, you should:

a. Not order the suspect to do anything.

b. Strongly consider telling the suspect that he or she is not under arrest and is rather being temporarily detained. This helps greatly in defeating a later claim that the suspect reasonably thought he or she was in custody. If the suspect ask whether he or she is under arrest, you **must** truthfully advise him or her of the status.

c. Be as non-accusatory as possible in your questioning.

d. Ask as many questions as possible about the crime.

e. Give the suspect *Miranda* warnings if probable cause to arrest is developed.

D. The Warning

If a suspect is placed in custody he or she should be warned and a statement taken if the suspect waives those rights.

Note: If your department requires that you contact a detective instead of taking a statement from rape, homicide, or other particular suspects, be sure to note any "volunteered" statements the suspect makes and convey these statements to the interrogating detective. If you are prohibited from warning and taking statements from certain suspects, **do not ask them any questions about the crime.** If you ask questions without warning the suspect in custody, later statements taken by the detective might be subject to suppression.

1. Advisement Must Be Understandable

It goes without saying that the advisement pursuant to *Miranda* must be given in a manner understandable to the suspect.

Examples:

Although the oral advisement was done very quickly and was somewhat hard to understand, the court of appeals concluded that the advisement was complete and sufficiently understandable, and when the defendant was asked if he understood each of his rights he unequivocally answered "yes." *People v. Harrison,* 58 P.3d 1103 (Colo. App. 2002).

Although the Miranda advisement was read very quickly, the advising officer stopped after reading each line and asked whether the defendant understood, to which he indicated that he did. The defendant had also been advised of his *Miranda* rights the day before. Therefore, the court held that the defendant's advisement was sufficient. *People v. Grenier*, 200 P.3d 1062 (Colo. App. 2008).

Compare with:

The Spanish-speaking suspect was advised of his *Miranda* rights through an interpreter who was untrained in translation and had no experience in assisting law enforcement in explaining *Miranda* rights to arrested persons. In addition, rather than translating the advisement verbatim, the interpreter provided misleading and confusing statements to the suspect regarding his waiver and privilege against self-incrimination. In finding an invalid advisement pursuant to *Miranda*, the Colorado Supreme Court stated: "although we acknowledge that no translation is perfect, the transcript of the advisement reveals that the interpreter made inaccurate word choices, embellished the advisement with misleading statements, and improperly told the detective that [the suspect] had waived his rights when he had said nothing. The interpreter's deficiencies contributed to [the suspect's] inability to understand his *Miranda* rights." *People v. Mejia-Mendoza,* 965 P.2d 777 (Colo. 1998);

S*ee also: People v. Aguilar-Ramos*, 86 P.3d 397 (Colo. 2004) (due to linguistic barrier, it took the detective eight attempts to learn the defendant's name; although the defendant frequently responded "yes" when asked if he understood his rights, he also interjected "yes" or "yeah" throughout the reading of the *Miranda* form, and at other inappropriate moments; the disjointed nature of the questions and answers showed that that each party frequently had no idea what the other was talking about); *People v. Redgebol*, 184 P.3d 86 (Colo. 2008) (the defendant, a recent Sudanese refugee, was not adequately advised of his rights due to an inadequate

translation of the advisement, substantial miscommunication between the defendant and the officer, and the defendant's cultural background and limited intellectual ability).

2. Use Your Card

An officer should always **read** the suspect his or her *Miranda* rights. If you read the suspect those rights you will not leave any of the rights out. More importantly, you will be permitted to read your card on the witness stand (be sure you bring your card to court). It is also extremely helpful to provide a suspect with a written *Miranda* advisement. Likewise, read that form to the suspect and have him or her initial the rights that were read, and sign the form indicating the suspect's understanding.

Example:

An experienced officer gave a suspect *Miranda* warnings by memory. Later, at the suppression hearing the officer was asked to recite the warnings exactly as he recited them to the suspect. Nervous, the officer forgot a few words of the warnings and the confession was suppressed due to an incomplete advisement.

Elagnaf was questioned at police headquarters following his arrest, and was given a written *Miranda* advisement. Because he was handcuffed during the interview, he did not sign the advisement form, although he did give verbal assurance that he understood his rights. Prior to a second interview the next day, he signed a second written advisement form. The Colorado Court of Appeals refused to suppress Elagnaf's statements made during these interviews by determining that there is no set format for advising suspects of their rights, so long as the format chosen reasonably conveys those rights. Thus, while the court opined that verbal advisement is the better practice, an advisement solely in writing will not automatically be invalidated. *People v. Elagnaf,* 829 P.2d 484 (Colo. App. 1991).

Note: The United States Supreme Court has recently condemned the practice of intentionally refraining from giving a suspect the Miranda warnings until after they confess, then reading the suspect his or her rights and having him or her repeat the confession. *Missouri v. Seibert*, 542 U.S. 600 (2004). There, the court found that the Miranda warnings given mid-interrogation were ineffective.

3. Repeating the Warnings After a Waiver

The Colorado Supreme Court favors, but does not rigidly require, new warnings before each interrogation. If the arresting officer warns a suspect and the suspect waives his rights, the suspect need not be re-warned if the same or a different officer is to question the suspect right away (usually within a few hours on the same day). However, the longer the time between the first waiver and the later questioning, the more important it becomes to re-warn the suspect pursuant to *Miranda*.

The supreme court, in *People v. Chase,* 675 P.2d 315 (Colo. 1984), has listed a number of factors which affect whether a new warning is required before a second session of questioning:

a. the length of time between interviews;

b. whether the suspect knows what the questioning will be about;

c. how the first warnings were given (oral v. written);

d. who initiated the second interview;

e. whether, and how much, the suspect was reminded of his or her rights before the second interview, and how clearly he or she acknowledged and waived those rights;

f. the suspect's background and experience with the criminal justice system.

"The ultimate question is whether, considering the totality of the circumstances, the suspect was sufficiently aware of the continuing nature of his or her constitutional rights so as to render any subsequent statement the result of a knowing, intelligent, and voluntary waiver of those rights." *People v. Freeman,* 47 P.3d 700 (Colo. App. 2001); *See also People v. Blessett,* 155 P.3d 388 (Colo. App. 2006) (additional warnings not required before the defendant gave a second statement because the character of the interrogation did not change significantly, the questioning merely concerned clarification of her previously given statement which had followed proper *Miranda* warnings and waiver of her rights, and none of the questions put to her subsequently would have caused her to forget those rights).

Example:

On December 15, 1993, police contacted the defendant, advised him of his *Miranda* rights, and then interviewed him. Police later left the defendant at his apartment. About 9 hours later, police again contacted the defendant, but he said he did not want to talk to anyone. The defendant was placed under arrest, and then escorted to the police car. On his own accord, the defendant stated: "I suppose you want a gun." To clarify what the defendant said, the detective asked: "You mean the gun?"; the defendant replied: "A gun." The defendant then led police to the location of the weapon. The court held that the defendant was not subjected to an illegal interrogation because he had initially indicated that he knew and understood his *Miranda* rights, and during the second contact, the defendant initiated further communication. *People v. Dunlap*, 124 P.3d 780 (Colo. App. 2004).

Note: Whenever an officer takes an oral statement from a suspect and then takes an audio or videotaped statement, the officer should re-warn the suspect on the tape.

4. Conversation – Warnings – Waiver - Interrogation

An officer may converse with a suspect in custody before warning him or her. However, this is a very dangerous approach. Even though the officer is careful not to discuss the crime in any way, a court might feel that the officer was trying to get the suspect to say something incriminating. Or the court might feel the officer was trying to get the suspect to make a decision (about whether to talk) before being properly warned. In either case, any statements will be inadmissible.

5. Suggested Techniques

Often, the way an officer gives a suspect his or her warnings can make a big difference in whether the suspect will give a statement. In order to aid in getting the suspect's waiver an officer should consider the following tips.

a. Do not discuss the crime with a person in custody before providing a *Miranda* advisement.

b. When you ask the suspect if he or she wishes to waive rights, do not go into a long restatement of the rights.

c. Sometimes every officer who reports to the scene of an arrest gives the arrestee a *Miranda* warning. After about the third or fourth time a suspect hears and waives those rights, that suspect usually asserts the rights just to get the officers to shut up. One officer should therefore be responsible for warning the suspect and obtaining a waiver. If a different officer wants to talk to the suspect a few hours later, the officer need only ask if the suspect remembers his or her rights and still wants to talk.

E. Waiver of Rights

If a suspect is in custody and has been advised of his or her *Miranda* rights, the officer should then inquire whether the suspect is willing to waive those rights and make a statement. The waiver must be knowing, voluntary, and intelligent in order to be valid.

1. Voluntariness of the Waiver

Voluntariness of a waiver is similar to voluntariness of a statement. A *Miranda* waiver is considered voluntary unless coercive governmental conduct - whether physical or psychological - played a significant role in inducing the defendant to make the confession or statement. *People v. Platt*, 81 P.3d 1060 (Colo. 2004). The following are examples of instances where the courts have addressed the issue of whether a suspect voluntarily waived his or her *Miranda* rights.

Note: Intoxication will render a suspect's waiver *involuntary* only when government conduct causes the intoxication. Generally, the issue of self-induced intoxication is relevant to whether suspect was so intoxicated that he or she could not have made a *knowing and intelligent* waiver, as discussed below. *People v. Platt*, 81 P.3d 1060 (Colo. 2004).

Examples – Voluntary Waiver

Owens was arrested for possession of a controlled substance and was provided a written advisement of his *Miranda* rights at the police station. He placed his initials after each of the warnings and then signed the form acknowledging that he understood the advisement. He also signed an express waiver of the rights. Officers then provided a "Witness Statement Form" which contained the printed statement "This statement is given of my own free will without threat or coercion or without promises of any kind. I also understand that I may be called upon to testify in court as to this case and statement." After Owens provided incriminating statements, one of the officers inappropriately

threatened to use a catheter if Owens refused to provide a urine sample voluntarily. The Colorado Supreme Court held that, even though the Witness Statement Form misstated Owens's privilege against self-incrimination at trial, that error did not invalidate Owens's waiver because he was fully and accurately advised of his rights during the written advisement procedure. The court also concluded that the officer's threat of forcefully obtaining a urine sample was made after Owens made his incriminating statements, and therefore did not taint the voluntariness of those statements. *People v. Owens,* 969 P.2d 704 (Colo. 1999).

After Page was booked into the jail, he was advised of his *Miranda* rights. He waived those rights and was interrogated. While he was being interrogated, two public defenders came to the jail and sought to meet with Page for the purpose of preparing an indigency application. Neither attorney had been appointed to represent Page. The public defenders were not allowed access to Page, and he was not informed of their presence. The Colorado Court of Appeals concluded that Page's decision to waive the right to remain silent did not become involuntary, unintelligent, or unknowing merely because, unknown to him, attorneys who had not been retained or appointed were willing to meet with him. *People v. Page,* 907 P.2d 624 (Colo. App. 1995).

Jordan was advised of his rights and initialed his understanding of each on a written advisement form. He later argued that his statement was involuntary because he was sleep-deprived and on Prozac and that he was unable to understand the consequences of making a statement. The court concluded that Jordan recognized the seriousness of his predicament, understood both the meaning and extent of his rights, and knowingly and intelligently waived those rights. *People v. Jordan,* 891 P.2d 1010 (Colo. 1995).

Pease was brought to the police station for questioning and signed a form acknowledging and waiving his *Miranda* rights before the interview. At the conclusion of the interview, Pease learned that police had obtained a warrant for his arrest. The court concluded that the failure of the police to tell Pease about the arrest warrant was not coercion. His decision to waive his rights was knowingly and intelligently made in that he understood his rights; it is not required that a defendant know all the circumstances which might affect his decision. *People v. Pease,* 934 P.2d 1374 (Colo. 1997).

During an interrogation of the defendant for making false bomb threats, the detectives told her she was a suspect in the bomb threats and made references to the tragedies at Columbine High

School and the World Trade Center. However, when the detectives read the defendant her *Miranda* warnings, she stated that she understood her rights and then relinquished them both orally and in writing. The court held that the detectives' references to past terrorist acts did not affect the defendant's free and deliberate choice to waive her rights. Thus, the Miranda waiver was valid. *People v. Blessett*, 155 P.3d 388 (Colo. App. 2006).

When McGlotten entered the interview room, he asked, "Why you fucking with me, man?" and made aggressive physical gestures. One of the officers responded by yelling and cursing at McGlotten. The officer said that McGlotten was potentially facing twenty-four years in prison, and that individuals were "pointing their finger at him." Immediately after this exchange, McGlotten abandoned his confrontational tone, and responded to the officer's questions by saying "Yes, sir" and "No, sir." The officer advised McGlotten of his *Miranda* rights, and McGlotten signed a written waiver. The Court of Appeals upheld the waiver, finding that McGlotten was not intimidated by the officer's aggressive remarks, and that the interrogation soon became calm and civil. The court also noted that the officers did not physically threaten McGlotten or make false statements to him. The court therefore concluded that McGlotten's will was not overborne by the police conduct and that his waiver was voluntary. *People v. McGlotten*, 166 P.3d 182 (Colo. App. 2007).

During his interrogation, the detective made comments implying that giving a statement was in Madrid's family's best interest, asserted that the police already knew what had happened, and offered Madrid a way to minimize his culpability by claiming the incident was a "mistake." The court held that even under these circumstances, Madrid's waiver of his *Miranda* rights was not the product of "intimidation, coercion, or deception," rather than a free and deliberate choice. *People v. Madrid*, 179 P.3d 1010 (Colo. 2008).

Example – Waiver Involuntary:

May was the driver of a car which was involved in an accident. Police detected a strong odor of alcohol on his breath and asked him to answer some questions while he was at the hospital. During the subsequent interview, May appeared to be drifting in and out of consciousness. He also inaccurately answered a number of questions, such as the date, where he was presently, and where he had been driving. The Colorado Supreme Court found that May was unable to comprehend the waiver that he had provided, and

thus the waiver was invalid. *People v. May,* 859 P.2d 879 (Colo. 1993).

2. Informing the Suspect of the Charges

It is not necessary to tell a suspect what crime the questioning will be about in order to obtain a valid waiver. In addition, once a valid waiver has been obtained, officers may inquire into any crimes they wish without having to re-warn the suspect. Of course, once the suspect learns what the questioning is about, he may assert his rights and end the interview.

Examples:

Federal officers arrested Spring in St. Louis on charges of firearms violations. They gave him a *Miranda* warning, obtained a waiver, and asked him about those crimes. During the questioning, and without giving Spring another *Miranda* warning or telling Spring they suspected his involvement in a Colorado murder, the officers asked him about the murder. Spring provided answers to some of the questions regarding the murder. The United States Supreme Court ruled that a suspect does not have to be told before a waiver what he or she will be questioned about, and does not need to be re-advised before questioning changes to another crime. *Colorado v. Spring,* 479 U.S. 564 (1987).

Wiley was arrested for driving while her license was suspended. Her car was impounded and she was taken to the police station and provided a *Miranda* advisement. Wiley later consented to a search of her purse, and an officer found illegal drugs. The officer asked her whether the drugs belonged to her, and she replied in the affirmative. On appeal, the Colorado Court of Appeals rejected Wiley's argument that she should have been re-advised of her *Miranda* rights upon the discovery of the contraband in her purse, concluding that no such re-advisement was required. *People v. Wiley,* 51 P.3d 361 (Colo. App. 2001).

Officers interviewed the defendant about an assault involving herself and the victim. The detective advised the defendant of her *Miranda* rights, and she initialed each advisement. She also had an opportunity to read the form and signed it, acknowledging that she understood her rights as a whole. The defendant also verbally affirmed that she understood all of the rights previously read to her and indicated that she was willing to speak with the detective. Although the defendant was not advised of the victim's death at the beginning of the interview, the court reiterated that officers

have no obligation to inform a suspect of the possible subjects of an interrogation or the facts and circumstances which may be pertinent to his or her decision to talk to police. The court concluded that the defendant's *Miranda* advisement was adequate and that her waiver was knowing and intelligent. *People v. Humphrey*, 132 P.3d 352 (Colo. 2006).

3. Knowing and Intelligent Understanding

A waiver of *Miranda* rights must not only be voluntarily given, but also with an understanding of the nature of the rights being waived. The phrase "knowing and intelligent" refers to the suspect's understanding of the basic choices outlined in *Miranda*: (1) that the suspect does not have to talk; (2) that the suspect can have a lawyer present; and (3) if the suspect does talk any statements can be used against him or her. "To broaden the inquiry beyond that simple question undermines the admissibility of confessions that are validly obtained, with no police misconduct, from a willing and adequately informed suspect." *People v. Al-Yousif,* 49 P.3d 1165 (Colo. 2002). The state is therefore not required to demonstrate that the suspect understood the tactical advantages of each of the choices, or the constitutional premises upon which they are based.

Examples:

Police officers went to Kaiser's home to investigate allegations of improper sexual contact with minors. The officers were aware that she was considered developmentally delayed. After she denied any inappropriate conduct, officers showed her photographs depicting her having sexual relations with minors, and then they verbally advised Kaiser of her *Miranda* rights. She was later taken to the police station, where she was re-advised in writing of her rights, which she initialed. Thereafter, she provided a confession. Officers later went to her house and, without re-advising her, obtained additional incriminating statements. The Colorado Supreme Court recognized that a defendant's mental capacity is important in determining whether there has been a knowing and intelligent waiver; "however, it should not be the only, or even the primary, factor in a trial court's analysis." The court concluded that "the record shows that Defendant, though mildly retarded, was intelligent enough to appreciate the seriousness of her predicament and the consequences of talking to the police about this matter." *People v. Kaiser,* 32 P.3d 480 (Colo. 2001).

Al-Yousif was arrested at a Denver bus station on suspicion that he committed a homicide. He had resided in the United States for four years and had intermittently attended school including English

language classes. While being transported to police headquarters, an officer gave him a brief oral *Miranda* advisement, and then told him to be quiet until he reached the station. He was later interviewed on videotape by detectives. That interview was preceded with a written *Miranda* advisement. The trial court noted that the advisement was rapid (18 seconds), Al-Yousif was not able to read along as the rights were read to him, the individual rights were not initialed, and no Arabic interpreter was provided. Al-Yousif signed the written form indicating he understood the rights and agreed to speak to the officers, but he asked to first speak to his uncle. His request was denied. Al-Yousif then was interviewed for 90 minutes. He then agreed to show the detectives where he had dumped the victim's body, and when he returned to the police station he was re-advised of his rights by a different detective. Al-Yousif then requested an attorney and the interview was terminated. Although the trial court found that the state failed to establish that Al-Yousif made a knowing and intelligent waiver of his *Miranda* rights, the Colorado Supreme Court reversed. The court concluded that, although Al-Yousif's English skills were limited, he possessed a sufficient level of understanding to knowingly and intelligent comprehend and waive his *Miranda* rights. While Al-Yousif's cultural background is a factor within the totality of the circumstances that bears upon the validity of his waiver, the relevance of that factor is limited. *People v. Al-Yousif*, 49 P.3d 1165 (Colo. 2002).

Officers picked up Aguilar-Ramos at his residence and brought him to the police station. At the outset of the interview, which was conducted entirely in Spanish, the detective spent several minutes attempting to get background personal information. The detective then presented Aguilar-Ramos with a printed *Miranda* form in Spanish and proceeded to read Aguilar-Ramos his rights in Spanish. The detective asked if he understood these rights, and Aguilar-Ramos asked, "What does it mean yes. If I want my attorney.... How ... how ... can I put down here?" The detective responded, "O.K. The ... question is, do you understand these rights that I have explained. Answer yes or no." The detective then explained to Aguilar-Ramos that he needed to sign the form so that he could talk to him. Aguilar-Ramos signed the form as directed. During the ensuing interview, each party frequently had no idea what the other was talking about. The court held that under these circumstances, Aguilar-Ramos did not understand his rights sufficiently to waive them. *People v. Aguilar-Ramos*, 86 P.3d 397 (Colo. 2004).

King met with police at the jail and agreed to provide a statement about a previous assault. The detective advised King of his *Miranda* rights and told him that signing the advisement form was not an admission of guilt. King indicated his understanding of his rights, signed the advisement form, and agreed to discuss the case. The court held that the Miranda waiver was valid, and was not obtained by deception because the detective had only assured King that his *signature* would not be incriminating, not that *subsequent statements* could not be used to incriminate him. *People v. King*, 151 P.3d 594 (Colo. App. 2006).

Intoxication will not invalidate an otherwise valid Miranda waiver if the suspect was capable of understanding the nature and ramifications of the rights being waived. The following factors are relevant in determining whether intoxication is affecting the suspect's ability to make a knowing and intelligent waiver:

- Whether the suspect's answers were responsive and appeared to be the product of rational thought process;
- Whether the suspect was able to appreciate the seriousness of his or her predicament, including the possibility of incarceration;
- Whether the defendant had the foresight to attempt to deceive the police in hopes of avoiding prosecution;
- Whether the defendant expressed remorse for his or her actions;
- Whether the defendant expressly stated that he or she understood the rights being waived.

Examples - Intoxication:

Quintana became involved in an altercation outside a bar that resulted in the stabbing of the bar owner. He was arrested, transported to the police station, and provided a *Miranda* advisement. Quintana waived his rights and told officers that he had consumed several drinks in the morning before being arrested. The detective noted a slight odor of alcohol on Quintana's breath, but testified that Quintana did not appear to be intoxicated. The Colorado Court of Appeals held that intoxication is one factor to be considered in determining the voluntariness and validity of a *Miranda* waiver, but intoxication alone does not necessarily invalidate that waiver. Here, Quintana appeared to be moderately affected by his consumption of alcohol, but, based upon his demeanor and responsiveness to police questioning, he was not so intoxicated as to invalidate a knowing and intelligent waiver. *People v. Quintana,* 996 P.2d 146 (Colo. App. 1998).

During the interrogation, the officer advised Platt orally and in writing of his *Miranda* rights, and Platt stated that he understood those rights. Platt made the statement five to seven hours after his last drug use. The statement was coherent, rational, and lucid. It contained a straightforward narrative of the sexual assault, Platt's explanation for making the assault, and his apparent appeal to the police for drug treatment instead of prison. Thus, the court held that Platt was not so intoxicated at the time of the *Miranda* advisements as to be incapable of understanding his rights and the consequences of waiving them. *People v. Platt*, 81 P.3d 1060 (Colo. 2004).

The defendant was involved in a car accident and was contacted by the police after his car rolled over. While awaiting the ambulance, the defendant waived his Miranda rights and spoke with the officer. At that time, his blood alcohol level was .291. The Colorado Supreme Court held that despite this level of intoxication, the defendant's waiver was valid. The court noted that the defendant was able to intelligently assess his own physical condition, and he was able to follow the officer's directions. The defendant also paid attention while the officer read the *Miranda* warnings, and, when asked if he understood those rights, the defendant replied that he did. *People v. Jewell*, 175 P.3d 103 (Colo. 2008).

See also People v. Martin, 30 P.3d 758 (Colo. App. 2000)(intoxication alone does not automatically render statements involuntary or invalidate an otherwise valid waiver of *Miranda* rights); *People v. Cardenas,* 25 P.3d 1258 (Colo. App. 2000)(defendant's intoxication did not prohibit him from understanding the nature of the rights he was waiving or from understanding the consequences of his waiver).

4. Active Waiver

Normally, a person waives his or her rights by orally stating that he or she waives them. Often, a suspect will also state in writing that he or she has agreed to waive rights, usually by signing a pre-printed form to that effect. There is no prescribed requirement regarding how an express waiver is to be obtained. *See, e.g., People v. Wiley,* 51 P.3d 361 (Colo. App. 2001)(oral waiver of *Miranda* rights was not invalided by the fact that the advising officer did not sign the written waiver until some unspecified time after the interview had already occurred).

Example:

Miller was being questioned in the hospital following an accident and was given a proper *Miranda* advisement prior to questioning. When asked if he understood his rights, Miller nodded his head in assent. The officer asked him to verbally assent, and Miller complied and proceeded to answer questions. The Court of Appeals found Miller's waiver of his rights to be voluntarily and intelligently made, and found no coercion on the part of the officer. *People v. Miller,* 829 P.2d 443 (Colo. App. 1991).

5. Waiver by Conduct

A valid Miranda waiver need not be express, but may be inferred from the actions and words of the person interrogated. *People v. J.L.M.*, 8 P.3d 435 (Colo. 1999). A person who has been warned may waive his or her rights by answering questions even though it was never specifically stated whether the suspect wanted to waive those rights.

Example:

Butler was arrested and was asked to sign a waiver of rights statement. He refused but said he would talk. He then provided a statement. The United States Supreme Court ruled that, although Butler never specifically waived his right to an attorney, such a waiver is inferred from his conduct. His statements were therefore admissible. *North Carolina v. Butler,* 441 U.S. 369 (1979).

Note: It is very risky to ask questions of a suspect in custody without a specific waiver of rights.

6. Waiver by Silence

Silence alone will rarely be sufficient to serve as a waiver.

Examples:

An officer responded to a silent burglar alarm on a railroad boxcar. When the officer arrived, he saw Roybal standing near the boxcar which was loaded with cases of beer. The officer arrested Roybal and advised him of his *Miranda* rights. Roybal did not respond. While transporting Roybal to the police station the officer asked him what he had been doing, and Roybal responded "I was trying to get the beer." The Colorado Supreme Court ruled that the officer never obtained a valid Fifth Amendment waiver, and the

statement was therefore inadmissible. *Roybal v. People,* 496 P.2d 1019 (Colo. 1972).

Compare with:

Nunez was twice advised of his rights orally and in writing. He agreed to talk to a detective after stating that he understood his rights. Although he hesitated in responding to the detective's first question until it had been asked numerous times, he did eventually answer it. Nunez stopped the interrogation at this point and requested a lawyer. The Colorado Court of Appeals refused to suppress the statement made by Nunez before he stopped the interview, holding that his silence (after agreeing to talk), without more, did not invoke his right to remain silent. *People v. Nunez,* 824 P.2d 54 (Colo. App. 1991).

7. Suggested Techniques

An officer must be able to prove to a court that the suspect indicated by some conduct that he or she voluntarily waived the *Miranda* rights. Always make sure the suspect says that he or she wants to tell his or her side of the story. Do not rely on silence.

F. Assertion of Rights

A suspect may assert his or her rights **at any time** after being warned. Such assertions may be a "complete" assertion, a "limited" assertion, or an equivocal or ambiguous assertion. A request for an attorney or an assertion of the right to silence "need not be sophisticated or in a legally proper form." *People v. Fish,* 660 P.2d 505 (Colo. App. 1983).

1. Complete Assertion

A complete assertion of rights is an unequivocal statement by the suspect that he or she wants to have a lawyer, or to remain silent. Once a suspect makes a complete assertion of his or her rights, the officer must "scrupulously honor" the request and **immediately cease the interview.**

Examples:

Arroya was taken to the police station to investigate the drowning of her son that occurred in her apartment. Prior to being interviewed a detective advised her pursuant to *Miranda*, and re-advised her again after she consented to the interview being videotaped. Arroya waived her rights and made a statement. After

the interview ended the detectives continued investigating, and conducted a second interview with Arroya two hours later. The detective did not re-advise Arroya prior to the second interview. After making several incriminating statements and the detective asked if she would like to take a break, Arroya stated, "I don't wanna talk no more." Believing that Arroya wanted a break, the detective stopped his questioning, but resumed questioning several minutes later without clarifying whether Arroya's statement pertained to taking a break or terminating the interview. Arroya then made additional incriminating statements. The Colorado Supreme Court recognized that once the right to remain silent has been invoked, this right must be scrupulously honored by the police. Among the factors to be considered in determining whether the right has been so honored are (1) the suspect's initial advisement and acknowledgment of his or her rights; (2) whether the officer immediately ceased questioning once the right to silence was invoked and did not attempt immediately to resume questioning; (3) whether the subsequent interrogation was by the same officer, in the same location, and about the same crime as the first interrogation; and (4) whether the suspect was re-advised of his or her rights at the outset of the subsequent interrogation. Here, the court concluded that, while the detective immediately ceased questioning Arroya after she stated she did not want to talk, she was only given a short break and questioning then resumed. The same detective resumed the questioning regarding the same crime, and the detective made no effort to clarify or to discuss Arroya's statement that she did not want to talk any more. Therefore, Arroya's invocation of her Fifth Amendment rights was not "scrupulously honored." *People v. Arroya,* 988 P.2d 1124 (Colo. 1999).

Officers arrested Chavez because he matched the description of a person who had just committed burglaries. The officer warned Chavez pursuant to *Miranda*, and Chavez said he did not want to talk to the officers at that time. While driving Chavez to the scene of the burglaries the officer asked Chavez some questions, and Chavez made some incriminating statements. The court ruled that by questioning Chavez after he had invoked his rights, the officer had violated Chavez's Fifth Amendment rights. The statement was therefore inadmissible. *People v. Chavez,* 632 P.2d 574 (Colo. 1981).

During the Miranda advisement, the defendant was advised of his right to an attorney, then asked "why don't I have an attorney now?" The detective did not respond, and continued reading the advisement. At the conclusion of the advisement, the defendant

again asked "How come I don't have a lawyer right now?" The Colorado Supreme Court held that these comments constituted unequivocal and unambiguous requests for counsel. *People v. Adkins*, 113 P.3d 788 (Colo. 2005).

The defendant was arrested and interrogated about a sexual assault. He waived his Miranda rights, and then began speaking with the officer. During the interrogation, the defendant was confronted with the victim's allegations. The defendant stated, "You know, if she's got some other different story, I'm going to have to talk to an attorney about this." The detective then asked, "are you telling me that you want to talk to a lawyer now?" The defendant replied, "well, yeah. I mean, you know, you're telling me she said something different." The Colorado Supreme Court held that these statements constituted an unambiguous and unequivocal request for counsel. *People v. Bradshaw*, 156 P.3d 452 (Colo. 2007).

See also: People v. Redgebol, 184 P.3d 86 (Colo. 2008) (Redgebol's answer of "Yes, he would like a lawyer" to the question of "Would you like a lawyer with you, while we talk today, or no?" was an unambiguous and unequivocal request for counsel).

2. Limited Assertion

A limited assertion of rights is a statement by a suspect that he or she wants to assert part of his or her rights, but not all of them. For instance, the suspect might say he does not want to answer a particular question or set of questions. Or she might be willing to give an oral statement but not a written one. In these circumstances, an officer may continue to question the suspect, albeit within the limitations stated by the suspect.

Example:

Barrett was arrested for sexual assault. When interrogated he refused to make written statements without the presence of his lawyer, but he orally answered questions. The United States Supreme Court upheld the admission of the oral statements, holding that Barrett's invocation of a right to counsel was limited only to written statements. *Connecticut v. Barrett,* 479 U.S. 523 (1987).

3. Equivocal Assertion

Often suspects express uncertainty as to whether it is in their best interest to talk with police or consult an attorney. In the right to counsel context, the United States Supreme Court has adopted a "clear articulation rule." If a suspect clearly requests an attorney, then no further questioning may occur until an attorney has been made available or the suspect reinitiates the conversation. However, if the suspect's request is ambiguous or equivocal, the police need not make an effort to clarify the statement and are free to continue the questioning. *Davis v. United States,* 512 U.S. 452 (1994). The court characterized the rule as a "reasonableness rule," stating "police officers should not be forced to make difficult judgment calls about whether the suspect in fact wants a lawyer even though he has not said so, with the threat of suppression if they guess wrong."

The Colorado Supreme Court has adopted the "clear articulation rule" in the invocation of the right to silence context. *People v. Arroya,* 988 P.2d 1124 (Colo. 1999): "We adopt this reasonableness rule in the context of invocation of the right to remain silent – before the police must scrupulously honor a suspect's right to remain silent, the suspect must clearly articulate that right so that a reasonable police officer in the circumstances would understand the suspect's words and conduct to mean that the suspect wants to exercise his right to cut off further questioning." In determining whether a suspect has made a clear assertion of his or her right to remain silent, the courts are to examine the totality of the circumstances surrounding the statement. Among the factors that are to be consider are:

a. the words spoken by the suspect and the interrogating officer;

b. the officer's response to the suspect's words;

c. the speech patterns of the suspect;

d. the content of the interrogation;

e. the demeanor and tone of the interrogating officer;

f. the suspect's behavior during questioning;

g. the point at which the suspect invoked the right to remain silent; and

h. who was present during the interrogation.

An officer's attempt to clarify a suspect's wishes may also be part of the totality of the circumstances.

Examples:

Prior to a custodial interview, Tally was advised of his *Miranda* rights, to which he replied, "I understand what you're saying." However, upon being asked if understood his rights he stated, "I understand what you're saying to me that I, that I should have an attorney present while you question me?" The officer replied, "that's not what I'm saying," and then he re-advised Talley. The officer then asked, "do you wanna talk to us at this time?" and Tally responded, "um, well the thing that I'm looking at later on is I wanna talk to you but I also, I don't wanna have an attorney come to me and tell me . . . this is not what I should've done." The detective acknowledged that he could not control what an attorney might tell Talley, and then asked, "so, will you talk to me." Thereafter, Tally agreed, and he made incriminating statements. The Colorado Court of Appeals held that Talley's references to an attorney did not constitute a clear, unambiguous request for counsel. Rather, since the remarks about counsel were ambiguous, "nothing prevented the detective from continuing his questioning, and his failure to ask questions designed to clarify defendant's intent cannot constitute a basis for suppressing his later statements." *People v. Tally,* 7 P.3d 172 (Colo. App. 1999).

During an interview with the police about the murder of a young girl, the defendant asked the investigators if he could talk to his wife. The investigators left the room for several minutes. While they were out of the room, the defendant said, "I ain't helping you no more till I see my wife.... Doing nothing else, saying nothing else till I see my wife." When the investigators returned to the room a few minutes later, they told the defendant they had talked to his wife and she wanted them to tell him that she loved him and that their children were fine. The defendant stated, "Fuck that, I want to see my wife before I help anymore, I want to see her. I won't say nothing, I won't talk to nobody until I see my wife. That's all I want is to see my wife." One of the investigators told the defendant that his wife had gone to get something to eat and would be back soon. The defendant said he "didn't wanna know no more, I don't wanna hear no more, see no more, I don't wanna hear it, I don't. I can't handle this man." The investigators continued to question him. The court held that a reasonable officer could have understood defendant's statements as indicating a desire to continue the interview, though his most immediate concern was for

a few minutes to talk to his wife. *People v. Jimenez*, 217 P.3d 841 (Colo. App. 2008).

During his interrogation for murder, the defendant stated, "maybe I should get a lawyer or what ever find out where I stand." The Court of Appeals held that this statement was ambiguous and did not necessitate the cessation of questioning. Later during the interrogation, the defendant stated, "I don't want to say the truth without a lawyer or something," and "I don't want to say the truth cause it's not a court of law and I don't have an attorney." The court also held that these statements did not clearly, unambiguously, and unequivocally invoke his right to an attorney. *People v. Grenier*, 200 P.3d 1062 (Colo. App. 2008).

About an hour into the defendant's interview, the defendant stated, "well, let's do this. To end this interview, give me my blood test, and let me go, or whatever you're going to do. I'm not going to sit here and argue with you. I know you want to argue with me.... Let's say, I'm not going to ... you're not going to tell me what I want to know, and I'm not going to tell you.... Oh, I just want to go home. That's what I want. I want to know can you take my blood test, or whatever you want to do." The court of appeals held that this did not constitute a request to cease questioning. *People v. Muniz*, 190 P.3d 774 (Colo. App. 2008).

4. Non-Assertions

Occasionally a suspect will say something that at first appears to be an assertion of rights but is not an assertion at all. In such circumstances an officer may continue to question the suspect.

Examples:

Grant asserted that he invoked his right to counsel when he told the detective that he had spoken with a public defender, showed him counsel's card, and reported that he had signed a request for a determination of indigency form. The Colorado Court of Appeals held, however, that "the fact that a defendant executed a financial eligibility form and the fact that a defendant was interviewed by a member of the public defender's officer does not constitute an unambiguous invocation of the right to counsel." *People v. Grant,* 30 P.3d 667 (Colo. App. 2000).

Wells and his friends committed several crimes. When they were arrested, Wells told his friends, "don't make any statements." The court of appeals ruled that this was not an assertion of the Fifth

Amendment right to remain silent. *People v. Wells,* 691 P.2d 361 (Colo. App. 1984).

When Rosales's girlfriend was interviewed at the police station, she told the officer that Rosales wanted has to help him find a lawyer. The following day, Rosales spoke to a detective after waiving his *Miranda* rights. The court concluded that "the principles of *Miranda* place the invocation of the right to counsel upon the suspect, and not upon benign third parties." *People v. Rosales,* 911 P.2d 644 (Colo. App. 1995).

A refusal to be taped or to sign a statement has been held not to constitute an assertion of rights. *People v. Trujillo,* 710 P.2d 1169 (Colo. App. 1985) .

An attorney cannot invoke a suspects Miranda rights anticipatorily by filing a motion purporting to invoke the rights during arraignment in an unrelated case. *People v. Vasquez,* 155 P.3d 588 (Colo. App. 2006).

5. Suggested Techniques

An assertion of Fifth Amendment rights is an important issue. An officer should consider the following tips when it appears a suspect is asserting his or her rights.

a. If a suspect says, in any way, that he or she wants to have a lawyer or does not want to talk, you must immediately stop questioning the suspect.

b. If the suspect makes an ambiguous assertion of rights, you may continue the interview, although it is advisable to clear up any ambiguity.

c. If the suspect says he or she does not want to answer a particular question, check to make sure he or she is still willing to talk about the case. If so, you may continue with other questions.

d. When testifying before a jury, **never** mention that the defendant asserted his or her rights. Likewise, never mention that the defendant "asked for a lawyer" or "did not say anything," or otherwise comment on the fact that the defendant exercised his or her constitutional rights.

G. Change of Mind After Assertion of Rights

A suspect may change his or her mind about giving a statement after an assertion of rights. If this occurs, the officer should, by all means, take the statement. If the suspect initiates the conversation, an officer should always re-warn and take a statement. The general rule is that an officer may reinitiate a conversation to see whether the suspect has changed his or her mind if the suspect asserted his or her right to silence, but not if the assertion was to the right to an attorney.

1. Assertion of Right to Silence

If a suspect in custody asserts the right to remain silent, an officer may (and should) return after a "reasonable time to see if the suspect has changed his mind about giving a statement. As the Colorado Supreme Court has stated, "*Miranda v. Arizona* [does not] mean that after an accused has once refused to talk to law enforcement officers, the police are forever barred from questioning or talking to the defendant . . . What the Supreme Court condemned in *Miranda* were those cases in which the police refuse to take 'no' for an answer and continue to question, harass and coerce the defendant to cast aside his desire to exercise his constitutional right to remain silent." *People v. Naranjo,* 507 P.2d 1273 (Colo. 1973).

a. Reasonable Time

There is no specific time limit on how long an officer must wait after the assertion to return. However, in discussing the issue, the United States Supreme Court has stated:

> "To permit the continuation of custodial interrogation after a momentary cessation would clearly frustrate the purposes of *Miranda* by allowing repeated rounds of questioning to undermine the will of the person being questioned. At the other extreme, a blanket prohibition against the taking of voluntary statements, or a permanent immunity from further interrogation, regardless of the circumstances, would transfer the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests. Clearly, therefore . . . the *Miranda* opinion can [not] sensibly be read to create a per se [prohibition] of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent." *Michigan v. Mosley,* 423 U.S. 96 (1981).

b. Returning to Questioning

Officers may resume questioning of a suspect who has invoked his or her right to silence only where they have "scrupulously honored" the right to cut off questioning. Among the factors the Colorado Supreme Court has said are important in deciding whether resuming questioning was proper are (1) the suspect's initial advisement and acknowledgment of his or her rights; (2) whether the officer immediately ceased questioning once the right to silence was invoked and did not attempt immediately to resume questioning; (3) whether the subsequent interrogation was by the same officer, in the same location, and about the same crime as the first interrogation; and (4) whether the suspect was re-advised of his or her rights at the outset of the subsequent interrogation. *People v. Arroya,* 988 P.2d 1124 (Colo. 1999).

An officer must avoid harassing a suspect, and should avoid waking him or her in the middle of the night for questioning.

Examples:

Officers with probable cause arrested Naranjo for murder. When Naranjo was given his rights, he said he did not want to talk. About four hours later officers returned and asked Naranjo if he would waive his rights. Naranjo waived his rights and stated that he had never seen the murder weapon (a knife) before. The officers ceased questioning but returned six hours later, obtained a waiver, and obtained more statements. The court ruled that it was not a violation of Naranjo's Fifth Amendment rights for the officers to return to see if Naranjo would waive his rights. Therefore, the statements were admissible. *People v. Naranjo,* 507 P.2d 1273 (Colo. 1973).

Quezada asserted her right to remain silent, and questioning stopped immediately. Forty-five minutes later a different officer, unaware of an attempt to interrogate Quezada, gave her a *Miranda* warning and obtained a waiver. Quezada then made incriminating statements. The court ruled that the statements were admissible. *People v. Quezada,* 731 P.2d 730 (Colo. 1986).

c. Initiation by the Suspect

Often, after a suspect asserts his or her right to remain silent, the suspect will begin a conversation with the officer about the crime.

These statements are, of course volunteered and admissible. They also, however, indicate a desire by the suspect to waive the right to remain silent. Prior to questioning the suspect, however, the officer should obtain a waiver.

Examples:

Marcellus and his wife were arrested on robbery charges, and he invoked his right to remain silent. The next day Maracellus's father-in-law told officers that Marcellus had killed someone. Officers then interviewed Marcellus's wife, who implicated him in the murder after explaining that she had been instructed by her husband to talk to them. Marcellus, acknowledging that he had told his wife to talk about the murder, was then interrogated and confessed to the killing. The Colorado Court of Appeals suppressed the confession on the grounds that Marcellus's instructions to his wife were insufficient alone to indicate his intent to re-initiate contact. The officers should not have re-approached him just because he told his wife he wished to speak to them himself. *People v. Marcellus,* 819 P.2d 555 (Colo. App. 1991).

Officers first contacted Close, who was a suspect in a robbery and assault case, at the jail in a neighboring county where he was being detained for an unrelated traffic offense. He was taken to an interview room where he was advised of his rights under *Miranda.* Close told the police he did not want to discuss his case, signed "nope" on the advisement form, and the interview terminated. Officers then transported him to the Denver County Jail. During the 45 minutes it took to transfer Close, he talked casually with the police about other matters. At the jail, Close became very conversational with the officers so they asked him again if he wanted to discuss the incident. He said "Yes," and was then re-advised of his *Miranda* rights. Close signed the advisement and waiver form and then made a statement. The court of appeals later rejected Close's complaint that the officers had not scrupulously honored his right to cut off questioning. *People v. Close,* 867 P.2d 82 (Colo. App. 1993).

After being given a *Miranda* advisement, Zamora told the officer he did not want to talk. Later, when he was asked if he had changed his mind he said no. Later still, Zamora asked officers what was going to happen to him. The officers asked if he wanted to speak with a detective, and he agreed. The detective explained the charges, and Zamora made a

statement. The detective reminded Zamora that he had not wanted to talk initially, and Zamora affirmed that he now wished to talk. He was then re-advised of his *Miranda* rights. The court of appeals later concluded that Zamora voluntarily and intelligently waived his rights, and found the statements to be admissible. *People v. Zamora,* 940 P.2d 939 (Colo. App. 1996).

The defendant was initially given a Miranda advisement and waived his rights to speak with the police. Nine hours later, he was arrested and asserted his right to silence; he was not questioned at that time. Minutes later, however, he voluntarily initiated a conversation with the police, following which the police interrogated him. The court held that although the defendant had previously invoked his right to silence, he was subject to further interrogation upon initiating a conversation with the police. *People v. Dunlap*, 124 P.3d 780 (Colo. App. 2004).

2. Assertion of Right to An Attorney

When a suspect asserts his or her right to an attorney the officer may not reinitiate questioning. Once a suspect has asserted the right to an attorney the officer has an extraordinary burden of showing that the suspect wanted to later waive that right.

Example:

Roberson was arrested for burglary and asserted his right to a lawyer. The officers ceased questioning. Three days later, another officer, who was unaware that Roberson had requested a lawyer at the first interrogation, went to question him about an unrelated crime. After advising Roberson of his rights, the officer obtained a waiver and obtained an incriminating statement about this unrelated crime. The United States Supreme Court suppressed the statement, holding that interrogation as to the crime for which the suspect was arrested, or any other crime, may not take place after the suspect's assertion of the right to counsel, unless the suspect initiates contact with the police. *Arizona v. Roberson,* 486 U.S. 675 (1986).

An officer may discuss the case with a suspect who has asserted the right to an attorney if the suspect "initiates further communication with the police. An accused initiates a conversation when his comments 'evince a willingness and a desire for a generalized discussion about the investigation.' And are not 'merely a necessary inquiry arising out of the

incidents of the custodial relationship.'" *People v. Pierson,* 670 P.2d 770 (Colo. 1983).

Examples:

Minnick was arrested for murder and an interrogation by police ended when he requested a lawyer. After Minnick consulted with counsel, police reinitiated the interrogation and Minnick confessed. The United Stated Supreme Court held that, since Minnick had consulted with an attorney, the police were not permitted to reinitiate interrogation without the presence of counsel. *Minnick v. Mississippi,* 498 U.S. 146 (1990).

Compare with:

McNeil was arrested and charged with armed robbery. He was *Mirandized* and, although he did not request an attorney, he refused to answer any questions. A public defender was appointed and he was arraigned. Later, he was questioned on several occasions about an unrelated murder. He was given his *Miranda* advisement, and he waived his rights and incriminated himself. The issue on appeal was whether McNeil's request for counsel under the Sixth Amendment for a charged offense constituted an invocation of his Fifth Amendment right to counsel under *Miranda.* In holding that it did not, the United States Supreme Court characterized the Sixth Amendment right as "offense-specific," and stated that it does not attach until after the initiation of adversarial judicial proceedings By contrast, the *Miranda-Edwards* right under the Fifth Amendment protects one in custody from inherently coerced interrogation about any offense. To request an attorney for trial purposes is not the same as requesting an attorney in the context of custodial interrogation. Moreover, a *Miranda*-based right to counsel must be specifically invoked and will not be inferred from a request for trial counsel. *McNeil v. Wisconsin,* 501 U.S. 171 (1991).

Martinez was arrested and charged with theft and burglary and taken to the police station for questioning. From the time Martinez was first interrogated, he denied knowledge of the crime and said that he wanted to talk to his lawyer. Although Martinez was returned to his cell after demanding counsel, police reinitiated interrogation. The Colorado Supreme Court held that the officer's conduct in repeatedly re-approaching Martinez after he had invoked his right to counsel was a clear violation of his Fifth Amendment rights. *People v. Martinez,* 789 P.2d 420 (Colo. 1990).

After the arrest of Marcellus and his wife for aggravated robbery, a detective interviewed Marcellus following his *Miranda* advisement. Marcellus denied the allegations, refused to write out a statement when asked, and requested a lawyer. Marcellus was implicated in a murder the next day, interrogated without a lawyer, and he confessed. In suppressing the confession, the court of appeals held that Marcellus's Fifth Amendment right to counsel attached when he refused to make a written statement until counsel was present. The court extended the *Edwards* rule to the police investigation of a separate offense, so that once a defendant has requested counsel on one charge, officers cannot re-interview him on a separate charge until counsel is provided. *People v. Marcellus,* 819 P.2d 555 (Colo. App. 1991).

Compare with:

Ross was arrested on drug charges and given his *Miranda* advisement. He indicated that he wanted to talk to an attorney, and officers ceased all communications. A detective gave Ross his business card and told him to call if he wanted to talk. Ross contacted the detective several days later, and the meeting began with the detective saying "hello," after which the two engaged in small talk. The detective did not ask Ross any questions and, although he was never re-advised of his *Miranda* rights, he made several incriminating statements before offering to become an informant. The court found Ross's statements properly admissible under the *Edwards* rule because Ross initiated the subsequent contact. In addition, evidence showed that the conversation centered around Ross's agreement to become an informant and did not pertain to the alleged crime itself. *People v. Ross,* 821 P.2d 816 (Colo. 1992).

After the defendant was formally arrested, he indicated he wanted a lawyer. The officers ceased their questioning and took the defendant to the jail for booking. Later, officers took the defendant to a hospital to obtain physical samples from him. During the ride to the hospital, the defendant asked if the officers had a tape recorder and told them he wanted to make a statement, which he did. After the biological samples had been taken, the officers returned the defendant to the jail. The next morning, the defendant asked jail personnel to arrange for him to speak again with the officers. At the sheriff's office, an officer advised the defendant of his rights, which the defendant waived, and the officers then questioned defendant for about two hours. The court held that the defendant had initiated conversations with police on both occasions, and the defendant was aware at all times of his

right to counsel, and that he nevertheless wanted to tell the police more of what he knew without counsel being present. *People v. Jimenez*, 217 P.3d 841(Colo. App. 2008).

3. Suggested Techniques

a. If a suspect asserts his or her right to silence, or an attorney, you must immediately stop asking questions.

b. If there is any question whether the suspect is waiving or asserting his or her rights, clear it up.

c. If a suspect asserts his or her right to silence, you may return after a reasonable time to see if the suspect has reconsidered.

d. If a suspect asserts his or her right to a lawyer:

1. tell the suspect that you will not be back to get the suspect's story unless he contacts you. Tell him how to reach you;

2. DOCUMENT the fact that the suspect asserted the right to a lawyer, so other officers will not try to question him. Make sure your department has an effective policy to inform other officers that a suspect has invoked his right to counsel;

3. if you must inform the suspect of other cases or investigations, say something like "there are also other cases/investigations I need to tell you about. I cannot discuss them now because you have asked for a lawyer, but here is what they are: [describe]. If you want to discuss them later you will have to contact me. Then END the conversation, even if the suspect wants to talk.

e. If a suspect in custody does contact you, ALWAYS give a new *Miranda* warning. (If there is any question whether the suspect is waiving or asserting his or her rights, clear it up; if you determine that the suspect is waiving rights, tell the suspect you do not want him to have any doubts; leave for a couple of hours and then return to make sure the suspect really wants to talk.)

H. Warnings After Charges Have Been Filed

After charges have been formally filed against a suspect (by a prosecutor), an officer must warn the suspect of his or her rights, prior to questioning, *whether or not the suspect is in custody.* This is because after charges have

been filed the suspect has a Sixth Amendment right to an attorney during interviews with state officials or their agents.

Note: Officers have a very heavy burden trying to show that a defendant waived the right to his or her attorney after one has been appointed for him. *People v. Pierson,* 670 P.2d 770 (Colo. 1983).

1. No Custody – Must Warn

When a suspect has been released from custody with charges pending, the suspect must be warned prior to an officer's questioning.

Example:

An officer goes to speak to a defendant who has had his initial appearances (and, therefore, an attorney appointed). Because the interview takes place at the suspect's home and the officer has absolutely no intention of arresting the defendant, the officer does not give a *Miranda* advisement. All statements obtained by the officer about the offense for which charges have been brought are inadmissible in court.

2. Informant (Agent of the State) – Must Warn

An informant may not take a statement from the suspect after charges have been filed if the informant is taking the statement because of a deal struck between the informant and state officials.

Examples:

Messiah and Colson were indicted on narcotics charges. Colson decided to "turn evidence" for the government. A tape recorder was placed in Colson's car and Colson then had a conversation with Messiah in which Messiah made admissions. The conversation was suppressed because Messiah had a right to counsel when talking to government agents after charges had been brought. *Messiah v. United States,* 377 U.S. 201 (1964).

A jail inmate was placed in a cell next to Smith so that the inmate could obtain information from Smith. The Arizona court found that the inmate was acting as an agent of the state, and the actions violated Smith's Sixth Amendment right to counsel. *State v. Smith,* 482 P.2d 863 (Ariz. 1971).

Compare with:

Battle asked a fellow inmate at the jail to kill a prospective witness. The inmate said he had a friend named Johnny who could be hired. The inmate then told the district attorney about the solicitations. An undercover offer posed as Johnny, and Battle asked the officer to kill the witness for $5,000. The court ruled that the officer did not violate Battle's Sixth Amendment rights because the statements were a direct result of Battle's "express invitation" and the conversation was not about the crime charged but about one which Battle wanted to commit. *People v. Battle,* 694 P.2d 359 (Colo. App. 1984).

An inmate approached a police officer at the detention center and, on several occasions, provided statements made to the inmate by Freeman, who was represented by counsel. The officer sought and received assurances from the inmate that he was providing the information on his own accord and that the inmate understood he would not receive, nor should he expect to receive, anything in return for providing the information. The Colorado Court of Appeals held that there was no evidence that the police had encouraged or instructed the inmate at any time or that he received anything in return for providing information regarding Freeman. "The police have no duty to stop an inmate who is acting independently, from providing information about a fellow inmate. *People v. Freeman,* 47 P.3d 700 (Colo. App. 2001).

3. Suggested Techniques

An officer should hesitate to question a suspect who has been charged and is represented by an attorney. However, if an informant comes forward with a statement from the suspect, without prompting from a state official, the statement will be admissible.

I. Emergency – Rescue Questions

An officer need not warn a suspect in custody when a life may hang in the balance. An emergency sufficient to excuse *Miranda* requirements will have the following elements:

a. Urgency of need in that no other course of action promises relief;

b. The possibility of saving human life by rescuing a person whose life is in danger;

c. Rescue as the primary purpose and motive of the interrogators.

Examples:

A young woman approached two police officers and told them that she has just been raped. She described the man who raped her in detail and told the officers that he had just sent her to the nearby market. She also told the officers that the suspect was carrying a gun. One officer saw the man, Quarles, and chased him to the back of the supermarket. The officer then handcuffed and frisked Quarles, and found a empty should holster but no gun. The officer asked Quarles where the gun was, and Quarles told him. Then the officer read Quarles his *Miranda* rights. The United States Supreme Court held that the need for answers in a situation posing a threat to public safety (here, leaving a loaded gun in a public place where an accomplice or private citizen could find it) outweighs the need for the *Miranda* rule protecting the privilege against self-incrimination. *New York v. Quarles,* 467 U.S. 649 (1985).

Compare with:

Ingram was arrested following a shooting incident. No gun was found in Ingram's car at the time of his arrest, although police knew from Ingram's mother that Ingram owned a gun. Although a detective was aware that Ingram had refused to waive his *Miranda* rights, he initiated an interview and asked Ingram to tell him what type of gun he owned and where the gun was located. He told Ingram that he needed to know this information because he was concerned that the gun would fall into the wrong hands. Ingram then described his gun but claimed he did not know where it was located. The Colorado Supreme Court concluded that, under these circumstances, the public safety exception set forth in *Quarles* did not apply. Unlike *Quarles,* which involved foregoing a *Miranda* advisement, Ingram had actually invoked his constitutional right to remain silent at the time of the interrogation. In addition, unlike *Quarles,* "Ingram had been safely in custody for several hours and had already invoked his *Miranda* rights, demonstrating that there was no 'immediate necessity' which would justify [the detective's] decision not to scrupulously honor Ingram's invocation of his right to silence. Moreover, there was no exigency in the circumstances surrounding the interrogation." *People v. Ingram,* 984 P.2d 597 (Colo. 1999).

J. Juveniles

Before taking a statement from a juvenile in custody an officer must give a *Miranda* warning and get a waiver of Fifth Amendment rights not only from the juvenile but also from the juvenile's parent, guardian, or custodian. *See* Section 19-2-511, 6 C.R.S. (2008). The exceptions to this rule are:

a. Out of state runaways.

b. Emancipated juveniles.

c. Traffic offenses.

d. When the juvenile's lawyer is present.

In addition, a juvenile must be advised of his or her right to have a parent present during police interrogation before he or she can validly waive that right under § 19-2-511. *People v. Barrow*, 139 P.3d 636 (Colo. 2006).

Note: Although the Colorado Supreme Court has recently held that a juvenile who misrepresents his age and leads police to believe that he or she is 18 years of age or older nevertheless must be advised in the presence of a parent or legal guardian, *Nicholas v. People,* 973 P.2d 1213 (Colo. 1999), the General Assembly has since specifically amended the statute to state that such advisement is not required if "the juvenile is eighteen years of age or older at the time of the interrogation or the juvenile misrepresents his or her age as being eighteen years of age or older and the law enforcement official acts in good faith reliance on such misrepresentation in conducting the interrogation." Section 19-2-511, 6 C.R.S. (2002).

Examples:

Eleven-year old T.C. and his mother came to the police station to volunteer information about a killing. However, T.C. was not accompanied by his mother when he was interviewed on videotape for forty-five minutes at the police station after first talking with officers and then riding with officers in a patrol car to view the scene of the crime. The Colorado Supreme Court upheld the trial court's ruling that the custodial interrogation was improper because it was not preceded by a *Miranda* warning and because T.C. was not accompanied by his parent during the questioning. *People v. T.C.,* 908 P.2d 20 (Colo. 1995).

S.M.D. was taken into custody in connection with a murder. He was interrogated in the presence of his guardian ad litem from an unrelated dependency and neglect action. The Colorado Supreme Court found that the guardian ad litem was acting in the representative capacity contemplated by the statute requiring the presence of a parent, guardian or legal or physical custodian, and the statement was therefore admissible. *People v. S.M.D.,* 864 P.2d 1103 (Colo. 1994).

VI. SIXTH AMENDMENT CONFRONTATION RIGHTS

All criminal defendants have a Sixth Amendment right to "confront their accusers." This means that if a person makes a statement implicating the defendant, that person must normally be subject to cross-examination by the defense attorney. An important consideration for officers is that if a co-perpetrator makes a statement implicating his partner, that statement usually cannot be used against the partner at trial. *Bruton v. United States,* 391 U.S. 123 (1968).

Note: Of course, if the suspect who makes the statement testifies at trial, the statement is admissible at trial.

Even if both (or all) the suspects tell the same story, the first defendant's statement cannot be used against the second defendant if the first defendant does not testify. The reason is that a defendant who has confessed is normally trying at trial to dissociate himself from his or her statements, and an accomplice's confession implicating him will be even more devastating to his case to the extent that it corroborates his own statements.

Still, whenever both suspects give statements, each suspect should be confronted with what the other said. If the two suspects have given the same version, the officer should try to get each suspect to "adopt" (accept as accurate) the other's statement. This might enable the prosecutor to use one defendant's statement against the other defendant.

The officer should question in detail about any inconsistencies between the two stories. Suspects will often change their story to fit what an accomplice said, or tell lies that incriminate themselves further.

VII. STATEMENTS TO PRIVATE PERSONS

Statements that the suspect makes to private persons can be crucial to the success of the state's case.

A. Before the Crime

Often a suspect makes statements prior to the crime which are of tremendous importance in showing the suspect's state of mind.

Example:

Mincey told a witness that he wanted his shotgun "sawed off" in order to "kill a pig if they get in my way," and he told another witness that he wanted it for protection in case he "got hassled by the pigs." During a drug arrest in Mincey's apartment, Mincey killed an undercover agent.

At trial, Mincey said he thought he was being "ripped off" when the officers entered and that is why he fought back. Mincey's earlier statement helped rebut this defense. *State v. Mincey,* 636 P.2d 637 (Ariz. 1981).

B. During the Crime

Statements made by a suspect during a crime are admissible against the suspect at trial. Be sure when you gather statements from all witnesses and co-conspirators that you elicit from them what everybody said during the crime.

C. After the Crime

Suspects often talk to others, especially informants, about their criminal activity. These statements can be crucial to the state's case.

1. Voluntariness

It is unsettled whether a statement made by a suspect to a private person must be voluntary in order to be admissible. In the past, the Colorado Supreme Court required a showing of voluntariness. *See Hunter v. People,* 655 P.2d 374 (Colo. 1982). However, in light of the United States Supreme Court's pronouncement in *Colorado v. Connelly,* requires involunteriness to be the product of state misconduct, it is questionable whether *Hunter* remains "good law." *See People v. Chastain,* 733 P.2d 1206 (Colo. 1987)(questioning the validity of the voluntariness requirement in relation to statements made to private citizens).

Even if the statement must be "voluntary" to be admissible, the test for voluntariness seems to be not as strict as for statements taken by officers.

Examples:

Amato stole some guns from a gun shop. A mutual friend of the victim and Amato told Amato that if Amato returned the guns he would not be prosecuted. Amato confessed and returned the guns. Later, officers arrested Amato, obtained a waiver of rights, and obtained a confession. The court of appeals ruled that because the private person was not an agent of the state when he took the statement, the statement was voluntary. Therefore, the statement and evidence were admissible. *People v. Amato,* 631 P.2d 1172 (Colo. App. 1981).

A statement made to a former policeman based upon his promise not to reveal or use it was voluntary, because no agency relationship existed between the witness and the police. *People v. Topping,* 764 P.2d 369 (Colo. App. 1988).

2. Miranda

A private person does not, of course have to give *Miranda* warnings, unless the private person is acting as an agent of the state and the suspect is in "custody."

3. Threats to Witnesses or Victims

When a victim or witness is threatened that fact is usually admissible at trial as an admission of guilt.

4. Admissions Made to Friends, Neighbors, Etc.

A suspect's statements to friends about the crime are usually admissible.

Example:

Rubanowitz called a defense witness during his trial and thanked him for her false testimony. The defense witness taped the call, and the tape was later ruled admissible at Rubanowitz's trial for witness tampering. *People v. Rubanowitz,* 673 P.2d 45 (Colo. 1983).

D. Suggested Techniques

The professional officer will try to pursue every lead in order to find relevant statements the suspect made to people before, during, and after the crime.

1. Remember, even the most minor statement by a suspect to a witness or victim may mean the difference between a conviction and an acquittal.

2. If a suspect made statements to the victim or witnesses, confront the suspect with those statements, if at all possible.

VIII. STATEMENTS FROM WITNESSES

Statements should always be taken from all witnesses, whether friendly or hostile, as soon as possible after the crime.

A. Witnesses Generally

Never, never assume that a witness is "friendly" and, therefore, need not be questioned and "locked into" a story. If a witness is not questioned, that witness is free to testify in any manner he or she pleases. If, however, the witness has given a prior statement to officers, the prosecutor can use that statement to discredit the witness if the story changes during the trial.

Example:

An officer responds to a domestic quarrel. The husband fights with the officer but is finally subdued. No one bothers to take a statement from the suspect's wife. Later at trial, the wife testifies that it was all the officer's fault. The suspect is acquitted. Under these circumstances a statement, any statement, from the suspect's wife would have allowed the prosecutor to discredit her on the witness stand.

B. Hostile Witnesses

It is absolutely crucial that you take statements from all potentially hostile witnesses before the suspect has a chance to work out his "story" with them. You are seeking, of course, *anything* the witness might say. The rule which applies to a suspect's statement applies equally to a witness's statement:

If the suspect actually committed the crime, everything the witness says about the suspect's participation *must* either tie the suspect to the crime or be a lie.

Note: Occasionally a hostile witness will honestly be mistaken in his or her statement. Be sure to confront the witness with any evidence which contradicts the witness's statement and give the witness a chance to change the story.

1. The Witness Who Refuses to Cooperate

Many officers do not try to talk to hostile witnesses because they figure the hostile witnesses will not talk to officers anyway. What officers often do not understand is that this refusal to cooperate can be used to impeach the witness if he or she tries to testify for the defendant at the trial.

Example:

Officers are often distressed when prosecutors will not file cases involving assaults on officers. One of the reasons is that, not only do officers fail to try to take statements from friendly witnesses

and the defendant, they refuse to take statements from hostile witnesses. In one case, however, a witness who was present at the scene of a bar parking lot fight testified for the defendant and said that the fight was all the officer's fault. The prosecutor, on cross-examination, first established that the witness was a friend of the defendant. He then asked the witness:

Q: Do you recall having a conversation with officer Barton right after the fight?

A: I remember a lot of cops running around harassing people.

Q: Do you recall the officer asking you, "what happened?"

A: One of them might have said that.

Q: Do you recall telling the officer, "What's it to you, you fucking pig?"

A: Well, the cop was harassing me.

Q: Did you say that to the officer?

A: I might have said something like that.

Notes:

a. An officer who gets any response similar to the above should always say something like:

1. "We are trying to get all the facts. If the suspect did not do anything wrong, we need to know now so we can decide whether to file the case." Or,

2. "We can get a court order (subpoena) to hear your story if you won't talk to us voluntarily.

b. Many jurors will be predisposed to convict just on the above statement.

c. The prosecutor is given great fodder for closing arguments.

d. If a hostile witness admits the prior inconsistent statement, it is not necessary to call

the officer to the stand. If the witness denies the statement, or does not recall having made the statement, the officer may be called to impeach the witness.

2. The Witness Who Claims Ignorance

If a witness claims ignorance ("I don't know nothin' about nothin'") as to any aspect of the suspect's participation, that ignorance can be used to impeach testimony at trial if the witness changes the story.

Example:

The witness tells the officer that he was not with the suspect that evening. Later at trial, the witness testifies as an alibi witness for the defendant and is impeached with his prior statement to the officer.

3. The Cooperative-But-Hostile Witness

It is impossible to discuss all of the questions and issues an officer should cover when discussing a case with a potentially hostile witness who will answer the officer's questions. Remember that your purpose is to obtain statements from the witness that force the witness to:

Tie the suspect to the crime in some way (cover all of the elements);

And/or

Lie about the suspect's involvement in some ways that can be proven false at trial;

And/or

Claim ignorance about certain matters so that the witness cannot testify about these matters at trial.

The above "prior inconsistent statements" can then be used to impeach the witness at trial.

a. Statements That Tie the Suspect to the Crime

It is impossible for an officer to know what elements of the crime the prosecutor may have difficulty proving at trial. For that reason,

an officer should get the witness to tie the suspect to the crime in everyway possible.

b. Lies and Mistakes That Can Be Proven False at Trial

An officer must carefully consider what facts the state can establish at trial. Questions must then be devised which will force the witness to either admit that these facts are true or lie about these facts.

Example:

The officer knows that there were no powder burns on the victim's hands and body and that there were powder burns on the suspect's hands. The officer suggests to the witness that possibly the victim had the gun. The witness then accepts that explanation and says that the victim had the gun; there was a struggle; and the gun accidentally went off.

(1) Confronting the Witness With His Lies

a. A witness should *always* be confronted with his lies and inconsistencies.

b. A witness should *never* be confronted with his lies and inconsistencies until the end of his statement (many witnesses will stop talking when confronted).

c. *Push* the witness to remain firm in his lie or recant the story. If the witness stops talking, explain that you are just trying to get to the truth.

(2) Mistakes

Any witness can be honestly mistaken about the facts. If an officer knows that a hostile witness is mistaken and can prove it, the officer might want to confront the witness with the "facts."

c. Statements That Contradict the Suspect's Story

Always try to tie the witness in on portions of that witness's statement that contradict the suspect's statement.

Example:

A suspect is arrested on robbery charges. He waives his rights and gives the witness as an alibi witness. The suspect says he knows only the witness' first name and where "he's staying." The officers take the suspect to the witness's place, then take the suspect off to jail. Without explaining all of the facts to the witness, the officers get a statement from the witness that he was not with the suspect on the night of the robbery.

Notes:

1. Remember to confront the witness with the suspect's story at the end of the statement.

2. If you cannot find the alibi witness, get as detailed a description as possible so that the suspect cannot just get anybody to come in and lie for him at trial.

d. Oral/Written/Taped Statements

A statement is admissible in court to impeach the witness whether the statement is written, taped, or unrecorded. It is always best to first "tie the witness in" with the oral statement. People are less likely to speak freely when an officer is writing or a tape recorder is running. But once a person has given the statement, the reluctance usually decreases.

(1) Written Statements

Written statements take many forms. As a practical matter, the most useful written statements for the street officer are the notes written after taking an oral statement.

It is usually more persuasive at trial when a witness is confronted with a statement written by that particular witness. If you write the statement for the witness, make sure you show that statement to the witness and ask him or her if the statement is accurate. If the witness says no, change the statement so it is consistent with what the witness says he said. Then ask the witness to sign the statement (and if the witness refuses to sign, document that refusal in your report).

(2) Taped Statements

Taped statements from hostile witnesses can be extremely valuable tools for a prosecutor. Always try to get the statements audio and/or videotaped.

C. Friendly Witnesses

1. Always get statements from all "friendly witnesses" (including how the witness can be reached at the time of trial; relatives; license number, etc.). Make sure the witness's statement is true and consistent with other statements given by other friendly witnesses (including officers) and other evidence in the case.

2. If the witness's statement varies from that of other evidence in the case, there has to be a reason: find it out. For example, a witness who is still in shock may have trouble thinking or speaking clearly. Always wait until a "friendly witness" has calmed down and is speaking accurately before taking a statement. However, keep in mind that no two witnesses will see an incident exactly the same, so do not put words in a witness's mouth. Any competent prosecutor can explain away minor inconsistencies to a jury.

3. Be prepared to elicit all facts from the witnesses. The witness does no know what facts are important. If you do not ask, vital information may never be known.

4. "Turn over every rock" in finding friendly witnesses. Anytime, for example, the case involves a domestic dispute, spousal murder, or child abuse, there will be a neighbor who can help.

D. Voluntariness and *Miranda*

A witness need not be "warned" pursuant to *Miranda* unless he or she is in custody. However, the statement must be voluntary (i.e., an act of free will) in order to be admissible. Therefore, at the end of every statement you take (but before you confront the witness with any lies), you should ask if the statement was given voluntarily and not as a result of any threats or promises.

E. Suggested Techniques

Always take statements from every witness who may know anything about the crime.

1. Narrative v. Specific Questions

When questioning witnesses, try to allow them to just "narrate" what they know without your interjecting a lot of questions. After they have narrated what they know, then go back and ask specific questions.

2. Friendly Witnesses

If the witness is a likely witness for the state, make sure that the witness is calm before taking a statement. If the witness is wrong or not telling the truth, find out why. It is a lot better for you to get the discrepancy figured out than to wait for the defense attorney to do it at trial.

3. Hostile Witnesses

The nature of the defense will often suggest the likely defense witnesses. Questioning these witnesses is often as important as questioning the suspect. Push these witnesses for answers – any answers.

IX. ANTICIPATING DEFENSES

A good officer will always consider probable defenses when taking statements. Often, if defenses are not anticipated and not rebutted by the officer while taking a statement, the defenses cannot be rebutted at all and the case will be lost. It is impossible to raise every possible factual circumstance and then discuss every possible defense that a suspect could assert in that situation. However, in 99% of the cases the most likely defense will be very obvious either before beginning the statement or immediately after a suspect (or defense witness) starts to answer questions.

Often, in order to rebut potential defenses you will have to ask the suspect "leading questions."

Example:

In a murder case where a potential defense is insanity (e.g., the suspect has confessed) the officer might ask:

Officer: "Do you go to church?"

Suspect: "Yes"

Officer: "Regularly?"

Suspect: "Yes"

Officer: "So you knew it was wrong to do that, didn't you?"

Suspect: "Yes"

The following are just a few common defenses and some of the questions to be resolved when the defense arises.

A. Self Defense

Self defense is based upon "justification" for the suspect's assaulting the victim. In essence, the suspect asserts that he was reasonably apprehensive that the victim was going to assault the suspect, so the suspect had to defend himself and used no more force than was necessary.

The following are some factors to consider:

1. The Condition of the Victim

Any admission by the suspect that all the injuries inflicted on the victim were not necessary in order to defend himself will be helpful.

Notes:

a. This is especially important when a deadly weapon is used. The suspect must reasonably fear serious injury.

b. Be sure to photograph the victim's injuries.

2. The Condition of the Suspect

Be sure to question the suspect about any injuries he or she has.

Notes:

a. Photograph the suspect even if the injuries are not visible so the suspect will not claim his injuries were ignored by the police.

b. Offer medical attention.

c. Document all answers.

3. The Suspect's Fear

Many suspects will not admit to their fear of the victim. Some will not be able to *specifically* state their fear.

Example:

The victim of a shooting, Mata, was "physical, loud, and argumentative when drunk." One night when he was drunk he walked into the street in front of Johnson's car, forcing Johnson to stop. After words were exchanged, Johnson asked the victim if the victim was trying to start trouble. The victim said if Johnson wanted him to he would, and then called Johnson a "fucking nigger." Mata then lunged through Johnson's window and Johnson shot the victim in the throat and chest. After officers arrested Johnson, they warned him, obtained a waiver, and took a statement. A portion of that statement was:

Q: "He stuck his hand through window?"

A: "Right"

Q: "Did he have anything in his hand or was he wearing gloves or . . ."

A: "Man, I was paranoid, man, I don't know."

Johnson was convicted.

4. History of Combatants

Always find out what the suspect knew about the victim. Make the suspect be specific so he cannot testify at trial that he knew the victim was a bully, always carried a gun, etc. Also, ask the suspect if he had ever been in fights before, carried a weapon before, etc. (and then ask his friends as well). Remember, a few admissions and/or lies can make the difference between acquittal and conviction.

5. Anger

Often there is an element of anger and frustration by the suspect in cases such as this. Although many suspects believe that anger justifies their aggression, it does not constitute a defense under the law. Therefore, officers should sympathize with the suspect's motives and seek to "draw out" the suspect's motives of anger rather than fear.

B. Accident

In homicides where the victim was killed by a single wound (usually gunshot) and the victim knew the suspect, there is a distinct possibility that the suspect will later raise the defense of accident.

Note: Many "experts" estimate that an inordinate number of homicides are classified as accidents or suicides.

The following are some suggestions to aid you in your investigation when accident is a potential defense:

1. The Suspect

While talking to the suspect, note the presence of any injuries, bruises, or other signs of a physical confrontation. Ask the suspect if he had any quarrels with the victim and ask him if he has suffered any injures recently.

2. Witnesses

Ask likely witnesses, neighbors, friends, and others about the relationship between the suspect and the victim prior to the killing.

3. Pathologist

Be sure to attend the autopsy and be sure to tell the pathologist what the suspect's story is. Often, the pathologist can tell you, by examining the nature, location, angle, and extent of the injuries, that the suspect's story is not true.

Note: After talking to the pathologist, go back and talk to the suspect.

4. Motive

In situations where accident is a possible defense, any motive (e.g., monetary gain, jealously, rivalry, silencing a snitch, etc.) can be very important in disproving the defense.

C. Intoxication

Intoxication can reduce a suspect's accountability for his or her acts only if the suspect was so intoxicated that he or she was unable to form the intent to commit to commit the crime.

Note: Never put in your report the conclusory statement that the suspect was drunk, intoxicated, "spaced out," or incoherent (except in DUI cases). Rather, describe factually what observations you made about the suspect.

Besides finding out how much the suspect had to drink, the most important factors to establish in your statements from the suspect and witnesses (including the victim) are:

1. Preparation

If a suspect has to prepare to do the particular crime, the suspect has a much more difficult time explaining that he or she was too intoxicated to intend to commit the crime.

2. Perpetration

The victim and witnesses can usually relate certain information establishing that the suspect was not so drunk as to prevent the suspect from forming the required intent.

Examples:

a. Burglary

1. Taking property only of value and leaving valueless property behind.

2. Point of entry showing an intent of minimizing detection.

b. Robbery

1. Demanding money rather than aimless rambling conversation.

2. Statements of the suspect showing an intent or purpose, such as inducing fear, no panic, instructions not to call the police, etc.

3. Post-Crime Conduct

The steps a suspect takes after a crime to avoid detection or apprehension can be very important in the rebuttal of an intoxication defense.

D. Alibi

If an alibi defense is asserted by the suspect, it is absolutely crucial that the officer contact the alibi witness in order to obtain statements contradicting the suspect's story. The best way to get a suspect to give a story that can be contradicted is to force the suspect to be specific. No matter how much he is lying, try to let the suspect know that you will not "check out" his story.

E. Insanity

Often, in serious cases, a defendant will assert the defense of insanity when he or she has no other alternatives (i.e. the case is so strong that the only defense is that the suspect was "crazy").

1. The Test

A person is legally insane if that person has a mental disease or defect at the time of the commission of the crime which prevents him from:

a. Knowing That What He Is Doing Is Wrong

Example:

The suspect shot his doctor in the head five times because the doctor failed to treat him. A homicide detective carefully questioned the suspect about his knowledge of guns and bullets, as well as his knowledge of "right" and "wrong." At trial, the state had little difficulty rebutting the suspect's insanity defense.

b. Knowing The NatureAnd Quality Of His Act

Example:

The defendant shoots and kills the victim. If the defendant asserts insanity as his defense, he might contend that God told him to kill the victim (did not know it was wrong) or that he did not know that when he pulled the trigger of the gun a bullet would come out of the barrel and strike the victim.

An officer who thinks that a suspect may later assert an insanity defense should always cover these issues in a statement in which the defendant confesses. Perhaps ask initially as a leading question, "You knew what you did was wrong, didn't you?" or "You wouldn't have done this if a cop was present, would you?" Then discuss why the suspect knew it was wrong.

c. Opinion by Officers

It is very important for officers to understand that they may be permitted to express their opinion as to the sanity or insanity of the defendant, even though the officers have no psychological or psychiatric training. For that reason, an officer should **never** put in a report a belief that the suspect appeared "crazy" or insane.

d. Information That Will Help Rebut An Insanity Defense

An officer responsible for obtaining information in order to rebut an insanity defense should consider obtaining statements from officers and lay witnesses that will establish that the suspect was rational and/or showed a knowledge of guilt. These factors, which would seem inconsequential in other types of cases, can be crucial in the insanity case.

(1) Before the Crime

(a) Conduct of the Suspect

Certain conduct of the suspect prior to the crime will help show that the suspect was rational, or that he knew what he was doing was wrong.

Examples:

(a) Lack of problems at work on the day of the incident.

(b) Prefatory acts such as buying a gun (rational behavior).

(c) Sneaking around or surreptitious entry (knows what he is about to do is wrong).

(d) Prior threats (motive).

(b) Mental State

A mental state, other than insanity, will help show rational thought.

Example:

Motives such as greed, anger, jealousy, etc.

(2) During the Crime

Witnesses to the crime might be able to explain that the suspect, although anxious or nervous, was rational and knew exactly what he wanted to do.

(3) After the Crime

An officer should find out and note anything the suspect does after the crime that shows that he or she was not insane (i.e., that establishes rational planning, thought, or behavior).

Example:

Flight or hiding (knowledge of wrongfulness of the act).

(4) Upon Apprehension

One of the best times for an officer to obtain information to prove that the suspect is sane is when the suspect is arrested.

Examples:

1. Does the suspect understand the officer's orders?
2. Does the suspect follow them?
3. Does the suspect answer questions easily and accurately (including questions at booking, etc)?

(5) While in Jail

Detention officers can provide extremely important information relating to sanity if the detention officers are informed of what the officer needs.

1. Does the suspect react rationally and reasonably with other inmates (i.e. play sports, cards, converse, etc.).

2. Does the suspect react rationally with the detention officers (i.e. follow orders, requests favors, converses, etc.)?

F. Entrapment

In cases where entrapment may be claimed as a defense (e.g., drug sales) the suspect should always be asked whether he or she committed the crime. Often the suspect will deny involvement (e.g., misidentification, denial that he knew it was drugs). The reason that this question is so important is:

1. If the suspects admits his or her involvement, the suspect's only logical legal defense is entrapment, which is a very difficult defense for a jury to accept.

2. If he or she denies involvement, it is very difficult for the suspect to later assert the entrapment defense, because in order to assert entrapment as a defense the defendant must normally admit to every element of the crime.

    a. As the experienced officer well knows, a suspect will often deny ownership, possession, involvement etc., no matter how "red-handed" that suspect is caught.

    b. Denial by the suspect of ownership or possession of crime-related evidence not only makes it more difficult to assert the entrapment defense, but also takes away the suspect's "standing" to contest any unconstitutional searches in court.

G. Fraud – White Collar

Officers must understand that a fraud suspect, especially white collar, is different from other criminals and that the interrogation approach must, therefore, be different.

1. Legal Defenses

In a fraud case the state can almost always prove that the defendant committed the illegal act. The legal defense, therefore, is usually that the defendant did not have the required guilty state of mind (e.g., intent, knowledge).

The following are some of the excuses that suspects will relate showing a lack of intent or knowledge.

a. "I just relied on others" or "I was just doing my job"

This is a favorite of salesmen. Salesmen are very difficult to convict in that they will usually claim that they were unaware of

the company's financial condition, never saw the "books," never attended a board meeting, and did not set policy.

Example:

Some men started a company to market pens. These men hired and trained salesmen to sell distributorships in the pen company. The salesmen gave prospective purchasers brochures and a sales pitch that was fraudulent. The court ruled that the salesmen could not be convicted of fraud because the state could not show that the salesmen knew that their sales talk, materials, sweepstakes contest, etc., was a fake. *United States v. Perlstein,* 576 F.2d 531 (3rd Cir. 1978).

To help anticipate and rebut this defense, an officer or investigator should:

1. Always try to "build the salesmen up" at the first interview. (A good salesman knows his product.)

2. Find out initially why the salesman thinks his product is so good. The salesman will then usually attempt to impress the investigator with his knowledge of the product and the company.

3. Find out what training and orientation meetings the salesman attended, what he was taught to do and how.

4. Find out what "sales talk" he was told to give and specifically who instructed him.

5. Find out if the salesman, his friends, relatives, etc., bought any product, stock in the company, etc.

6. Find out whether the salesman has a "stake" in the company. If he loaned money, property, etc., to the company, he probably has knowledge of the company's financial status.

7. Show the salesman the sales literature and ask him relevant questions about it. You will be surprised how often he will volunteer valuable information.

8. Be sure to talk to those people whom the salesman names as participants. Try to talk to them before the suspect does.

b. "I was a poor businessman"

It is important in rebutting this defense to initially make the suspect feel smart and make him want to tell you how smart he is right away. Ask questions about how the business works, what experience and education he has, find out what other companies he worked for, and whether any of them ever went broke.

c. "I felt good about it" or "Look what I lost"

These defenses are not really legal defenses but can impress a jury. Get specifics about what made the suspect feel good about the company. Find out if the suspect sold to friends, relatives (or ever tried to). Talk to the suspect's character witnesses and ask them if the suspect ever tried to sell to them.

If the suspect lost money, find out what he lost. It is very important to try to get the suspect to specifically state what the financial condition of the company was before and during the scam. Ask the suspect exactly where his income from the company originates. Often the suspect will be "skimming" through fringe benefits, etc. If the suspect admits this, or lies about it, that fact will aid a prosecutor immensely at trial. If the suspect refers to books to substantiate his claim, ask if you can look at them and get a copy.

2. The "Real" Defenses

The "real" defenses in a fraud case are often more important than the legal defenses. The "real" defenses are the psychological factors which play upon the emotions of the jurors.

a. "Conning" the Jurors

An officer must remember that a fraud defendant is an expert con man. His very existence has depended on "conning" people. The defendant who cannot be impeached with his prior statements will almost always take the witness stand and "twist the jurors around his little finger." Unless the defendant's well prepared testimony can be rebutted, he will likely be acquitted.

b. The Defense Attorney

The defense attorney in a fraud case is usually an extremely capable lawyer. He or she is usually adept at showing that:

(1) The state is "picking" on his client. The investigator is malicious, incompetent, and unethical.

The fairness of your professional investigation will aid greatly in rebutting this contention.

(2) The client is an "upstanding person of the community."

This is another good reason to contact the suspect's potential character witnesses (ask the suspect who they are). Be sure to ask the character witnesses on what they base their judgment. Is it their personal opinion or what have they have heard (and who have they heard if from)? Also, ask them how familiar these witnesses are with the suspect's business affairs.

(3) The client made a mistake, it was an "innocent mistake, and it won't happen again.

The best way to rebut this "real" defense is to dig for other victims. If the suspect did it, it is likely he has done it before, and he probably continued to do it after charges were brought. During one of the interviews, get the suspect to admit that it "was not right" (do not say "wrong" or "unethical") to do what he did, if you can.

c. Juror Identification

Jurors "identify with" fraud defendants. The fraud defendant looks like, dresses like, has a family like, and acts like the juror's next door neighbor. Jurors initially feel sorry for the fraud defendant and, after spending days (sometimes weeks) with him, often grow to like him.

In order to convict the fraud defendant, it is absolutely crucial that the jurors hear some good reasons to dislike him. Normally, it is just not enough that the victim suffered financial loss. The jury must hear that the defendant is a greedy, conniving, sneaky, bad, or unbelievable person.

3. Approach to Interviews in Fraud/White Collar Cases

a. Always work closely with a prosecutor in establishing legally important questions to ask.

b. Try to take another investigator with you or tape record the conversation so that later if the suspect claims you are lying about the statement he gave you will have corroboration.

c. Most suspects want to "talk their way out of" their predicament unless the charges have already been brought. An officer therefore, during the first interview, should maintain a "can you help me" non-custodial atmosphere. However, you must take care not to imply any promises (e.g., do not say "I am not looking to get you charged").

d. Convey the impression to the suspect that all you want to do is "clear up" the problem. Do nor quarrel with the suspect or contradict him right away.

e. It is very important that the suspect "tie himself into a story," no matter what the story is. This will give predictability for the prosecutor.

f. If possible, do not ask a lot of questions initially. Just let the suspect narrate his side of the story.

g. After a suspect has narrated his story, ask questions that will require the suspect to take a position as to his specific defense.

h. Get the suspect to identify any important exhibits, documents, papers, pictures, etc.

i. During the first interview, lay a foundation for later interviews by explaining to the suspect, in a friendly way, that a future talk may be necessary to "straighten this out."

j. Get specific names, places, addresses of any witness for the suspect.

k. It is always better to interview a suspect two or three times. However, keep in mind that you may not "get another shot." Get all of the information possible during the first interview: the who, what, where, when, why, and how of every issue.

l. Before you go back for a second interview, be sure to go over all of the information obtained with a prosecutor and another investigator. You will probably be surprised at how many points they can help with for the second interview.

m. A suspect who is lying will almost always give a different story during the second interview than the first.

n. If a suspect is later arrested, warn him, be friendly, and take a final statement. At the end of the statement you may want to confront him with the evidence you have against him, and his lies and admissions (talk this over with the prosecutor first).

H. Suggested Techniques

The professional peace officer will always try to rebut the most likely defenses by talking to the suspect and potential witnesses.

X. VOLUNTARINESS HEARINGS

The so-called voluntariness hearing is a court proceeding to determine the admissibility of a defendant's statements.

Note: The hearing will cover both voluntariness and *Miranda* issues relating to the defendant's statements.

A. Motion to Suppress

In order to hold a voluntariness hearing the defense attorney must submit to the court a motion to suppress the defendant's statements.

Note: "Suppression" means, simply, that the jury will not be allowed to hear any of the statements the suspect made.

The motion is supposed to contain a statement of facts and law in support of the motion.

B. Document and Paperwork Review

Often, officers do not carefully review all of their reports and other paperwork in anticipation of the hearing. This is a big mistake because misstatements during your suppression hearing testimony, even if they do not result in the suppression of evidence, may still be used against you if the case later goes to trial. Often, a motion to suppress statements or evidence will be filed for the

simple reason of getting a witness's testimony "on the record," for potential impeachment at the time of trial.

1. Your Report(s)

It is crucial that you know your report perfectly before taking the stand. Ask the prosecutor what questions the defense attorney is likely to ask.

2. Other Officer's Report

Read over the other officer's reports relating to the taking of the statements. If you disagree with another officer's report be sure to call it to the attention of the prosecutor.

3. The Motion to Suppress

Ask the prosecutor if you can see the defendant's motion to suppress. There may be facts recited by the defense attorney which will help you prepare for the hearing or which you can easily refute.

C. The Burden of Proof

The state must prove by a preponderance of the evidence that the defendant's statements were voluntary and were not in violation of *Miranda.*

D. The Hearing

The state has the burden of proving that a statement was voluntary, and will normally have to call to the witness stand the officer(s) who advised the suspect and took the statement. The defense attorney will cross-examine the officer(s), in an attempt to show involuntariness or a *Miranda* violation, and also to get "discovery" and impeachment material for trial.

E. Suggested Techniques

Most officers (and some prosecutors) underestimate the importance of the suppression hearing. Not only is evidence often needlessly suppressed at these hearings, but the defense attorney gets the opportunity to "tie the officer in" to sworn testimony which can be used against the officer at trial.

Generally, the most common problems encountered by officers who testify are:

1. Failure to study their reports and the reports of fellow officers.

2. Failure to read the suppression motion of the defendant.

3. *Miranda* warning given by memory rather than reading the card.

4. Making promises to the suspect.

5. Contradictions between reports or testimony of officers.

6. Failure to have a good talk with the prosecutor in preparation for the hearing.

Chapter 10

IDENTIFICATIONS

I. INTRODUCTION

This chapter discusses the legal and practical questions involved in the identification of a suspect at a lineup or showup.

II. SUGGESTIVITY

It is unfair and, therefore, a violation of due process of law to suggest **in any way** to a witness that a suspect to be observed committed the crime. The test, according the United States and Colorado Supreme Courts, is that, if the pretrial identification procedure is "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification," the suspect's due process rights are violated. *Simmons v. United States,* 390 U.S. 377 (1968); *Bernal v. People,* 44 P.3d 184 (Colo. 2002).

Note: The following rules and procedures do not apply to identifications of inanimate objects, *People v. Reed*, 216 P.3d 55 (Colo. App. 2008) (automobile); *People v. Hogan*, 114 P.3d 42 (Colo. App. 2004) (gun); nor do they apply when an officer makes an identification during an ongoing investigation, *People v. Howard*, 215 P.3d 1134 (Colo. App. 2008); or when a witness views the defendant's photo in the newspaper without police involvement, *People v. Dunlap*, 124 P.3d 780 (Colo. App. 2004).

There are many ways an officer could improperly suggest to a witness who to select. These suggestions may occur before, during or after the identification.

A. Suggestivity Before the Identification

An officer must be careful to avoid any conduct before the identification which might be ruled suggestive.

1. An officer should never tell a witness that:

   a. the police have caught the person who committed the crime;

   b. the victim's property was found in the suspect's possession;

   c. the suspect made admissions or confessed to the crime;

d. the person to be observed (e.g., in a photographic or physical lineup) is a suspect.

2. An officer should almost always tell a witness:

a. to keep an open mind;

b. that the person who committed the crime may not be among those present in a photographic or physical lineup;

c. not to talk to any other witnesses about the identification, if other witnesses may be required to make an identification.

See People v. Borrego, 668 P.2d 21 (Colo. App. 1983).

It is not unduly suggestive to have a witness verify the accuracy of a surveillance photograph or video of a crime scene before viewing a photographic lineup, even where the photographs or video show the perpetrator. This is because the photographs or video do not suggest to the witness to select a particular suspect.

Example:

A police detective showed the victim of a convenience store robbery the store surveillance camera photographs taken while the robbery was in progress. This was done in order to verify that the photographs were an accurate representation of the time and place of the robbery. The detective put away the surveillance photographs and then showed the victim a photographic lineup containing Loyd's photograph. The victim identified Loyd as the perpetrator of the crime. The court of appeals ruled that this procedure was not unduly suggestive because there was little possibility of misidentification. The surveillance photo depicted "the likeness not of some possible suspect in the police files, but of the person who actually committed the robbery." *People v. Loyd,* 751 P.2d 1015 (Colo. App. 1988).

B. Suggestivity During the Identification

An officer must avoid any conduct during an identification which might suggest who the suspect is.

1. Lineups

An officer must not allow the witness's attention to be drawn to a particular suspect because of the composition of the lineup or by what the officer may say or do. In evaluating whether a lineup procedure is

"impermissibly suggestive," a number of factors are important, including the size of the array, the manner of its presentation, and the details of the photographs themselves. *See Bernal v. People,* 44 P.3d 184 (Colo. 2002)

a. Composition

The police do not have to provide a lineup containing only "exact replicas" of the suspect. All that is required is that the photos are matched by race, approximate age, facial hair, and a number of other characteristics. "The principle question is whether the picture of the accused . . . so stood out from all of the other photographs as to suggest to an identifying witness that the person was more likely to be the culprit." *Bernal v. People,* 44 P.3d 184 (Colo. 2002) An array in which the individual characteristics of the accused (e.g., hair color, race, etc.) stand in stark contrast to the other photographs is impermissibly suggestive.

Examples – Lineup Suggestive

Bernal was arrested following an armed robbery. Both victims described the robbery suspect generally as a "Hispanic" male with a medium complexion. Other than giving an approximate height and weight of the robber, the victims stated that the suspect "sounded Hispanic." The victims were shown a photo lineup consisting of six color photographs of young men. Bernal's photograph appeared to be the only photograph of an "Hispanic" male, although one of the other photographs "could be perceived as also depicting an 'Hispanic' male.'" Bernal's photograph was taken against a clear white background, while the other photographs were taken against a neutrally colored Venetian blind backdrop. After viewing the photograph array for several minutes, the witnesses identified Bernal as the robber. The Colorado Supreme Court held that "ethnicity was a controlling and overriding characteristic of the witnesses' description of the robber," and since the ethnicities of most of the other men in the photo lineup were conspicuously different (i.e., not "Hispanic"), the lineup was impermissibly suggestive. In addition, the different background of Bernal's photograph "compounds the already-mentioned deficiencies of the photo array. . . ." *Bernal v. People,* 44 P.3d 184 (Colo. 2002)

Stevens gave a grocery store a number of forged checks. The witnesses told officers that the perpetrator was a "light

skinned Black woman." The officers showed the witnesses six photographs, only one of which was a picture of a black woman (i.e., Stevens). The Colorado Court of Appeals ruled that the identifications were unduly suggestive and suppressed them. *People v. Stevens,* 642 P.2d 39 (Colo. App. 1981).

Examples – Lineup Not Suggestive

The victim described his assailant as a tall black man between twenty and thirty years old with a round face. All the photographs in the lineup shown to the victim depicted men of the same age and race as the suspect, Dotson; several wore white T-shirts similar to Dotson's T-shirt; and other subjects in the photos also matched Dotson's hair and facial features. The Colorado Court of Appeals held that the lineup was not impermissibly suggestive, even though the background of Dotson's photograph was somewhat darker than the other photographs, because Dotson's photograph was "not so striking or distinctive as to be impermissibly suggestive and did not give rise to a substantial likelihood of irreparable misidentification. *People v. Dotson,* 55 P.3d 175 (Colo. App. 2002).

A kidnapping and sexual assault victim originally described her assailant as "white." However, the lineup later shown to her consisted of photographs of Hispanic males with light complexions. The Colorado Court of Appeals nevertheless rejected the assertion that the lineup had to consist of only photographs of white males. Since the array of photographs was composed of individuals of the same race, approximate age, hair and facial type, the lineup was not unduly suggestive. *People v. Martinez,* 32 P.3d 520 (Colo. App. 2001).

A robbery victim was shown a photo lineup depicting six light-skinned Caucasian males, of the same approximate age and weight with short to extremely short hair. Borghesi's image stood out, however, because his skin tone was considerably lighter than that of the others, due to the lighting or overexposure of the film, and because he was depicted leaning forward with his head cocked at a slight angle whereas the other photographs depicted men squarely positioned in front of, and looking into, the camera. The court found that, although one's attention is immediately drawn to Borhesi's photograph, this fact alone would not

cause one to identify him as the robber, and since the individuals in the lineup were matched in race, approximate age, hair type, weight and other characteristics, the lineup was not "unreliable as a matter of law." *People v. Borghesi,* 40 P.3d 15 (Colo. App. 2001).

See also People v. Griffin, 985 P.2d 15 (Colo. App. 1998)(lineup containing photos of suspects reasonably matched by race, approximate age, and hair type is not unduly suggestive even though the suspects have varying degrees of facial hair, because the degree of variation is not so great as to make any one stand out among the others); *People v. Daniels,* 973 P.2d 641 (Colo. 1998)(photo lineup is not unduly suggestive where suspect's photograph did not "leap out" as different from the rest); *People v. Bolton,* 859 P.2d 311 (Colo. App. 1993)(photo lineup was not unduly suggestive even though the defendant was the only person in the lineup with mixed black and white parentage, where the complexions of all the persons in the lineup fell within a range described by the victims); *People v. Ridenour,* 878 P.2d 23 (Colo. App. 1994)(slight difference in the apparent ages of and the different types of shoes worn by the suspect and the other lineup participants were not so impermissibly suggestive as to raise a substantial possibility of misidentification); *People v. Carrasco,* 85 P.3d 580 (Colo. App. 2003) (photo array was not suggestive where it contained six photographs, all the men were the same race and approximate age, all had the same type of facial hair and shared many facial characteristics; although the exposure of the defendant's photograph was darker, the similarity of the men in the photographs, and the fact that the witnesses already knew the defendant, compensated for any difference in this regard); *People v. Owens,* 97 P.3d 227 (Colo. App. 2004) (array was not suggestive because the defendant was shown in a green shirt because nothing in or about his picture suggested that the shirt originated from the department of corrections, nor were there any uniquely suggestive features that were directly related to an important identification factor); *People v. Wilford,* 111 P.3d 512 (Colo. App. 2004) (photo array was not suggestive due to the defendant being the only one of two in the array with braided hair, where the robber was described as having braided hair, as the degree of variation among the pictures was not so great as to make the defendant stand out among the others); *People v. Hogan,* 114 P.3d 42 (Colo. App. 2004) (array proper where five of the men appeared to be of the same race, all appeared to be of the

same approximate age, three had facial hair, and five shared many facial characteristics).

Example – Voice Identification

Portley was selected out of a lineup as the person who robbed and sexually assaulted the victim. The victim was able to make an identification based upon the voice of Portley during the lineup. Portley appealed on grounds that the voice lineup was unduly suggestive as to render the identification of him inadmissible. The Colorado Court of Appeals held that even though the voices of those participating in the lineup were not identical, the speakers' general speaking styles and the general pitch of the voices were sufficiently similar to obviate any undue suggestivity. *People v. Portley,* 857 P.2d 459 (Colo. App. 1992).

Note: It is important for an officer to remember not to reveal the *source* of a suspect's photograph when testifying at trial before a jury (i.e., the photo was a "mug shot"). Such a comment may unfairly imply past criminal activity and result in a mistrial. *People v. Thatcher,* 638 P.2d 760 (Colo. 1981). *Compare with People v. Borghesi,* 40 P.3d 15 (Colo. App. 2001)(testimony of investigating officer that photos used in lineup were drawn from the police department's computers did not require a mistrial because it was likely that the jury assumed the "mug shot" was taken when the suspect was booked for the charged crimes).

b. Officer Conduct

An officer must avoid saying or doing anything which would direct a witness's attention to a particular suspect.

Examples:

After the victim viewed a photo lineup without making an identification, the officer told the victim that he believed that the police had the culprit in custody. However, the officer did not disclose whether that person's picture was in the array. The victim then asked to see the lineup again and tentatively identified Montanez. The court held that the officer's comment gave no hint as to which, if any, of the photographs might be the suspect, and therefore no improper

police conduct occurred. *People v. Montanez,* 944 P.2d 529 (Colo. App. 1997).

When a witness initially selected someone other than the suspect from the lineup, an officer suggested that she use a business card to over the top of the head in each photo to gain clearer perspective of each individual's appearance while wearing a hat. The court of appeals held that such a procedure was not so unduly suggestive as to violate the defendant's due process rights, because having the witness cover the top half of each photograph in no way implicated the defendant, nor drew attention to his particular photograph. *People v. Davis,* 851 P.2d 239 (Colo. App. 1993).

A young girl could not pick the kidnapper from a photo lineup. When asked the reason she said the man's hair was different from the men depicted in the lineup. The girl was then told to pretend the men in the photographs were wearing hats. The girl then selected Rex. The court ruled that this procedure was not overly suggestive. *People v. Rex,* 636 P.2d 1282 (Colo. App. 1981).

c. Number of Participants

To avoid allegations of suggestivity an officer should include plenty of participants in any lineup procedure. "The more pictures used in an array, the less likely it is that a minor difference, such as background color or texture, will have a prejudicial effect on selection. In contrast, when relatively few photographs are used in an array, minor differences such as background color make a picture stand out and can repeatedly draw a witness's eyes to that picture." *Bernal v. People,* 44 P.3d 184 (Colo. 2002)

Examples:

Photo array with six suspects, only one of which depicted an Hispanic male photographed against a white background, as contrasted with the other lineup participants who were photographed against neutrally colored Venetian blind backdrops, was unduly suggestive. *Bernal v. People,* 44 P.3d 184 (Colo. 2002).

Webster's photograph was included in a lineup even though he was the only one in which the suspect's hair had "geri curls" and had a "menacing expression." He also claimed

that his picture stood out because the light was shinning directly into his face. The Colorado Court of Appeals noted that "the eighteen photographs show a wide variety of hair styles and the defendant's is not particularly remarkable in the group. At least three of the photographs have the light shining into the suspects' faces. Finally, the defendant's expression is not particularly menacing and does not stand out from the group." *People v. Webster,* 987 P.2d 836 (Colo. App. 1998).

2. Show-ups (One-on-One Confrontations)

"Show-ups" (one-on-one confrontations) are, of course, by their very nature suggestive. Although show-ups are not generally favored, they are permissible when a suspect is captured soon after the crime because (a) Officers must be permitted to quickly determine if they have caught the right person and, if not, to be able to immediately continue the pursuit; and (b) If the person was not the perpetrator, he can be immediately released without the embarrassment of a lineup, greater delay, and arrest.

Examples:

Two masked and armed robbers held up a pharmacy in Greeley. The pharmacist saw them drive away in a white-over-black or brown Pontiac. An officer near Boulder stopped the Pontiac and brought the pharmacist to the scene, and he identified the car, a sawed-off shotgun, and Mascarenas. The Colorado Supreme Court ruled that, while the procedure used in this case was "not preferable to more carefully controlled lineup procedures at the station house [it was] reasonable under the circumstances. "[T]he police action in returning the suspect to the vicinity of the crime for immediate identification . . . fosters the desirable objectives of fresh, accurate identification which in some instances may lead to the immediate release of an innocent suspect and at the same time enable the police to resume the search for the fleeing culprit while the trail is fresh." However, the court remanded the case to the trial court to determine whether the identification was reliable (*see* Section III). *People v. Mascarenas,* 666 P.2d 101 (Colo. 1983).

While Young was being questioned by police outside his apartment building, a spotlight was shone on him, and the robbery victim and a witness were then separately driven up to observe him. Both the victim and the witness had a good opportunity to view the robber at the time of the crime and had been attentive. They gave good descriptions of the robber and, despite the fact he

had changed his clothes, identified him with almost no hesitation. Furthermore, Young was not in handcuffs and the identifications took place less than an hour after the robbery. Under these circumstances, the court ruled that the identification procedure was not unduly suggestive. *People v. Young,* 923 P.2d 145 (Colo. App. 1995).

Williams was robbed and the victim went to the police station to report the crime. Soon thereafter, Williams was caught and, in a show-up, was identified by the victim. The court ruled that because the identification occurred so soon after the crime, the identification was admissible. *People v. Williams,* 516 P.2d 114 (Colo. 1973) ; *see also People v. Trujillo*, 75 P.3d 1133 (Colo. App. 2003) 9police investigating a burglary brought the victim and a witness to a nearby location where they had detained the defendant for a one-on-one show-up identification; the procedure was upheld, particularly because the police needed to quickly determine whether the defendant was the suspect).

Compare with:

A store manager called the police after recognizing a woman who had previously attempted to pass a stolen check. The police arrested the woman, handcuffed her, waited for a clerk who had witnessed her previous attempt to pass a bad check to arrive, and held her for a one-on-one identification by the store clerk. The clerk had only a scant opportunity to observe the person who passed the check, the clerk was uncertain about her identification of the defendant as that person, and the identification occurred an hour and a half after the check was passed. The court ruled that, under these circumstances, the identification was unreliable and inadmissible. *People v. Hardiway,* 874 P.2d 425 (Colo. App. 1993).

C. Suggestivity After the Identification

An officer should avoid any conduct after the identification which might be ruled suggestive. An officer should never tell witnesses that they picked the "right" or the "wrong" person.

Examples:

After the victim identified Webster in a photo lineup, the officer told the victim and her mother that Webster was presently in jail on domestic violence or possibly other charges. The Colorado Court of Appeals held that since there was no connection between Webster's arrest on

unrelated charges and the victim's identification, the identification remained reliable and was properly admissible. *People v. Webster,* 987 P.2d 836 (Colo. App. 1998).

The victim of a sexual assault was shown a number of photographs. When the victim picked Johnson as her assailant, the officer told her the name of the person and that he had been previously tried for sexual assault. While the trial court ruled that these comments "were so inflammatory" that the charges must be dismissed, the Colorado Supreme Court reinstated the charges, holding that the comments did not render the identification unreliable. *People v. Johnson,* 653 P.2d 737 (Colo. 1982).

Note: The supreme court did not say that this type of comment was acceptable. To the contrary, officers should **never** make these types of comments.

D. Showing a Witness More Than One Lineup

Often a witness cannot pick the suspect from a lineup, identifies the wrong person, or (in the case of a photo lineup) asks to see a live lineup. A problem may arise in conducting another lineup (or more) when only the person from the first lineup is placed in the subsequent lineups. The courts, however, have been very lenient on officers when this procedure is used. Unless other suggestive factors are present, this factor alone will usually not result in the suppression of the identification. *Gimmy v. People,* 645 P.2d 262 (Colo. 1982); *People v. Mattas,* 645 P.2d 254 (Colo. 1982); *People v. Thorpe,* 641 P.2d 935 (Colo. 1982).

III. RELIABILITY

Even when an identification is unduly suggestive, the witness may be allowed to identify the suspect *at trial* if the state can show that the in-court identification is reliable.

A. Independent Basis

In order to show reliability, a prosecutor must show that an in-court identification is totally independent of the suggestive identification, i.e., that the suggestive pretrial identification could not affect the accuracy of the identification at trial. The following are examples of situations were witnesses have an "independent basis" (other than the suggestive pretrial identification) for the in-court identification.

Examples:

Pacheco had rented a room from the victim and her daughter. Pacheco was arguing with the daughter when he shot and killed her. The mother tried to stop Pacheco and Pacheco shot her too. Later, Pacheco was twice brought to the victim for a on-on-one confrontation. The victim ultimately identified Pacheco at trial. Pacheco argued that because the original identifications were under obviously suggestive circumstances the victim's in-court identification should be suppressed. The supreme court disagreed. The victim had known the suspect for several months before the murder. Therefore, the in-court identification was not based upon the suggestive pretrial procedure but rather upon the victim's acquaintance with Pacheco. *People v. Pacheco,* 502 P.2d 70 (Colo. 1972).

Madonna and Robitz twice gave Hanneman $10 to pick up a prescription for dilaudid. The prescriptions were forged and Hanneman was arrested Officers showed Hanneman pictures of Madonna and Robitz and asked if "these were the same parties involved with him in the incident at [the pharmacies]. Hanneman positively identified Robitz and tentatively identified Madonna. The court ruled that the pretrial identification was clearly unduly suggestive and, therefore, inadmissible at trial. However, Hanneman was properly permitted to identify the defendants at trial because he had been with the defendants for 16 hours and the witness, therefore, had an independent basis for this identification. *People v. Madonna,* 651 P.2d 378 (Colo. 1982).

See also People v. Thiery, 780 P.2d 8 (Colo. App. 1989)(an independent basis from a suggestive photo array was established where a highly attentive and experienced police officer observed the perpetrators of the crime from a distance of four feet); *People v. Campbell,* 785 P.2d 153 (Colo. App. 1989), rev'd on other grounds 814 P.2d 1 (Colo. 1991)(identification evidence is not rendered unreliable or inadmissible simply because the witness had chosen other persons in previous lineups); *People v. Martin,* 791 P.2d 1159 (Colo. App. 1989)(showing the victim the defendant's scar was not likely to cause the victim to misidentify the defendant as her attacker, since during the attack she had ample opportunity to see the scar and had concentrated on it).

B. Reliability Factors

Ordinarily, reliability depends on the following factors:

1. the opportunity of the witness to view the criminal at the time of the crime;

2. the witness's degree of attention;

3. the accuracy of the witness's prior description of the criminal;

4. the level of certainty demonstrated by the witness at the confrontation; and

5. the length of time between the crime and the confrontation.

Neil v. Biggers, 409 U.S. 188 (1972); *Bernal v. People,* 44 P.3d 184 (Colo. 2002)

IV. SEARCHES AND SEIZURES

When a person is detained or arrested he or she has been "seized" under the Fourth Amendment. The seizure, therefore, must be reasonable in order to be constitutional.

A. Detentions

If there is reasonable suspicion to believe a suspect has committed a crime, and there was a witness to the crime, the suspect may be detained for a reasonable period until the witness can arrive to identify the suspect.

1. Showups

An officer may seize the suspect for a reasonable time in order to conduct a showup if the crime was recently committed.

Examples:

An officer stopped York because he generally matched the description of a prowler who was trying to break into a house. After stopping York, the officer received a radio report that a different house, belonging to Osuna, had been burglarized and Mrs. Osuna had been assaulted. Mrs. Osuna came to the scene and positively identified York as the perpetrator. The California court ruled that because York generally matched the description given by Osuna the detention awaiting the showup was a reasonable seizure. *People v. York,* 166 Cal. Rptr. 717 (Cal. App. 1980).

An officer, during a detention, should avoid any indications of custody except in the following circumstances:

a. Handcuffs or Physical Restraint

A detainee may be handcuffed or otherwise physically restrained if he or she attempts to flee, the officer has reasonable suspicion to believe the suspect has just committed a violent crime, or the officer is in reasonable fear for his or her safety.

b. Movement

A detainee should be "frozen" until the identification. A detainee should not be taken to the witness for an identification unless the officer can give a good reason why the witness could not be brought to the detainee, or the detainee consents to the movement.

Example:

Officers on foot patrol saw an elderly man chasing Cobbin. They radioed fellow officers that a possible robbery was in progress. Officers caught Cobbin and transported him back to the victim's barber shop where the victim identified Cobbin as having stolen money from the cash register The court ruled that, although it was proper to stop Cobbin, moving him for the identification was illegal (i.e., constituted an arrest without probable cause). *People v. Cobbin,* 692 P.2d 1069 (Colo. 1984).

2. Rule 41.1 Orders

An officer may petition the court for permission to obtain "nontestimonial evidence" from a suspect (e.g., blood, hair, saliva, photographs). This includes the power to detain an individual on less than probable cause for purposes of participating in a lineup. Crim. P. 41.1

a. Requirements

The requirements of the order are that:

1. There is probable cause that a crime was committed.

2. There are reasonable grounds, not amounting to probable cause to arrest, to suspect that the person named or described in the affidavit committed the offense, and

3. The results of the lineup will be of material aid in determining whether the person named in the affidavit committed the offense.

b. Other Issues Relating to the Petition and Order

(1) Authority to Issue

Any judge of the Supreme, District, County Court or Court of Appeals may issue the order to detain. Crim. P. 41.1(a)

(2) Length of Detention

The detainee must be detained no longer than is reasonably necessary to conduct the lineup. Crim. P. 41.1(f)(1).

(3) Time Limitations

After the order is signed, officers have ten days to find the detainee, conduct the lineup and return the order to the judge. Crim. P. 41.1(f)(2).

(4) Searches

The detainee may not be searched except for a protective search for weapons. Crim. P. 41.1(f)(5).

(5) Questioning

Never question the detainee about the case, **even if** he or she wants to talk to you (although you can *listen* to any *volunteered* statements the suspect might offer). Tell the suspect that you cannot discuss the case until he or she has been released. After you have released the suspect, tell him he is free to go but that you would like to talk to him.

Example:

Harris, who was suspected of sexual assault, was served with a Crim. P. 41.1 court order, taken in a police car to a hospital for extraction of bodily samples, and then to an armory building for a lineup. On the way to the hospital, a police detective advised Harris of his *Miranda* rights and obtained a waiver. The detective then questioned Harris on the way to the hospital, at the hospital, and on the way to the armory building. Harris

made some incriminating statements. The court ruled that the detective's questioning exceeded the purposes of the Crim. P. 41.1 order and, therefore, was illegal. *People v. Harris,* 703 P.2d 667 (Colo. App. 1985).

3. Searches

A detainee should not be fully searched before an identification is made. An officer may frisk a detainee before the identification if the officer has a reason to believe the detainee is armed.

B. Arrests

A suspect may be arrested before an identification if there is probable cause to arrest without the identification.

1. Movements for Showups

A suspect may be taken to the witness for identification if (a) there is probable cause to arrest and (b) the crime occurred recently.

2. Physical Lineups

A suspect may be placed in a physical lineup if there is probable cause to believe the suspect committed a crime.

V. RIGHT TO AN ATTORNEY

A. Lineups

1. Physical Lineups

a. After Formal Proceedings Have Begun

A suspect has a right to an attorney at a physical lineup after:

1. the suspect's first appearance in court on the charge; or

2. a warrant has been issued for the suspect on the charge.

b. Before Formal Proceedings Have Begun

If formal proceedings against the suspect have not begun, the suspect has no right to an attorney at a physical lineup.

2. Photographic Lineups

A suspect does not have a right to an attorney at a photographic lineup no matter when the identification occurs. *United States v. Ash,* 413 U.S. 300 (1973); *People v. Ortega,* 508 P.2d 784 (Colo. 1973).

B. Show-ups

A suspect does not have the right to an attorney at a lawfully conducted show-up. *Kirby v. Illinois,* 406 U.S. 482 (1972).

VI. NON-TESTIMONIAL EVIDENCE

The Fifth Amendment states that a person "shall not be compelled in a criminal case to be a witness against himself." Many defense attorneys have argued that by requiring a suspect to "give" the officers physical characteristics (e.g., voice, handwriting exemplar, blood sample, etc.), the suspect is being compelled to testify against himself. All courts have rejected this argument because the characteristics are "non-testimonial," that is, not communications.

Example:

A suspect is required, during a lineup, to say "Give me your money or I'll kill you." This requirement does not violate the suspect's Fifth Amendment right to silence because it is the physical characteristic (voice) rather than the communication (words stated) which is being compelled. *United States v. Dionnisio,* 410 U.S. 1 (1973); *People v. Shackelford,* 546 P.2d 964 (Colo. App. 1976).

VII. SUPPRESSION HEARINGS

When the identification of a defendant is in issue, the defense attorney will usually bring a motion to suppress the identification of his or her client. The usual basis of the motion is that pretrial identification procedures were unduly suggestive. The hearing is divided into two parts. First, the defendant is obligated to establish that the procedures employed by the police in obtaining the identification were unduly suggestive. If the defendant sustains this burden, the state is then required to show that, despite the improper suggestiveness, the identification was nevertheless reliable under the "totality of the circumstances." *Manson v. Brathwaite,* 432 U.S. 98 (1977); *Bernal v. People,* 44 P.3d 184 (Colo. 2002). During this hearing, the officers and witnesses involved in the identification are called to the witness stand to testify about the identification procedure.

VIII. IDENTIFICATIONS AT TRIAL

One of the most important and dramatic moments at a trial is when a witness points at and identifies the defendant as the perpetrator of the crime.

A. The Witness's Testimony

A witness is permitted to identify the defendant in court if the pretrial identification was not unduly suggestive or the in-court identification is based upon the witness recollections of the crime rather than the suggestive pretrial identification.

A witness who has not previously identified a suspect in a pre-trial identification procedure is nevertheless allowed to make a first-time in-court identification of the defendant, unless there are constitutionally impermissible suggestive circumstances at the trial. *People v. Monroe,* 925 P.2d 757 (Colo. 1996).

B. The Officer's Testimony

An officer may normally testify to the witness's pretrial identification of the suspect, including the actual words spoken by the witness during the identification. This fact can be especially crucial when the witness is present but can no longer identify the defendant at trial. The reason for the officer's power to repeat the witness's words was best described by one of this country's greatest judges:

> "[T]he earlier identification has greater probative value than an identification made in the courtroom . . . The failure of the witness to repeat the [out-of-court] identification in court does not destroy its probative value, for such failure may be explained by loss of memory or other circumstances." *People v. Gould,* 354 P.2d 865 (Cal. 1960).

IX. SUGGESTIONS FOR OFFICERS

In order to avoid suggestivity and ensure reliability, you should consider the following procedures:

A. General

The following are general tips to aid you in "creating" a non-suggestive identification:

1. Never say anything about the suspect before, during, or after the identification.

2. Always tell the witness to keep an open mind.

3. Always tell the witness that the person who committed the crime may or may not be present.

4. Always tell the witness before the identification that you cannot legally answer any questions about the suspect or whether the witness picked the "right" or "wrong" person.

5. Never say anything during the viewing.

6. Never permit multiple witnesses to identify the suspect at the same time.

7. Always tell witnesses not to discuss the identification with other witnesses.

8. Tell the witness that you must write everything the witness says about the crime and criminal in your report.

9. Write down everything the witness says about the perpetrator during the identification.

10. Read back to the witness exactly what is going into your report and tell the witness that this report must be sent to the defense attorney.

B. Physical Lineups

1. Include at least six participants, if possible.

2. Choose participants of the same race and sex and about the same age and size.

3. If the witness described the perpetrator as having a particular physical characteristic (mustache, beard, etc.) it is important that all of the participants in the lineup have that characteristic.

4. If the suspect wore distinctive clothing, jewelry, etc., either have *all* participants wear clothing, jewelry, etc. or *none* of them wear such items.

5. If the witness requests that a participant do something (e.g., give a voice exemplar) make sure all participants do the same thing.

6. If the suspect will not perform a "non-testimonial" act (e.g., step forward, turn to the side, give a voice sample), tell the suspect that this

may be an admission of guilt which may be used against him or her in court.

7. Take frontal and profile pictures of the participants.

8. Document the names of all participants in the order in which they were shown in the lineup.

9. Preserve the photographs and names according to departmental policy for trial.

10. If formal proceedings have begun against the suspect, the suspect has a right to have an attorney present (unless the suspect waives the right to an attorney).

    a. Try to get the prosecutor to attend as well.

    b. The role of the defense attorney is as an observer, not a participant.

    c. If the defense attorney makes legitimate suggestions to avoid suggestivity during the lineup, try to accommodate those suggestions.

    d. However, "it is not a denial of defendant's constitutional rights that police do not comply with all of counsel's requests." *People v. Borrego,* 668 P.2d 21 (Colo. App. 1983).

    e. Do not permit the defense attorney to "run the show" or harass witnesses.

C. Photographic Lineups

1. Use the most recent photo, or the photo which most closely matches the witness's description (e.g., older photo with beard if witness described a person with a beard; most recent photo if the suspect has no beard).

2. Obtain photos of other persons of the same age and race with the same general facial characteristics.

3. Use at least six photos, if at all possible.

4. Try to make sure that the photo of the suspect is not different than the others (e.g., smaller or bigger, different backgrounds, etc.).

5. Avoid any markings on the photographs (e.g., names, mug number, etc.)

6. Number each photo on the back.

7. Tell the witness before the identification, "I am going to show you six photographs. Please keep an open mind. The person who committed the offense may or may not be among the pictures you are about to see. Please take your time and look through all of the photographs before making any comment. If you recognize any of the persons in the photographs please pick out the person you recognize. I am required by law to avoid helping you. I am also forbidden by law to tell you whether your choice, if you make one, is a suspect in the crime."

8. If the witness picks a photo, ask the witness to initial the back side of the photo. Initial the photo yourself and put the date and time on it.

9. Tell the witness exactly what you are putting in your report about the identification. Make sure the witness agrees with your recollections and understands that the report will be sent to the defense attorney.

10. Record in your report the names (and identifying information) of all participants in the identification and of the persons whose photos were used.

11. Preserve the photographs in an evidence envelope according to department policy.

D. Show-ups

If you catch a suspect soon after the crime and there was an eyewitness:

1. Avoid indications that the suspect is in custody, if possible.

2. Bring the witness to the suspect unless the witness cannot move or the suspect agrees to the movement.

3. Do not say anything about the suspect to the witness.

4. If possible, let the witness identify the suspect without any questions or prompting.

5. Do not search the suspect or his vehicle, except for a protective search (frisk) when appropriate until after the suspect has been identified.

E. Ensuring Reliability

An officer can do little to ensure the reliability of a witness's identification. However, an officer can cause the unreliability of an identification or create a reasonable doubt in a juror's mind.

Example:

A five-foot-tall female victim tells an officer that the robber was tall. The officer than asks, "6'2" – 6'4"? The woman answers, "Yes." Later, when it is determined that the robber was 5'10" the defense attorney has a "field day" cross-examining the witness and officer. The woman on cross-examination will never remember or admit that it was the officer who "suggested" the height. An officer must remember that, to a five-foot tall woman, any robber over five feet, eight inches is bound to look "tall." If a witness is to avoid the frustration of this cross-examination, an officer must be very careful when taking a description from a victim of witness.

1. If the crime just occurred and the officer must radio a quick tentative description, get the best general description you can (race, gender, range of height and weight, etc.).

2. After doing this, relax the victim or witness in any way you can. Witnesses in shock normally do not give good descriptions.

3. After the witness has relaxed, ask the witness to close his or her eyes and visualize exactly what happened. Tell the witness to try to see the perpetrator in his or her "mind's eye."

4. Let the witness narrate what happened.

5. Ask the witness to describe the perpetrator.

6. Ask the witness to try to approximate about where his or her eyes hit on the suspect's body.

7. Ask the witness to approximate your height or weight.

8. Go back over the witness's statement to avoid miscommunication and ensure accuracy.

9. Remember, the witness is "tied into" anything you put in your reports. Make sure it is accurate.

Chapter 11

EVIDENCE

I. INTRODUCTION

This chapter discusses the Rules of Evidence (hereafter Rules) as they relate to information or objects gathered by officers in the investigation of a case.

A. DEFINITION OF EVIDENCE

Admissible evidence is information or things which the "fact finder" (usually the jury) is allowed to consider when deciding whether a defendant is guilty or not guilty.

Note: In a trial "to the court" the judge alone decides both the law and the facts.

B. Purpose of the Rules of Evidence

The purpose of the Rules is to *limit* information or objects which a jury may hear, see, feel, etc. Courts and the legislature feel that a jury should experience evidence only which is

1. Relevant
2. Reliable
3. Not unduly prejudicial
4. Based on proper foundation
5. Constitutionally gathered.

C. Purpose For Which Evidence is Offered

One of the most confusing (and important) questions about the Rules is that a "piece" of evidence may not be admissible to prove one point but may be admissible to prove another.

Examples:

An officer responds to a domestic quarrel. As the officer attempts to resolve the problem, the husband and the officer get into a fight. The husband is arrested and officers take a statement from the wife in which she explains how the fight started between her husband and the officer. The statement may be inadmissible to show that the officer acted properly and the defendant started the fight. Also, the wife may not be called as a witness for the state because

the husband may be permitted to assert the "spousal privilege." However, if the husband calls his wife to the witness stand to testify for him, and against the officer, the prosecutor can discredit (impeach) the woman with her original statement to the officers.

A defendant's prior felony convictions are not admissible to prove that the defendant is a "bad" person. However, if a defendant takes the witness stand the prior felony convictions are admissible to show that the defendant is not reliable or believable.

II. KINDS OF EVIDENCE

There are many different ways to categorize evidence. These classifications are about as helpful and meaningful in the performance of an officer's duty as the classification of insects. The important thing to remember about evidentiary classification is the different ways the different types of evidence get received into evidence so the jury can see, fear, feel, smell, and "taste" them.

A. Direct – Circumstantial – Substitute Evidence

The prosecutor or defense attorney may offer direct, circumstantial, and/or substitute evidence in order to prove a fact in question.

1. Direct Evidence

Direct evidence is evidence which proves a fact directly. In other words, a witness testifies that he or she saw, heard, smelled. or felt evidence which goes directly to the defendant's guilt or innocence.

Example:

A state's witness testifies that he saw the defendant shoot the victim.

2. Circumstantial Evidence

Circumstantial evidence is evidence which does not directly show the fact in question but which "implies" that the fact actually happened. There is no difference in the amount of evidence necessary to convict whether the state's case is based in whole or part on direct or circumstantial evidence. *Diebold v. People,* 485 P.2d 900 (Colo. 1971).

Example:

A state's witness testified that she saw the defendant go into the victim's apartment, heard what sounded like a gunshot, and saw the defendant run from the apartment.

3. Substitute Evidence

The Rules provide for "substitutes" for direct or circumstantial evidence. Substitute evidence is evidence which does not have to be proved directly or circumstantially because it is a matter of common or "legal" knowledge.

a. Judicial Notice

The judge may take "notice" of certain facts that are not subject to reasonable dispute that are either generally known within the jurisdiction or capable of accurate and ready determination by resorting to sources whose accuracy cannot be reasonably questioned.

Example:

A judge could take judicial notice of the fact that January 1, 1999 was a Sunday.

b. Presumptions

Certain facts are presumed under the law to be true without proof of those facts. These facts can be shown to be untrue by the other side.

Examples:

The defendant is presumed to be innocent.

Witnesses are presumed to be "competent" to testify. *People v. District Court,* 647 P.2d 1206 (Colo. 1982).

There is a presumption that a victim's prior sexual conduct and sexual orientation in a sexual assault case is irrelevant. *People v. McKenna,* 585 P.2d 275 (Colo. 1978); *People v. Murphy,* 919 P.2d 191 (Colo. 1996).

c. Inferences

A jury is sometimes allowed to "infer" certain facts based on the establishment of other facts.

Examples:

A jury may infer that a person driving with a blood alcohol content of 0.10 or higher to be under the influence of alcohol. *Barnes v. People,* 735 P.2d 869 (Colo. 1987). **Note:** the threshold level is now 0.08.

A jury may infer that a person in the exclusive possession of recently stolen property was the person who participated in the theft/burglary of that property. *People v. Wells,* 197 Colo. 350, 592 P.2d 1321 (Colo. 1974).

Note: In such cases, the state still bears the burden of proving the charge beyond a reasonable doubt, so be sure to obtain a statement from witnesses, the defendant, etc. *People v. Weems,* 676 P.2d 1222 (Colo. App. 1983).

B. Testimonial – Real – Demonstrative – Documentary Evidence

The types of evidence the jury may see, hear, smell, and touch are often characterized as testimonial, real, documentary, or demonstrative evidence.

1. Testimonial Evidence

Most evidence presented to a jury is testimonial, i.e., what a witness says under oath on the witness stand. This is usually "factual" testimony, that is, what the witness saw, heard, smelled, felt, or tasted that relates to whether the defendant did or did not commit the crime.

Sometimes a witness is permitted to give an opinion about certain facts.

a. Factual Testimony

Normally, a witness is limited to testimony about the relevant facts that the witness can swear he or she actually saw, heard, smelled, tasted, or felt (i.e., based on the witness' personal knowledge).

b. Opinion Testimony

A witness normally cannot give an opinion about the facts. A witness may be permitted to give an opinion if the witness is an expert and the court feels the expert is helpful for the jury to understand the facts. A lay witness may give an opinion if the opinion is rationally based on the perceptions of the witness and is helpful to a clear understanding of a relevant fact.

(1) Expert Opinion

When facts are beyond the experience of the jury, an expert is permitted to give an opinion which explains or interprets the facts.

Examples:

Experts are allowed to testify that DNA extracted from crime-scene related evidence "matches" DNA obtained from a suspect, and the statistical probabilities of such a "match." *People v. Shreck,* 22 P.3d 68 (Colo. 2001).

Experts have been allowed to offer opinions regarding the "battered woman syndrome," *People v. Yaklich,* 833 P.2d 758 (Colo. App. 1991), "rape trauma syndrome." *People v. Hampton*, 746 P.2d 947 (Colo. 1987); *People v. Baenziger*, 97 P.3d 271 (Colo. 2004), and victim recantation, *People v. Wallin*, 167 P.3d 183 (Colo. App. 2007).

An expert may testify as to the typical demeanor and behavioral traits displayed by a sexually-abused child. *People v. Mintz*, 165 P.3d 829 (Colo. App. 2007).

An expert may or may not be allowed to offer an opinion as to the "unreliability" of eyewitness identification, depending on whether the testimony is helpful to the jury. *Campbell v. People,* 814 P.2d 1 (Colo. 1991).

Experts have been allowed to offer opinions regarding comparisons of shoeprints, *People v. Perryman,* 859 P.2d 263 (Colo. App. 1993); voiceprints, *People v. Drake,* 748 P.2d 1237 (Colo. 1988), and tool marks, *People v. Genrich,* 928 P.2d 799 (Colo. App. 1996).

An expert may be permitted to provide an opinion as to whether a suspect was "insane" at the time of the commission of the crime. *People v. Galimanis,* 944 P.2d 626 (Colo. App. 1997).

Experts are permitted to testify about whether a particular agreement or transaction was a "security." *People v. Destro,* 215 P.3d 1147 (Colo. App. 2008); *People v. Pahl,* 169 P.3d 169 (Colo. 2006)

Experts are not allowed to testify that a defendant matched a "drug courier profile" to prove that the suspect was guilty of a drug offense, *Salcedo v. People,* 999 P.2d 833 (Colo. 2000), but an expert may testify as to the *modus operandi* of drug traffickers, *People v. Ramirez,* 1 P.3d 223 (Colo. App. 1999), *People v. Montalvo-Lopez,* 215 P.3d 1139 (Colo. App. 2008), or that the actions of a suspect were consistent with those of a drug "runner." *People v. Gay,* 24 P.3d 624 (Colo. App. 2000) ; *People v. Atencio,* 140 P.3d 73 (Colo. App. 2005) .

(2) Lay Opinion

A person without any specific training or experience in an area (lay person) may sometimes be allowed to give his or her opinion of facts, if those facts are rationally based on the witness's perception, and the opinion is helpful to the jury. The following are some of the more common examples of "facts" upon which lay witnesses may express an opinion:

(a) Age

A competent observer may be permitted to state an estimate or opinion as to the age of another person. *People v. Fierero,* 606 P.2d 1291 (1980).

(b) Appearance

A witness who is familiar with the defendant may state an opinion that the person in a photograph or videotape looks like the defendant. *Robinson v. People,* 927 P.2d 381 (Colo. 1996); *United States v. Borrelli,* 621 F.2d 1092 (10th Cir. 1980).

(c) Condition of Evidence

An officer, for example, may testify as to the condition of evidence, such as the fact that certain tears on dollar bills recovered from a suspect were consistent with the tearing that occurs when bills are extracted from parking lot money depositories. *People v. Garcia,* 784 P.2d 823 (Colo. App. 1989).

(d) Drugs

A court may admit lay identifications of marijuana and other controlled substances based on testimony concerning their appearance, taste, and smell. *People v. Graybeal,* 155 P.3d 614 (Colo. App. 2007).

(e) Handwriting

Lay witnesses may give an opinion as to the handwriting of another based upon familiarity with that handwriting. Rule 901(b)(2).

(f) Intoxication

A person who has had sufficient opportunity to observe the demeanor and conduct of another may express an opinion as to whether that person is intoxicated. *People v. Norman,* 572 P.2d 1257 (Colo. 1977); *People v. Souva,* 141 P.3d 845 (Colo. App. 2005).

(g) Police officers

A police officer may testify that witnesses are sometimes unable to make photographic lineup identifications after incidents that happened quickly. *People v. Rincon,* 140 P.3d 976 (Colo. App. 2005). An officer may also testify that it is not uncommon for guilty criminal suspects to deny guilt, make false accusations of police brutality, and falsely claim that they do not understand their Miranda rights. *People v. Tallwhiteman,* 124 P.3d 827 (Colo. App. 2005).

(h) Sanity

A person who is acquainted with the defendant and who observed the defendant around the time of the crime

may testify as to his or her sanity. *People v. Medina,* 521 P.2d 1257 (Colo. 1974) ; *Dunlap v. People*, 173 P.3d 1054 (Colo. 2007).

(i) Smell/Taste

A lay witness is permitted to offer an opinion about what an object or substance smelled, felt, or tasted like if the person has had some experience with the object or substance. *Enyart v. People,* 201 P. 564 (Colo. 1921).

(j) Speed

Lay witnesses may give their opinions relating to the speed of a vehicle. *Eagan v. Maiselson,* 350 P.2d 567 (Colo. 1960).

(k) Value

The owner, and anyone else with sufficient knowledge of the property, may give an opinion as to the value of the property. *City and County of Denver v. Hinsey,* 493 P.2d 348 (Colo. 1972).

(l) Voice Identification

A voice may be identified by anyone familiar with the voice. Rule 901(b)(5).

2. Real Evidence

Physical objects which are the original pieces of crime-related evidence are often classified as "real evidence." These objects may be admitted into evidence so the jury can see, feel, hear, and/or touch them if a witness can testify that the objects are related to the crime in question.

Examples:

Weapon used by the defendant.

Fingerprints lifted from the crime scene.

Stolen property found on the defendant.

3. Demonstrative Evidence

Demonstrative evidence is used to better explain the facts to the jury but may not itself be admissible if the opposing side objects. The judge has wide discretion in admitting demonstrative evidence. The important point to remember is that the value of demonstrative evidence is not that the jury can take the object to the jury room *during deliberations*, but that it helps them *during the trial* to understand the evidence.

Examples:

A certain firearm is described by a witness but is not located by officers. Another firearm that is similar to the one described by the jury may be displayed so the jury understands what that weapon looks like.

A crime lab detective may be permitted to demonstrate how fingerprints are lifted by bringing into court an object that is similar to the object from which a print was lifted. *See People v. LeMasters*, 666 P.2d 573 (Colo. 1983)(fingerprint expert brought in a glass to demonstrate how prints were lifted from a similar glass).

4. Documentary Evidence

Examples:

a. Handwriting
b. Photographs
c. Taped events or conversations
d. Business records

III. THE TRIAL

In order to understand evidence, an officer should have some knowledge of how the Rules relate to the various stages of the trial.

A. Pretrial

Before trial begins, the defense attorney and/or prosecutor often make "motions" to prohibit the other side from introducing evidence to the jury.

1. Constitutional Violations

Defense attorneys often make motions to suppress evidence because of alleged constitutional violations of their clients' rights.

2. Other Motions

Often the defense attorney, or prosecutor, move to prohibit the introduction of other "damaging" evidence. These motions are made when one side feels the other side is going to offer evidence which is not admissible under the Rules.

3. Discovery

Attorneys often file motions to require the other side to provide information regarding the case. Much of the "discovery" in a criminal case is automatic. On other occasions, either the defense or the prosecution must file a motion to require the disclosure of such information.

Examples:

The defense attorney may file a motion to require the state to provide medical or psychological reports of a victim. These documents are privileged and usually not subject to disclosure unless the victim "waives" the privilege. *People v. Covington,* 19 P.3d 15 (Colo. 2002); *People v. Sisneros,* 55 P.3d 797 (Colo. 2002).

B. Jury Selection

During jury selection, the jurors are questioned about their knowledge of the facts of the case, the law, and any prejudices they might have which relate to the parties involved or the evidence that will be introduced at trial.

C. Opening Statements

The purpose of an opening statement is for the attorney to explain to a jury what evidence the jury can expect to receive during the trial. An attorney may not, during opening statement:

1. Tell the jury facts unless there is a good faith and reasonable basis for believing that the facts will be admitted into evidence.

2. Argue the guilt or innocence of the defendant.

D. The State's Case

After opening statements the prosecutor is permitted to call witnesses to the witness stand and ask them questions.

1. Direct Examination

Direct examination is the questioning of witnesses by the proponent of the evidence.

a. Leading Questions

A prosecutor is normally not permitted to ask leading questions during direct examination. Rule 611(c). Leading questions are questions which suggest the answer to the witness. These are usually questions which only require a "yes" or "no" answer. The reason for this rule is that these questions permit the attorney to "testify" and the witness is to simply confirm what the attorney says are the facts. Witnesses, not lawyers, are supposed to present evidence to the jury.

b. Objections

If the prosecutor asks an improper question, the defense attorney may object to the question. A witness may not answer the question unless the judge overrules the objection. Probably the most frequent objections are based on:

1. Irrelevancy
2. Lack of foundation
3. Hearsay
4. Leading the witness

2. Cross-Examination

After the prosecutor has finished questioning the witness the defense attorney is permitted to cross-examine the witness. There are generally two purposes for cross-examining a state's witness. These purposes are to elicit answers which are favorable to the defendant's case and to "impeach" (discredit) the witness.

The biggest difference between the kinds of questions asked during direct and cross-examination is that during direct examination an attorney may not ask leading questions, but during cross- examination an attorney may (and should) ask leading questions.

a. Eliciting Facts Which Support the Defendant's Theory

Long before the trial starts, the defense attorney determines the strengths and weaknesses of the state's case. The defense attorney formulates a defense theory which revolves around the weaknesses in the state's case. Then the defense attorney concentrates on how to elicit facts which support this defense. One of the most effective ways to elicit these facts is through the state's witnesses.

b. Impeachment

Whenever a state's witness gives damaging testimony the defense attorney must try to discredit the witness. This is called impeachment. To impeach a state's witness the defense attorney asks questions to show the jury that the witness is not telling the truth (lying or mistaken) and/or that the witness is not a truthful person. It is improper for an attorney to try to impeach a witness simply because the witness is a "bad person."

(1) Prior Inconsistent Statements

Any time a state's witness makes a statement at trial that is different from statements made earlier, the witness may be impeached with the prior inconsistent statement.

Examples:

An officer makes statements at trial which differ from the officer's police report or preliminary hearing testimony. The officer may then be impeached with these previous statements.

An eyewitness, after identifying the suspect, is impeached by the officer's report which shows that the witness gave a physical description of the robber which does not match the defendant.

A defendant makes admissions during a guilty plea and then later withdraws that plea. At trial, the defendant makes statements different from the admissions made at the plea hearing. The prosecutor is allowed to impeach the defendant with the prior admission. *People v. Cole,* 584 P.2d 71 (Colo. 1978).

(2) Ability to Perceive or Recollect

A state's witness may be cross-examined and impeached on his or her perceptions or recollections about the crime or crime scene.

Example:

The defense attorney was permitted to cross examine witnesses about their heroin use because the attorney was attempting to establish that the witnesses were "under the influence of the narcotic substance at the time of the occurrence . . . or . . . at trial, [which are] matters which might affect the witnesses' ability to perceive, remember, or testify as to a particular event." *People v. Roberts,* 553 P.2d 93 (Colo. App. 1976).

(3) Hostility, Prejudice or Bias

A state's witness's testimony may be discredited if the defense attorney can show that the witness is hostile, prejudiced, or biased.

Example:

White officers stopped Taylor, a black man. As the officers were about to frisk Taylor, he fled. As Taylor fled an officer fired several shots at him. Taylor was arrested the next day. At trial, Taylor testified that he had no gun and was being harassed by officers who were prejudiced against blacks. Taylor's attorney asked one of the officers if he was prejudiced against blacks. When the officer replied, "No," the defense attorney was permitted to bring in witnesses of prior arrests to testify that the officer had made "racial slurs" and was "sadistic in the manner in which he effected the arrests." *People v. Taylor,* 545 P.2d 703 (Colo. 1976).

(4) Deals

If a witness is given a "deal" to testify, he or she may be impeached by the details of the agreement. Witnesses who are the beneficiaries of promises in exchange for their testimony are often of little value at trial; jurors just do not believe them.

(5) Prior Felony Convictions

A witness may be impeached by his or her prior felony convictions.

(6) Prior Relevant Bad Acts

If a witness has committed prior relevant bad acts the defense attorney may impeach the witness with those acts.

Example:

An officer has to fight the suspect to arrest him, so the suspect is charged with assault. The suspect, through discovery, finds that the officer has been recently disciplined for "brutality" or "excessive force." The suspect at trial will be permitted to cross examine the officer about the prior cases.

Note: The biggest problem for prosecutors in assault on police officer cases is that (a) the officers do not take enough statements and (b) the officers' disciplinary records.

E. The Defense Case

When the state rests, the defense puts on its case. The defense case, as it relates to the Rules of Evidence, is exactly the same as the state's case. Every officer must remember, however, that the defendant does not have to present any evidence at trial because it is the state's burden to prove the defendant guilty beyond a reasonable doubt. The defendant does not have to prove his or her innocence.

F. Jury Instructions

The trial judge instructs the jurors on the applicable law of the case. Some of this law relates to the elements and defenses of the case. The following are examples of instructions that may be given relating to the Rules of Evidence.

1. Defense Theory

The defendant is permitted to submit an instruction on his or her "theory." For example, a defendant may claim that he was so far away from the scene of the crime that he could not have been at the crime scene at the time of the commission of the crime. An instruction of the

defendant's alibi theory may therefore be given to the jury. *People v. Nunez,* 841 P.2d 261 (Colo. App. 1992).

2. Flight

A flight instruction may be appropriate when the suspect flees the scene, flees from an officer, leaves the state, or hides out using a false name. The reason for such an instruction is to inform the jury that such "flight" may be used as evidence of the defendant's "consciousness of guilt."

Example:

After being apprehended, Gonzales fled. The court instructed the jury that, although flight alone is not enough to establish guilt, it is a circumstance that may be considered in determining the guilt of the defendant. *People v. Gonzalez,* 525 P.2d 1139 (Colo. 1974); *see also People v. Garcia,* 169 P.3d. 223 (Colo. App. 2007).

3. Recent Possession

A judge may instruct the jury that possession of recently stolen property, "if unexplained," is a circumstance that the jury may consider in determining whether the defendant took the property. *Wells v. People,* 592 P.2d 1321 (Colo. 1974).

4. Self Defense

If appropriate, the defendant may be entitled to an instruction explaining his or her defense of self defense.

5. Accomplice Testimony

If there is no corroboration for an accomplice's testimony, the jury will be instructed to "act upon his testimony with great caution." *People v. Small,* 631 P.2d 148 (Colo. 1981).

G. Closing Arguments

After both sides have "rested," the attorneys may argue to the jury. The purpose of these arguments is to combine the facts which the jury heard with the law, which the judge has given, and make the jury believe that the defendant is (or is not) guilty beyond a reasonable doubt. The Rules of Evidence and Ethics prohibit attorneys from arguing "outside" the facts and law. Specifically, they may not:

1. Misstate the facts or law of the case.

2. Express personal beliefs.

3. Appeal to the passions or prejudices of the jury.

H. Techniques For Officers

The following are some suggestions for officers who want to learn how the Rules of Evidence relate to a trial.

1. Obtain some transcripts from a prosecutor and read them in the following order.

   a. Opening Statements

      Ask yourself what is it the prosecutor must prove? What is the defense theory of the case?

   b. Closing Arguments

      Did the prosecutor prove what he or she wanted to? Did the prosecutor successfully rebut defenses? Was the defense attorney able to show what he or she wanted to?

   c. Jury Instructions

      What does the judge say about the prosecution case? What does the judge say about the defense case?

   d. The Trial

      Look at the witnesses' testimony with an eye toward whether, and how, the prosecutor got the evidence admitted.

2. Understand that when you are on the witness stand, the prosecutor can not ask you "leading questions." You must be prepared by knowing all of the facts. If possible, do a run through of the questions and answers before trial. If the case is important and the prosecutor is professional, he or she will appreciate your professionalism.

3. Find out from the prosecutor what the defense theory of the case is. Ask what questions the defense attorney will ask you.

4. Never, never, while testifying, try to "sneak" facts in which you know are inadmissible. The judge will hate you – forever. (If you cause a mistrial, the prosecutor will too). Besides, it is unprofessional.

IV. ADMISSIBILITY OF EVIDENCE AGAINST A DEFENDANT

Information and objects are admissible against a defendant if all of the following are established by the state:

The evidence tends to prove that the defendant committed the crime (relevant)

AND

The evidence is likely to be true (reliable)

AND

The evidence is not unduly prejudicial

AND

A proper "foundation" is laid for the introduction of the evidence

AND

The officer did not violate the suspect's constitutional rights in the collection of the evidence.

A. Relevance

Relevant evidence is evidence which tends to prove that a defendant either committed or did not commit the crime. Irrelevant evidence is not admissible.

Example:

Carlson was charged with burning her business. At trial the prosecutor asked an agent for Carlson's insurance company whether Carlson's insurance claim was paid. When the agent said the claim was denied, the prosecutor asked why. The agent said, "Based on our evaluation of the evidence we had, and on the advice of our attorney, we felt we had a provable arson defense." The court ruled that the agent's testimony was irrelevant (and unduly prejudicial). Therefore, the conviction was reversed. *People v. Carlson,* 677 P.2d 390 (Colo. App. 1983).

Most evidence will be obviously relevant or irrelevant. The following are situations discussed by the courts that may not be so obvious to the officer.

1. Motive

The defendant's motive to commit a crime is, of course, not an element of the crime. However, it can be very important in persuading a jury that the defendant in fact committed the crime. Evidence showing a defendant's motive is almost always admissible.

Examples:

Calvaresi burned his nightclub because he was in financial trouble and was insured for $65,000. The court ruled that Calvaresi's motive to commit the arson was relevant and, therefore, admissible. *People v. Calvaresi,* 600 P.2d 57 (Colo. 1979).

Evidence of defendant's gang activity was found to be admissible to show that the shooting was motivated by gang rivalry. *People v. Webster,* 987 P.2d 836 (Colo. App. 1998).

2. Negative Evidence

Negative evidence is a fact, or set of facts, which tends to show that something did not happen. Negative evidence is usually relevant.

Examples:

Officers catch the suspect and find property in his pockets which was in the victim's home the day before. The officers lift fingerprints from the victim's home which do not belong to the suspect or the victim. The defendant may introduce evidence that his prints were not in the house and that unknown prints were found.

Bueno committed an armed robbery. Someone committed a similar robbery the next day. Bueno was charged with the first robbery and at trial the defense tried to present evidence that a witness to the second robbery said that Bueno was not the robber. The trial court ruled that this evidence was irrelevant, but the Colorado Court of Appeals reversed, ruling that the defendant should have been permitted to present this negative evidence. *People v. Bueno,* 626 P.2d 1167 (Colo. 1981).

3. Weapons, Disguises

A weapon or disguise is always admissible at trial against a defendant if a witness can testify that the weapon or disguise "looks like" that used during the crime, and the state can "tie" the evidence to the defendant in

some way. Surprisingly, Colorado courts have also permitted the introduction of guns and disguises which could not be identified by a witness.

Example:

Watson committed an armed robbery while wearing a wig. Officers, while executing search warrant, found three revolvers and four wigs The court ruled that the weapons and disguises were admissible even though "there is no evidence that they were used in the crime." *People v. Watson,* 650 P.2d 1340 (Colo. App. 1982).

4. Aliases

A defendant's use of aliases is admissible if it shows consciousness of guilt or a desire to avoid detection. However, if the use of an alias is not in some way connected with the crime it is irrelevant and inadmissible.

Examples:

Loyd repeatedly eluded police in their efforts to execute a warrant for his arrest. When officers finally found him, he gave them two false names. At Loyd's trial, the arresting officer was allowed to testify that Loyd gave two aliases before being arrested The court ruled this evidence relevant in light of Loyd's efforts to avoid detection. *People v. Loyd,* 751 P.2d 1015 (Colo. App. 1988).

Compare with:

DeHerrera was arrested for robbery. When officers searched DeHerrera they found various pieces of identification showing that DeHerrera used other names. The court ruled that, because the aliases had nothing to do with the crime committed, they were not admissible at trial. *People v. DeHerrera,* 647 P.2d 241 (Colo. App. 1981).

5. Informants

The state will have to disclose the identity of an informant only if nondisclosure will prevent the defendant from preparing a meaningful defense. For trial, this normally means the informant must have been an eye or ear witness to the crime.

Often before trial a defendant will attack the validity of the arrest. If the arrest was based on an informant's hearsay, the defense will try to force

the state to reveal who the informant is. In order to succeed, the defense must show either that the informant does not exist or that the informant did not provide the information on which the officer relied.

The courts will consider the following factors in deciding whether to order disclosure of the identity of an informant:

a. whether the informant was an eye or ear witness;
b. whether the informant is available or could be made available;
c. whether other witnesses can show it is likely the informant's testimony will be different than other witnesses' testimony;
d. whether the defendant knows or could find out who the informant is; and
e. whether the informant was deeply involved in the crime.

People v. Garcia, 752 P.2d 570 (Colo. 1988).

Examples:

Rodriguez showed the court that the informant was "an actual participant rather than a mere tipster." The state then could not find the informant. The court ruled that the case had to be dismissed because in such cases the state has a "duty to make reasonable effort to keep contact with the informant." *People v. Rodriguez,* 645 P.2d 851 (Colo. App. 1982).

An informant stated to police that an unnamed person said that the unnamed person could obtain drugs from a male residing at a specific address. The informant had driven the unnamed person to the address and had been shown the drugs purchased by the unnamed person. The Colorado Supreme Court concluded that the prosecution need not disclose the identity of the informant, because the defendants had not established that the informant would be a likely source of relevant and helpful evidence essential to the determination of guilt or innocence. The court also concluded that the informer privilege did not extend to the unnamed person because that person did not furnish information to the police. The court noted that the unnamed person's identity might be protected where the revelation of the unnamed person's identity would likely lead to disclosure of the confidential informant's identity. However, under the circumstances, the court concluded that the prosecution's unsupported allegations to that effect "must be afforded scant weight." *People ex rel. Sandstrom v. District Court,* 904 P.2d 874 (Colo. 1995).

An anonymous caller reported to the sheriff that she had been in a house where marijuana was being grown. After corroborating the information, officers obtained a search warrant. The Colorado Court of Appeals concluded that once the tip had been corroborated, the anonymous informant's existence became irrelevant to the case, and Siegl's request for disclosure of the informant's identity was properly denied. *People v. Siegl,* 914 P.2d 511 (Colo. App. 1996).

6. Officer's Prior Misconduct

Prior proven misconduct of the officer may be admissible if the relevance can be shown. The issue usually arises when the state charges the suspect with assault upon an officer. During the discovery process the state is ordinarily not required to disclose criminal histories for police officers (the state must disclose such histories for all other witnesses) because police officers cannot, pursuant to statute, be qualified for their positions if they have criminal histories that could be used for impeachment purposes. However, the prosecution may be required to disclose any criminal history of any police officer witness if that criminal history is known to the prosecution. *People v. Fox,* 862 P.2d 1000 (Colo. App. 1993).

Example:

Officers responded to a disturbance in a housing project. When they approached the source of the disturbance, Cole pulled out a machete and cut an officer's hand. At trial, Cole was permitted to introduce evidence of two unrelated citizen complaints of excessive force by the officer. The first incident, which occurred about nine months earlier, involved an arrest in a bar. The officers were found to have acted properly by the department and the defendant had pled guilty to assaulting a police officer. In disapproving the trial court's ruling, the Colorado Supreme Court stated, "[T]he first incident . . . which occurred more than nine months prior to the arrest of the defendant . . . is totally irrelevant to the issues under consideration. Such evidence has little or no bearing on the credibility of the officer as a witness, and serves only to improperly attack the general character of the officer." *People v. Cole,* 645 P.2d 830 (Colo. 1982).

B. Reliability

Even when the evidence offered is very relevant, the state must still show that it is reliable. The question of whether evidence is "reliable" is sometimes based on law which is centuries old (e.g., hearsay), or which has only recently

been ruled upon (e.g., voice prints). The following is a discussion of issues that the courts have discussed as reliable or unreliable.

1. Hearsay

Hearsay testimony occurs when a witness tries to tell the jury what another person told the witness with the expectation that the jury should believe the truth of what was said to the witness. The Rules of Evidence relating to when hearsay is admissible are sometimes confusing and complicated. The general rule is that hearsay is not admissible. One of the primary reasons why hearsay is inadmissible is that such "testimony" cannot be tested through cross-examination.

Example:

The victim made statements about her fear of Borrelli. Borrelli later killed the victim. The court ruled that statements were hearsay and could not be admitted for the purpose of proving the victim's fear. *People v. Borelli,* 624 P.2d 900 (Colo. App. 1980).

However, there are instances in which hearsay testimony is admissible, generally because of some form of inherent reliability of the statements. The following are some exceptions to the rule that hearsay statements are not admissible.

a. Admissions

An admission is any statement by a suspect which ties him or her in any way to the crime. Admissions are technically not an exception to the hearsay rule; under the Rules, admissions are not hearsay statements. Rule 801(d)(2)(A). The important thing for an officer to remember is that admissions of a suspect are admissible in court, if offered against the suspect by the prosecution. However, the self-serving statements of a suspect are not admissible if offered into evidence by that suspect.

Example:

The defendant's statements following a shooting, to the effect that he was sorry he shot the victim and that he did not mean for the victim to die, were not admissions but were rather inadmissible self-serving declarations. "A defendant's self-serving declaration is generally not admissible because there is nothing to guarantee its reliability. If this were not the case, a defendant could thereby create his own favorable

evidence." *People v. Atkins,* 844 P.2d 1196 (Colo. App. 1992).

Note: Get and document any admissions you can.

b. Statements Against Penal Interest

Statements against penal interest are statements made which could subject a person to criminal liability. These statements are very similar to admissions and confessions. In order to be admissible under the penal interest exception:

1. The declarant must be unavailable;

2. The statement must be so likely to expose the declarant to criminal liability that the declarant would not have made the statement unless he believed it to be true.

3. The statement cannot be "offered to exculpate the accused . . . unless corroborating circumstances clearly indicate the trustworthiness of the statement. Rule 804(b)(3).

Examples:

Newton and several accomplices robbed a store of money and gift certificates. Six days after the robbery Cummins, a 17-year old, came to the police station and provided a statement regarding the actions of Newton immediately after the robbery. The Colorado Supreme Court stated, "Here, Cummins's statement to [the officer] would subject her to liability as an accessory. Unless she believed the statement to be true, a reasonable person would not inform a police officer that she was aware of a robbery that had just occurred, that she knew the persons involved in that crime, that she witnessed the robbers enter the apartment she was occupying, that she left the apartment and saw the police surround the apartment, and that she informed the robbery participants of the police officer's presence. Taken together, these statements would support a finding that Cummins violated the law and are thus against her penal interests. *People v. Newton,* 966 P.2d 563 (Colo. 1998).

Farrell and Blakenship were arrested in connection with a murder. After being advised of his *Miranda* rights, Blakenship gave the officers a detailed statement, including the fact that he and Farrell had stolen several cars, robbed

and ransacked the victim's house, and abducted, bound, and abandoned the victim in a field. The Colorado Supreme Court held that the statement, on its face, qualifies as a statement against penal interest because through his admissions Blankenship "exposed himself to liability for multiple criminal charges, including the murder of [the victim]." *People v. Farrell,* 34 P.3d 401 (Colo. 2001).

c. Excited Utterances

An excited utterance is a "statement relating to a startling event made while the declarant was under the stress of excitement caused by the event or condition." Rule 803(2). A lay witness, or officer, may repeat at trial the statements of a witness when the above elements are satisfied.

Examples:

The statements of two children concerning the kidnapping of their mother made two hours after the event constituted an "excited utterance" and was therefore an exception to the hearsay rule. General questions asked by the father did not destroy the statements' character as excited utterances. *People v. Fincham,* 799 P.2d 419 (Colo. 1990).

Two statements by Garcia's two-year-old son implicating his father in the stabbing death of his mother were admissible as excited utterances. The first statement was made after the child saw his mother in a casket, and he made the second statement after seeing his mother's photograph on the wall at his grandfather's house approximately one week after the stabbing. The Colorado Supreme Court concluded that, because the child was in close proximity to his mother both before and immediately after she was stabbed, the child's statements concerning the stabbing satisfy the requirement that he had personal knowledge of the matter. *People v. Garcia,* 826 P.2d 1259 (Colo. 1992).

Hearsay testimony was admitted at Hulsing's murder trial from the victim, as recounted by neighbors and friends. The witnesses were allowed to testify to the victim's emotional state and to statements made by her just minutes after an argument with Hulsing. In addition, the statements given to police by the Hulsing children minutes after the shooting were admitted. Because these statements were made while the declarants were still in a state of stress and excitement,

the court of appeals concluded that they were properly admissible under the excited utterance exception to the hearsay rule. *People v. Hulsing,* 825 P.2d 1027 (Colo. App. 1991).

After the victim was stabbed, she was being transported in an ambulance and, in response to a police officer's question, she told the officer who stabbed her. The court held that this statement was admissible as an excited utterance under CRE 803(2). *People v. Moore*, 117 P.3d 1 (Colo. App. 2004)

The victim's statements, made over a two hour period after she was sexually assaulted and stabbed in the neck, were properly admitted under the excited utterance hearsay exception. The victim was hysterical, repeatedly asked if she was going to die, continually lapsed into her native French, and was continually being examined and treated for her injuries. *People v. King*, 121 P.3d 234 (Colo. App. 2005).

Statements from the victim to her friend about the beating she had suffered were properly admitted as excited utterances, as they were made during two phone calls to the friend and during the ride to the friend's home, before the victim had a chance to calm down. *Compan v. People*, 121 P.3d 876 (Colo. 2005).

d. Dying Declarations

A dying declaration by the victim of a crime is admissible if:

1. The victim believes he or she is about to die.

   Example:

   "John shot me . . . I am not going to make it this time." *Dolan v. People,* 449 P.2d 828 (Colo. 1969).

   Note: The victim does not have to express knowledge of impending death. It may be inferred from the circumstances. *Reppin v. People,* 34 P.2d 71 (Colo. 1934).

2. The statement was made voluntarily without suggestive questions.

Example:

Officer asked, "Who shot you?" The victim's response was admissible as a dying declaration because the officer did not suggest an answer. However, if the officer's question was, "Did Mackey shoot you," the answer would be inadmissible.

3. The victim dies.

e. Written Records

Written government and business records are normally hearsay because the prosecutor wants the jury to believe what is written in those records, even though they are often written by someone who is not in court and cannot be cross-examined. These records are admissible as exceptions to the hearsay rule only if certain factors are satisfied which reflect that the records are reliable and truthful. These factors are that the record must:

1. have been made in the "regular course of business."

2. have been made at or near the time of the act, transaction, occurrence, or events.

3. have not have been prepared solely to establish the culpability (criminal liability) of a suspect.

Example:

An officer followed Stribel's car, at a uniform distance and speed, and determined that Striebel was traveling 48 miles per hour in a 30 miles per hour zone. In order to prove proper calibration of the police car, the prosecutor introduced the calibration which had been signed by the mechanic testing the car. The card which was introduced into evidence through the custodian of the calibration records was clearly hearsay, because the mechanic who tested the car was not called to be cross-examined. However, the court ruled that the card was admissible because the calibration tests and their results were routine business procedures, and because tests are not performed, nor are the records "kept for purpose of proving in court that any particular defendant was speeding . . . the record makers of speedometer calibrations have no motive to falsify the records, and the records are trustworthy." *People v. Stribel,* 609 P.2d 113 (Colo. 1980).

f. Statements of a Child Victim of Unlawful Sexual Offenses

An out-of-court statement, made by a child victim or witness of a sexual offense, may be admissible at trial for that crime if there are sufficient safeguards of reliability of the statement, and the child either testifies or is unavailable and there is corroboration of the sexual abuse. Section 13-25-129, 5 C.R.S. (2008). If the child's statement falls under some other hearsay exception (e.g., excited utterance), the statement is admitted under that exception. *People v. Bolton,* 859 P.2d 311 (Colo. App. 1993).

When section 13-25-129 is applicable, the child need not be "competent" in order for the child's statements to be admissible. *People v. Moore,* 860 P.2d 549 (Colo. App. 1993) *rev'd on other gnds* 877 P.2d 840 (Colo. 1994). In determining the reliability of the child's statements, courts should consider, among other things, the use of age-appropriate language, absence of a motive to lie, spontaneity of statements, the general character of the child, whether more than one person heard the statement, and whether leading questions were used to elicit the statements. *People v. Diefenderfer,* 784 P.2d 741 (Colo. 1989); *People v. District Court,* 776 P.2d 1083 (Colo. 1990).

Example:

Statements made by a child sex abuse victim and her brother were properly admissible where the statements were spontaneous, the initial and follow up questioning was non-leading, the children were frightened and nervous while making the statements, their language was age-appropriate, there was no prejudice or bias by the children against the defendant, and there did not appear to be any event between the time of the abuse and the time of the statements that would account for the contents of the statements. *People v. Frost,* 5 P.3d 317 (Colo. App. 1999).

Evidence corroborating an unavailable child's statements include testimony from an eyewitness of the act, medical or scientific evidence indicating the child was sexually assaulted, expert opinion that the child experienced post-traumatic stress consistent with sexual abuse, evidence of similar acts committed by the defendant, or the defendant's confession. *People v. Bowers,* 801 P.2d 511 (Colo. 1990).

Note: The United States Supreme Court has held that the admission of testimonial hearsay statements violate

the Confrontation Clause unless the declarant is unavailable and the defendant has had a prior opportunity to cross-examine. *Crawford v. Washington*, 541 U.S. 36 (2004). In light of this case, there will be an extremely limited number of circumstances where the child's statements will be admissible if the child does not testify at trial.

g. State of Mind

If a person's state of mind is relevant at trial, statements the person made which show what that state of mind was are admissible.

Example:

The trial court erred in rejecting defendant's offer of proof as to two witnesses whose testimony would have substantiated defendant's assertion that he had taken his daughter, in violation of custody, to protect her after she revealed to him that his ex-wife and another man were abusing her physically, mentally, and sexually, and that his ex-wife and the other man lived together in violation of a restraining order entered to protect defendant's daughter. The statements of the two witnesses were admissible as non-hearsay because they were not offered to prove the truth of the matter asserted, but only to substantiate defendant's claim that he believed his daughter was being abused by his ex-wife and a man living with her in violation of a restraining order. *People v. Mossmann,* 17 P.3d 165 (Colo. App. 2000).

h. Prior Inconsistent Statements

When a witness testifies differently than an earlier statement, and claims the earlier statement was false, the earlier statement is admissible and is not hearsay. Rule 801(d)(1); Section 16-10-201, C.R.S. (2008).

Example:

A girl told a police officer, her mother, and a social worker that her stepfather had sexually assaulted her. At trial, the girl admitted making those statements, but stated that she had been lying and was telling the truth at trial when she denied the assault. The prosecutor then called the officer and social worker to testify to the girl's previous statements. The court

ruled the "prior inconsistent statements" were admissible. *Montoya v. People,* 740 P.2d 992 (Colo. 1983).

i. Arresting Officer Statements

In a driver's license revocation hearing, a hearing officer may rely on hearsay testimony of one police officer which is based on the *firsthand* knowledge of another officer who is not present at the hearing.

Example:

An officer saw a vehicle weaving in the road, stopped the vehicle, and gave the driver a sobriety test, which the driver failed. The officer arrested the driver for DUI and turned him over to another officer, describing what had happened. The second officer recorded what the first officer reported and performed an alcohol test. At the license revocation hearing, only the second officer testified, and included what the arresting officer told him. The supreme court later ruled that this hearsay was admissible to support the license revocation. *Charnes v. Olona,* 743 P.2d 36 (Colo. 1983).

j. Prior Consistent Statements

A prior statement made by a witness that is consistent with the testimony at trial is admissible and not hearsay if it is offered to rebut an express or implied charge of recent fabrication by the witness. Rule 801(d)(1).

Examples:

A child victim told police she had been sexually assaulted by Eppens. A week before trial, she recanted her accusation. At trial she testified consistently with her statement to police On cross-examination, defense counsel impeached her with her recantation. The prosecution later sought to introduce the victim's statement to the detective through the testimony of the detective. The Colorado Supreme Court held that the victim's prior consistent statement was admissible to rebut an implied charge that the victim had fabricated her testimony at trial. *People v. Eppens,* 979 P.2d 14 (Colo. 1999).

2. Competency

A competent witness may testify; an incompetent witness may not testify because that testimony is unreliable. Although, historically, many types of witnesses were not competent to testify (such as criminals), almost anyone is competent to testify now if the potential witness personally knows anything about the crime and knows the difference between truth and lying. The two situations where the competency issue most frequently arises are with witnesses who are mentally ill and witnesses who are very young.

a. Unsound Mind

Persons who are of unsound mind are incompetent to testify because their testimony is unreliable.

Examples:

A partially deaf and mute woman was raped by Alexander. Alexander appealed on grounds that the victim was incompetent to testify. She had communicated in American Sign Language on the witness stand. Although the victim was perceived as being mildly retarded, the court upheld the conviction, saying that if a witness can observe, recollect, communicate, and understand the oath to tell the truth, she is competent to testify and any mental deficiency is simply a matter for the jury in deciding how much weight to give her testimony. *People v. Alexander,* 724 P.2d 1304 (Colo. 1986).

A psychiatrist observed the deposition of the state's prime witness. Afterward, the psychiatrist testified that the witness was of an unsound mind when she testified. The court ultimately ruled that the deposition was inadmissible because the testimony of the witness was unreliable. *People v. District Court,* 647 P.2d 1206 (Colo. 1982).

b. Children

Children are competent to testify if they can recollect the events in question and appreciate the difference between telling the truth and telling a lie.

Example:

Girls, 9 and 10 years of age, who were victims of sexual assault were found competent to testify. *People v. Salazar,* 648 P.2d 157 (Colo. App. 1981).

Although the child victims had difficulty articulating the concepts of "truth" and "lie" and gave some incorrect answers to questions unrelated to the charge, they were properly found competent to testify where they could convey the details of the events, identify the defendant, and answer questions by both counsel. *People v. Whitman*, 205 P.3d 371 (Colo. App. 2007).

c. Witnesses Who Have Been Hypnotized

It is very difficult for a prosecutor (or defense attorney) to convince a court to allow a witness to testify if the witness has used hypnosis to enhance his or her memory of the incident. Essentially, the proponent of such evidence must establish that, despite the hypnosis, the testimony is reliable based on the "totality of the circumstances." *People v. Romero,* 745 P.2d 1003 (Colo. 1987).

3. Scientific Evidence

Scientific evidence offered in a trial is admissible only if the evidence has been shown to be reliable. In determining whether to admit scientific evidence, a court is required to determine (1) the reliability of the scientific principles; (2) the qualifications of the witnesses offering the scientific evidence; and (3) the usefulness of the testimony to the jury. *People v. Shreck,* 22 P.3d 68 (Colo. 2001). Courts are allowed a wide amount of latitude in deciding whether scientific evidence is sufficiently reliable for a jury's consideration.

a. Physical Characteristics

The reliability of the scientific analysis of certain physical characteristics for comparative purposes has long been recognized by the courts.

(1) Fingerprint Analysis

The reliability of fingerprint analysis is now unquestioned. Twelve points of comparison have traditionally been required to positively establish that the questioned print was left by

the defendant. Now, it is clear that even though there are fewer than twelve points of comparison, the results are admissible. *People v. Gomez,* 537 P.2d 197 (Colo. 1975).

Note: Always lift fingerprints where possible and record in your reports exactly where each print was lifted and which direction it "pointed."

(2) Hair Analysis

It is possible to identify a person by virtue of hair that has been left behind. This can be an especially effective piece of evidence in sexual assault cases where the rapist leaves pubic hairs on the victim or the victim's pubic hairs are located on the suspect.

(3) Blood Analysis

Scientists have become amazingly sophisticated in putting blood together with the person from whom it came, assuming that the blood is properly preserved and analyzed. Courts have recently recognized that sophisticated methods of examining blood, through DNA analysis, is sufficiently reliable to permit admission into a criminal trial. *Fishback v. People,* 851 P.2d 884 (Colo. 1993)(DNA analysis through RFLP-based techniques are sufficiently reliable); *People v. Shreck,* 22 P.3d 68 (Colo. 2001)(DNA analysis through PCR-based techniques are sufficiently reliable).

b. Polygraph Results

The courts feel that the polygraph (lie detector) is so unreliable that the *results* of such tests are never admissible, even if both sides agree to the introduction of the results. *People v. Anderson,* 637 P.2d 354 (Colo. 1981); *People v. Dunlap*, 975 P.2d 723 (Colo. 1999); *People v. Wallace*, 97 P.3d 262 (Colo. App. 2004). A witness may not ever mention that the defendant took a polygraph test. The examiner may testify about the suspect's statements (if they are otherwise admissible), but must not mention the use of the polygraph.

Examples:

The United States Supreme Court has ruled that statements taken after the polygraph are admissible if the suspect was

properly warned of, and validly waived, his Fifth Amendment rights. *Wyrick v. Fields,* 459 U.S. 42 (1982).

Robinson, who was accused of sexual assault on a child, agreed to take a polygraph test. The examiner believed Robinson was lying and told him so. The examiner asked Robinson if he "was sorry for what he had done with Cindy," and Robinson answered, "Yes." The court ruled that this exchange was relevant, and admissible, if the examiner called the test "an interview." *People v. Robinson,* 713 P.2d 1333 (Colo. App. 1985).

c. Voice Prints

The Colorado Supreme Court has adopted the reasoning behind a line of decisions which refuse to admit voice analysis evidence "on the ground that voice analysis techniques contain the same inherent deficiencies that have led, in general, to rejection of polygraph test results as evidence in judicial proceedings." *People v. Drake,* 748 P.2d 1237 (Colo. 1988).

d. Experiments

In order for experiments to be admissible, the conditions under which the experiment is conducted must be substantially similar to those at the time of the occurrence.

Examples:

An officer responded to a silent alarm and found McCombs beside his car. Inside the car the officer found property stolen from a nearby store. Because there was no forced entry, and the officer wanted to prove burglary, the officer conducted an experiment in which he left the store, walked to McCombs' apartment and returned with a car. The court ruled that evidence of this experiment was admissible. *People v. McCombs,* 629 P.2d 1088 (Colo. App. 1981).

Sexton attempted to pass a vehicle on a hill and crashed into an oncoming car. Officers took pictures showing where the suspect passed. The court ruled that the pictures were admissible. *People v. Sexton,* 555 P.2d 1151 (Colo. 1976).

LeMasters burglarized the victim's home and assaulted her. At trial, LeMasters asserted the defense of alibi. The state was permitted to introduce test drives from the place where

LeMasters said he was to the victim's home to show that the alibi was untrue. *People v. LeMasters,* 666 P.2d 573 (Colo. 1983).

C. Undue Prejudice

Even when evidence is relevant and reliable the evidence is not admissible if the evidence unduly prejudices the defendant. Normally, a defendant is unduly prejudiced when a witness refers to any other "bad act" the defendant has committed other than the one he is on trial for. However sometimes a bad act is admissible if it is relevant and its probative value is not substantially outweighed by the danger of unfair prejudice.

Example:

Lowe killed an eleven-year old girl because her braces cut his penis as he was sexually assaulting her. While in jail after his arrest Lowe wrote the following note to a fellow inmate.

"Chuck,

Dig it Buddy,

I'm writing this note to you to keep away from my Bitch! You ain't nothing but a Bitch yourself, and if you continue to fuck with Cookie I'm going to fuck your toothless face.

If that isn't enough to keep you away from my lovely, well you'd better ask people why I'm here, if you don't already know! And your [sic] just as weak as that little girl!

Stay Away Bitch or Else Pay the Price.

J.L."

The court ruled that, although the note was very prejudicial, the prejudice did not substantially outweigh its value in court. Therefore, the note was admissible. *People v. Lowe,* 616 P.2d 118 (Colo. 1980).

The following is a discussion of "bad acts" which may or may not be admissible at trial.

1. Convictions

Prior convictions are not admissible against the defendant except to impeach the defendant if he or she elects to testify on his/her own behalf. The reason that prior convictions are inadmissible, although relevant and reliable, is that a jury is likely to convict even if there is a reasonable doubt of guilt.

Example:

The defendant is on trial for burglary. He has three prior burglary convictions. If the jury hears this evidence there is a danger that they will convict the defendant no matter how weak the evidence is on the charged offense.

a. Impeachment

Defendants who elect to testify may be impeached with their *felony* convictions. Section 13-90-101, C.R.S. (2008).

b. Misdemeanors

Prior misdemeanor convictions normally are inadmissible, even for impeachment purposes. However, sometimes a prior misdemeanor conviction will be admissible, such as when a defendant specifically testifies that he has no prior criminal record, *People v. Metcalf,* 926 P.2d 133 (Colo. App. 1996), or if the misdemeanor bears on the defendant's credibility, such as prior false information charges, *People v. Gillis,* 883 P.2d 554 (Colo. App. 1994) (underlying facts of the false information charge were admissible; the fact of the misdemeanor conviction was not admissible).

2. Other Bad Acts

When bad acts, other than felony convictions, are admissible is one of the most complicated and confusing areas of the Rules. Generally, evidence of a defendant's prior bad acts is not admissible to prove that the defendant is a bad person or has a propensity to commit crime. However, evidence of prior bad acts is admissible if (1) he evidence relates to a material fact; (2) the evidence is logically relevant; (3) the evidence is independent of the intermediate inference that the defendant has a bad character; and (4) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. *People v. Spoto,* 795 P.2d 1314 (Colo. 1990). Among some of the purposes for the admission of prior bad acts of a defendant are "as proof of motive,

opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Rule 404(b).

The following is a list of the various reasons for admission of other "bad acts."

a. Motive

Usually when it is necessary to show a bad act in order to prove a defendant's motive for committing a crime the bad act is admissible. The trial court, however, may rule that the act is too prejudicial for the jury to hear.

Example:

In the prosecution of a deputy sheriff for furnishing alcohol to an inmate, testimony regarding sexual contacts between the deputy and the inmate was admissible to establish the deputy's motive in providing the alcohol. *People v. Quinn,* 794 P.2d 1066 (Colo. App. 1990).

In a case where the defendant was charged with assaulting a woman at a gas station, evidence of other acts evincing his hatred toward women was admissible for the purpose of proving motive. *People v. Cousins*, 181 P.3d 365 (Colo. App. 2007).

b. Complete Story Doctrine

When other bad acts committed before, during, or after the crime are "part and parcel" or "intertwined with the commission of the offense charged," those bad acts are admissible to explain the context of the crime.

(1) Before the Crime

Bad acts leading up to the crime are normally admissible to complete the story for the jury.

Examples:

In a prosecution for criminal extortion and harassment based on threatening and obscene phone calls by the defendant to a female acquaintance, the Colorado Supreme Court upheld the admission of hundreds of other phone calls received by the victim before and

after the charged offense. "Evidence of other offenses is admissible under certain circumstances. For example, such evidence may be an integral part of the criminal transaction with which the defendant is charged. It also may be needed for the fact finder to understand the context in which the alleged crime occurred." *People v. Czemerynski,* 786 P.2d 1100 (Colo. 1990).

In a prosecution for second degree assault upon a peace officer, the evidence established that an officer was assaulted by the defendants in the course of responding to a disturbance call. In upholding the admission of evidence that the defendants had harassed a woman and her dog and assaulted a man who came to her aid prior to the officer's arrival (which formed the basis of the disturbance call), the court acknowledged that the offense charged clearly grew out of the disturbance and was part of one continuing transaction. *People v. Plotner,* 534 P.2d 791 (Colo. 1975).

In a homicide prosecution stemming from a traffic altercation between the defendant and the driver and passenger of another car, evidence that the defendant was arguing violently with a companion, speeding, and driving recklessly shortly before the charged incident was admissible to explain his hostile behavior toward the victims just minutes later. "Where, as here, the evidence showed that defendant's angry state of mind earlier in the evening persisted up to and included the time of the shooting, evidence of defendant's behavior and statements during that time were admissible as part of the *res gestae.*" *People v. Rudnick,* 878 P.2d 16 (Colo. App. 1993).

Evidence of a drug offense committed by the defendant earlier in the day was admissible in a trial on a subsequently committed drug offense, where: the drugs found in the second offense were linked to the first offense; the undercover agent had given the defendant his phone numbers during the first offense, and these numbers were on a bindle containing the drugs found during the second offense; money used in the first drug transaction was found on the defendant during the second offense; and, the drugs found in the defendant's car during the second offense were the same types of

drugs involved in the earlier transaction. *People v. Skufca*, 141 P.3d 876 (Colo. App. 2005).

(2) During the Crime

Bad acts committed during the crime are usually admissible, even if the defendant is not charged with the acts.

Examples:

Jackson was involved in a fencing operation. Officers videotaped some conversations while buying some stolen property from Jackson. During these conversations, Jackson admitted past crimes and expressed interest in future crimes, including murder and robbery. Later at trial, Jackson contended that he did not have the specific intent to commit the crime because of his addictions. The court ruled that evidence of the other bad acts was admissible because it was part of the "res gestae" to explain the context of the offense. *People v. Jackson*, 627 P.2d 741 (Colo. 1981).

White walked into a Laundromat, put his arm around the neck of the victim, and "escorted" her to the car. A neighbor who was with the victim called the police. White then assaulted and raped the victim. White was charged with sexual assault, and his defense at trial was consent. The state was permitted to introduce the "kidnapping" to complete the story and to establish "force, threats and fear." *White v. People*, 494 P.2d 585 (Colo. 1972).

A baggie of marijuana found in the center console between the driver's and front passenger's seats was admissible because the defendant had been seen smoking marijuana in the car, and the baggie was similar in type to a baggie of cocaine found in the defendant's sock. *People v. Perea*, 126 P.3d 241 (Colo. App. 2005).

(3) After the Crime

Bad acts by the defendant soon after the crime or during the arrest are normally admissible to complete the story for the jury.

Examples:

Evidence that several weeks after the homicide the defendant forged and cashed checks payable to the deceased was admissible to show motive and as "an integral part and parcel of the total picture surrounding the homicide." *Wooley v. People,* 367 P.2d 903 (Colo. 1961).

In a prosecution for the murder of a bank president during the course of a robbery, evidence that, in the course of their flight into another state, the defendant and his confederates committed other crimes, including kidnapping and two homicides, was admissible on the grounds that such crimes were indivisibly connected with, and in furtherance of, the original crime. *Abshies v. People,* 289 P. 1081 (Colo. 1930)

Evidence of the defendant's threatening and harassing behavior towards the child sexual assault victim's treatment providers was properly admitted because it showed the defendant's consciousness of guilt and continual efforts to control the victim, and rebutted the defendant's claims that he was a "father figure" acting in the victim's best interests. *People v. Kyle*, 111 P.3d 491 (Colo. App. 2004).

c. Modus Operandi – Common Scheme or Plan

Modus operandi is the *unusual* (unique) conduct by a criminal when he or she commits crimes. Other bad acts are usually admissible when offered to show modus operandi, or common scheme or plan, as this establishes the identity of the perpetrator of the crime.

(1) Assault and Homicide

Sometimes in murder cases the perpetrator commits the crime in the same way. When this is the case, other bad acts may be admissible to show modus operandi, or common scheme or plan.

Examples:

Garner was charged with the murder of a co-worker. Because the case was based on circumstantial evidence,

prosecutors sought to introduce evidence that Garner had killed two other women in a similar manner for the purpose of establishing Garner as the perpetrator of the murder presently charged against him. The Colorado Supreme Court held the other-crime evidence admissible because the modus operandi in all three cases pointed to Garner as the perpetrator. *People v. Garner,* 806 P.2d 366 (Colo. 1991).

In a first degree murder prosecution, the court of appeals found the trial court had not committed plain error by admitting testimony from defendant's wife that defendant was "more volatile, secretive, [and] more verbally abusive" upon his return from Denver and that she felt her life was in danger. The evidence explained why defendant's wife called the police and disclosed his confession, and also offered a possible motive of fear or retaliation for the witness to fabricate the story of defendant's confession. *People v. Thompson,* 950 P.2d 608 (Colo. App. 1997).

In a robbery and murder case of a massage therapist, Cook allegedly asked the victim to come to his residence and give him a massage in exchange for handyman skills. The trial court properly admitted evidence of out-of-state incidents in which Cook lured or attempted to lure victims to meet him under false pretenses. *People v. Cook,* 22 P.3d 947 (Colo. App. 2000).

Crespin met a woman in a bar and left with her. He smoked marijuana in the parking lot. He then rode home with her. When he tried to make advances on her couch she resisted. He then tried to strangle her, but she resisted and fled. Later Crespin "picked up" a woman in a bar, smoked marijuana in the parking lot, rode home with her and strangled her on the couch. The court ruled that the first incident was admissible in the trial of the murder because of the same modus operandi. *People v. Crespin,* 631 P.2d 1144 (Colo. App. 1981).

In a case involving the beating and resulting death of a homeless man, evidence of a subsequent assault committed by the defendant on another homeless man was properly admitted because the evidence was

relevant to the material issues of identity and intent since the two acts were perpetrated by a group of homeless youths who severely beat homeless men and then left them to die. *People v. Harrison*, 58 P.3d 1103 (Colo. App. 2002).

(2) Sexual Assault

Frequently those who commit sexual assaults use the same techniques in achieving their goals. This is especially true when the goal is one associated with deviancy, and even more particularly when children are the targets of the assault. Section 16-10-301, C.R.S. (2008), specifically authorizes the admission of prior acts of sexual assault for any purpose other than propensity to commit crimes, so long as those acts are relevant and not unduly prejudicial.

Examples:

Defendant was charged with sexually assaulting another inmate while in jail. Testimony from a former inmate that defendant had sexually assaulted him while incarcerated in another facility was properly admitted to show a common plan, scheme, or design. *People v. Martinez,* 987 P.2d 884 (Colo. App. 1999).

Opson asked a twelve-year old girl to help him find his dog. The girl obliged and was led to an isolated area where she was assaulted. The court admitted evidence of an earlier incident where Opson asked a little girl to help him find his dog The little girl, instead, left. The court ruled that the other bad act was admissible to show modus operandi and identity. *People v. Opson,* 632 P.2d 602 (Colo. App. 1980).

During Fell's trial on sexual assault and incest charges, the prosecution was permitted to present evidence that he had sexually abused the victim when she was a child, 12 years previously. The Colorado Court of Appeals determined that this evidence was properly admissible. Because the prior acts involved Fell and the same victim, the details were admissible to show a common scheme. Furthermore, the court held that the prior acts were not so remote in time to unduly prejudice Fell because he and the victim's mother were divorced during that period and he had only limited

contact with the victim. *People v. Fell,* 832 P.2d 1015 (Colo. App. 1991).

Evidence concerning four prior sexual assaults on children committed by the defendant was properly admitted, despite the fact that assaults occurred 27-33 years prior, because the assaults were sufficiently similar to the offense at issue to be probative on the issues of identity, modus operandi, and intent. *People v. Larson*, 97 P.3d 246 (Colo. App. 2004).

(3) Robbery

Robbers often use the same modus operandi when committing their offenses, and often those other acts are admissible to establish identity or other issues.

Examples:

In two robberies of jewelry stores, three men entered the stores while only one salesperson was present in the sales area. One man checked for alarms. One man asked the salesperson to show him a piece of jewelry and then pulled a gun. Those in the back of the store were made to lie down and their hands were tied behind them. Jewelry was removed from the women and the suspects escaped in a blue Plymouth. The court ruled that evidence of one of the robberies could be used in the trial of the other robberies because it helped establish the identity of the perpetrators. *People v. Wiedemer,* 641 P.2d 289 (Colo. App. 1981).

In two robberies, Casper robbed cleaning stores while wearing a red wig and a tan trench coat. He also told the employee in each case to separate out the checks. The court ruled that evidence of one robbery was admissible at the trial of the other because it established identification. *People v. Casper,* 631 P.2d 1134 (Colo. App. 1981).

(4) Burglary

Other burglaries may be admissible if the method of committing the burglary is so distinctive that it identifies the defendant as the perpetrator.

Example:

Ray entered a home during the daytime and stole only jewelry, leaving all electronic equipment behind. Ray used a pillow case belonging to the victim to transport the stolen property. Within eight days, a burglar broke into homes during the daytime in the neighborhood and used a bag belonging to the victim to transport jewelry, but left electronic equipment behind. The court ruled that the latter two burglaries showed a continuing plan and established identity. Therefore, evidence of the two later burglaries were admissible at the trial of the first. *People v. Ray,* 626 P.2d 167 (Colo. 1981).

(5) Fraud

Other similar acts may be admitted to prove identity or knowledge in fraud cases.

Example:

Madonna called a pharmacist and, claiming to be a doctor, asked the pharmacist to fill an order for dilaudid. Madonna then gave Hanneman $10 to get the drugs. About a week earlier Madonna had given a taxi driver $10 to present a prescription for dilaudid at a drugstore. Madonna called the pharmacy claiming to be a doctor and ordered the prescription. The earlier bad act was admissible in the trial of the second to establish modus operandi and identity. *People v. Madonna,* 651 P.2d 378 (Colo. 1982).

In a securities fraud case, the co-conspirator's prior felony convictions and the defendant's numerous acts of bad business practice were admissible to show that the defendant had concealed material information to advance a fraudulent course of business. Evidence that the co-conspirator used investor funds for personal use and solicited other victims was admissible to prove the existence of a conspiracy to defraud. *People v. Rivera,* 56 P.3d 1155 (Colo. App. 2002).

(6) Domestic violence

In a case where the defendant was accused of breaking into his ex-girlfriend's home, assaulting her, and dragging her to

the basement, evidence that the defendant previously broke into an ex-girlfriend's home and grabbed her was admissible. *People v. Torres*, 141 P.3d 931 (Colo. App. 2006).

d. Intent

If the intent of the defendant is at issue, other bad acts showing that criminal intent may be admissible.

Example:

Mason was on trial for writing bad checks. Seven other bad checks were admissible to show intent to defraud. *People v. Mason,* 643 P.2d 745 (Colo. 1982) .

Evidence that the defendant had previously used her sister's name in connection with an arrest was relevant to show her intent to (1) buy time before her identity could be determined, and (2) evade responsibility for what she had done. *People v. Gallegos*, 2009 WL 399766 (Colo. App. 2009).

Evidence that the defendant previously possessed crack cocaine was relevant to whether he knowingly possessed imitation crack cocaine, as the prior possession made it more probable that he was aware that the substance he possessed appeared to be crack cocaine. *People v. Taylor*, 131 P.3d 1158 (Colo. App. 2005).

e. Malice or Ill-Will

If the defendant previously injured or threatened the victim, evidence of these bad acts may be admissible to show the mental state of the defendant.

Examples:

In admitting evidence of the defendant's prior threats and arguments with the victim (his wife), the court of appeals stated: "In homicide cases involving marital partners, any fact or circumstance relating to ill-feeling, ill-treatment, jealousy, prior assaults, personal violence, threats, or any similar conduct or attitude by one spouse against the other is relevant to show motive and malice in such crimes." *People v. Hulsing,* 825 P.2d 1027 (Colo. App. 1991).

See also People v. Lazare, 542 P.2d 1290 (Colo. 1975)(evidence of threats made against the victim by defendant six months before the murder was admissible to establish malice).

f. Disprove Accident

Prior relevant bad acts are usually admissible to disprove the defense of accident.

Examples:

Evidence showing Vialpando's history of attempts to escape from custody and his willingness to use force against law enforcement officers was admissible because it tended to prove Vialpando's intent, preparation, and plan to escape and murder a deputy and that murder was not an accident or mistake. *People v. Vialpando,* 954 P.2d 617 (Colo. App. 1997).

Christian said his daughter died when she struck her head on the crib. The state was permitted to introduce other instances of child abuse in order to show that the injury was no accident. *People v. Christian,* 632 P.2d 1031 (Colo. 1981).

Compare with:

Evidence of a similar event in which the defendant woke his roommate and placed a gun to his neck was not admissible to rebut the defendant's claim that he shot another individual accidentally in self defense where the jury was likely to misuse the evidence of the prior event as proof of bad character. *People v. Spoto,* 795 P.2d 1314 (Colo. 1990).

g. Consciousness of Guilt

Other bad acts which show a consciousness of guilt, such as flight or threats to witnesses, are usually admissible at trial.

3. Photographs

Photographs are normally admissible if the photographs are relevant and a witness can testify that they accurately show the scene. However, a photograph is not admissible when the prejudice to the defendant substantially outweighs the probative value of the photograph.

a. Mug shots

A mug shot is not admissible because it tends to show that the defendant committed a prior offense. *People v. Bozeman,* 624 P.2d 916 (Colo. App. 1980); *People v. Bugarin,* 507 P.2d 875 (Colo. 1973).

b. Gruesome Pictures

Gruesome pictures of assault and homicide victims are usually admissible, unless they are so inflammatory and prejudicial as to substantially outweigh any probative value. *People v. Roark,* 643 P.2d 756 (Colo. 1982); *People v. Hamrick,* 624 P.2d 1333 (Colo. App. 1979).

D. Foundation

Evidence gathered by officers will be admissible at trial only if the prosecutor can lay a "foundation" for the evidence.

1. General Rules

Generally, a prosecutor is required to give a complete background for the evidence to be shown to the jury. This "foundation" includes the "who's," "where's," "when's" and the "how's" of the evidence.

2. Collection of Evidence

If the prosecutor cannot prove *who* collected *what* evidence *where* and *when,* the evidence is often ruled inadmissible.

a. "Finders"

It is usually much easier for a prosecutor if only one officer has seized all of the evidence found at the scene. That way, even if another officer actually found the evidence, only the officer who seized and tagged the evidence needs to be called as a witness.

It is very important to gather evidence very carefully. Always keep and mark evidence separately, and do not give the evidence to anyone except the property section custodian. In order to get evidence "admitted" at trial, the prosecutor must usually prove who found the evidence, exactly where it was found, and where it has been since it was located.

b. "Keepers"

Do not pass evidence around. Let the officer who seizes the evidence keep it in his or her possession until the evidence is turned over to the custody of the property section.

3. Documentation of Evidence

An officer who collects evidence must carefully document where, when, and how the evidence was seized.

a. Labeling the Evidence

An officer who collects evidence should be sure to label or tag *each piece* of evidence according to departmental policy (usually officers initials, date, case number, etc.).

Example:

An officer is about to testify that the shirt handed to him was the same shirt worn by the defendant at the time of the arrest. The officer is asked the location of the officer's identifying marks. When the officer cannot find the label, the admissibility of the evidence is questionable. Even if the evidence is admitted, the strength of the evidence is diminished. Furthermore, the defense attorney, on cross examination, makes the officer appear incompetent as an investigator. Finally, the defense attorney argues to the jury in closing argument that the sloppy collection of evidence is just another illustration of the hit-and-miss police work characterizing the investigation.

Note: Before you testify, always check the evidence you seized in order to locate your identifying mark(s).

b. Documenting the Evidence

An officer should always carefully document in his or her report all of the evidence that is seized. The report should also identify exactly where the evidence was seized (and from whom) and any identifying marks on the evidence, such as serial numbers, scratches broken, or missing parts, etc.

Examples:

The suspect attended a party at the victim's apartment. Later, he returned to the apartment, entered through a bathroom window and raped the victim. The officers investigating the crime failed to notice and document exactly where the fingerprints were found on the bathroom window ledge and in which direction they were pointing. At trial, the suspect took the stand and testified that after going to the bathroom, he opened the window to let in some fresh air and left his prints on the sill. Result: not guilty.

Compare with:

The suspects prints are found on the passenger window of the victim's car. The investigating officer carefully noted and documented that the suspect's prints pointed downward. The suspect could not testify that he was not in the car because the prints could only have been applied when the suspect grasped the top of the window from inside the car (or while lying on top of the car).

4. Preservation of Evidence

Evidence must be properly preserved in order to be admissible.

a. Writings

The "best evidence rule" states that in order to be admissible, a writing must be the original unless:

1. the writing has been lost or destroyed by no fault of the party seeking to introduce it; or

2. the writing cannot be obtained because (a) the other party has it or (b) the court does not have jurisdiction to obtain it; or

3. it does not unfairly prejudice the defendant.

b. Photographs

Occasionally, officers take photographs of evidence and then lose the original evidence (or return it to the owner). When such evidence has distinctive marks which identify the property, serious issues arise as to whether the photographs are admissible. Therefore, before an officer releases property back to a

victim/owner, the property should be photographed in such a way as to document any serial numbers of other identifying characteristics. An officer should always check with the prosecutor before releasing evidence if charges have been filed.

c. Chain of Custody

(1) Definition

A "chain of custody" is the combination of documented "links" between the moment a piece of evidence is seized and when it is offered into evidence. These "links" are the officers, and others, who handled the evidence and the times, places and purposes of the handlings.

(2) When a Chain is Required

When evidence can change, dissipate, be tampered with, substituted for, or adulterated, the courts are very strict in requiring a chain of custody. A chain of custody is always required for drugs that have been subjected to forensic testing.

Examples:

Garcia shot Doris Dietz. When the bullet was removed from the victim it was given to operating room personnel. A nurse later found a bullet marked Doris Dietz and forwarded it to the coroner. The court ruled that because the state could not present evidence as to who took the bullet from the doctor "there is a break in the chain of custody" and the bullet, therefore, was not admissible. *People v. Garcia,* 752 P.2d 570 (Colo. 1988).

LeMasters burglarized the victim's home and assaulted her. However, he left his fingerprints behind on a glass. The fingerprints, when lifted, were put in an envelope and placed in the property room. LeMasters contended that, because the envelope was unsealed the fingerprint might have been tampered with. The court rejected this argument as speculative stating, "mere speculation is insufficient to establish a break in the chain of custody." *People v. LeMasters,* 666 P.2d 573 (Colo. 1983).

As Atencio was being arrested, he tore open a foil packet and threw the contents (heroin) in the air. An officer scraped up the heroin. The officer testified that he gave the heroin to another officer, who then gave it to yet a third officer, who ultimately placed the heroin into the property bureau for testing. At trial, the third officer testified that he received the heroin directly from the first officer. The court ruled that "Even where there is some confusion about the chain of custody, so long as the evidence was accounted for at all times, the evidence is admissible." *People v. Atencio,* 565 P.2d 921 (Colo. 1977).

A chain of custody was sufficiently established where a police officer testified that he gave the crack cocaine to another officer who placed it in a bag, and that he believed proper police procedures had been used in storing the evidence. People v. Freeman, 47 P.3d 700 (Colo. App. 2001).

(3) When a Chain is Not Required

Although it is always preferable to be able to establish the chain of custody of physical objects, it is not always required. A piece of evidence which is not really subject to changes in composition, or tampering, is admissible if an officer can testify how he or she obtained the evidence and that it is in same condition as when it was first obtained. In order to establish this, an officer should tag and mark the property according to departmental policy as soon as it is recovered.

Example:

Beltran shot the victim but the victim took the gun away before the police arrived. The officer who seized the gun "left the gun unattended in the evidence room." When the officer attempted to identify the gun at trial, the defense attorney objected because there was no chain of custody. The officer, though, testified that "it was the only gun of that type he had seen during his career . . . and that he recognized it by the distinctive manufacturer's insignia it bore." The court ruled that no "chain" was necessary for the admissibility of the evidence, because the officer "sufficiently identified the gun as the one he had seized from [the victim]." *People v. Beltran,* 634 P.2d 1003 (Colo. App. 1981).

d. Lost or Destroyed Evidence

The issue of lost or destroyed evidence is very important to law enforcement. Officers should always do everything within their power to avoid the loss or destruction of evidence. The most important factor in the determination of whether the defendant's "due process" (fairness) rights were violated is whether the evidence would have established that the defendant did not commit the crime.

The courts have established a very stringent standard for defendants claiming that they were hurt by the loss or destruction of evidence. In order to establish a due process violation, the defendant must show:

1. the evidence was suppressed or destroyed by the prosecution.

2. the evidence possessed an exculpatory value that was apparent before it was destroyed.

3. the defendant was unable to obtain comparable evidence by other reasonably available means.

Trombetta v. California, 467 U.S. 479 (1984); *People v. Greathouse,* 742 P.2d 334 (Colo. 1987).

In addition, courts typically rule that a defendant must show that the officers acted in bad faith to prove a due process violation based on the loss or destruction of evidence.

Example:

Youngblood kidnapped, assaulted, and sodomized a child. The boy's mother took him to a hospital where a doctor took a swab sample from the boy's rectum and made a microscope slide. This was given to the police. The police also took the boy's clothing, which they stored without refrigerating. A police criminologist examined the slide and determined there had been sexual contact. He did no other tests at that time, in keeping with his department's procedures. Youngblood was arrested and charged with the assault. Months later, the criminologist tried to test the swab and semen on the clothing, but by then the tests provided no results which could help identify the assailant. If tests had been done right away, or if the clothes had been refrigerated, the test might have proved Youngblood innocent. The United States

> Supreme Court ruled that Youngblood's due process rights were not violated because the officer (criminologist) had not acted in bad faith. The court also stated that officers have no duty to perform any particular test. *Arizona v. Youngblood,* 488 U.S. 51 (1988).

The Colorado Supreme Court has held that the suppression of the results of blood tests was not appropriate in connection with careless driving and drug possession charges when a second sample preserved for the defendant turned out to be un-testable: "The due process clause of the fourteenth amendment does not invariably require a state to preserve evidence which might be favorable to the accused when dealing with evidentiary material 'of which no more can be said than it could have been subjected to tests.' When dealing with such evidence, unless an accused can show bad faith on the part of the police, failure to preserve useful evidence does not constitute a due process violation." *People v. Wyman,* 788 P.2d 1278 (Colo. 1990).

See also People v. Scarlett, 985 P.2d 36 (Colo. App. 1998)(no due process violation where defendant did not allege police willfully destroyed evidence and trial court found police only negligent and that damage to truck while impounded was not result of any bad faith conduct by police; also, no apparent exculpatory value prior to damage and other evidence admitted was as reliable as what defendant sought).

The courts have several remedies once they decide that officers unlawfully destroyed or lost evidence. The most common is to prohibit any testimony about the evidence. This often means the case cannot be proven and must be dismissed. In some cases, the court will reduce the charge or allow the defense to comment on the destruction of evidence to the jury.

Even though the courts are now more lenient about evidence lost by the police, officers should not be any less careful. The loss of evidence will always hurt the prosecution. Either the evidence was incriminating, so the state's case is weaker without it, or the evidence helped the defense which will, because of the loss, get as much or more help from the court.

(1) Blood/Breath Samples - DUI

> It is not a due process violation to fail to preserve a second sample of breath or blood in a DUI case.

Examples:

Humes was arrested for DUI, and a blood sample was drawn. The blood test showed a blood alcohol level of 0.333. Although a second blood sample was drawn, it was not properly preserved and could not be tested. The first sample could not be retested either. The trial court suppressed the blood alcohol results because of destruction of the evidence. However, the Colorado Supreme Court reversed, holding that neither the federal or state constitution requires preserving a second blood sample in DUI cases. This is because a second sample drawn at the same time does not have an apparent exculpatory value. *People v. Humes,* 762 P.2d 664 (Colo. 1988).

The United States Supreme Court held that failure to preserve breath samples in DUI cases does not violate due process rights because the test results, not the breath sample, are the evidence, and because the state was not attempting to suppress evidence that could exonerate defendants. *Trombetta v. California,* 467 U.S. 479 (1984).

(2) Narcotics

Narcotics which are to be used against a defendant must be preserved for trial. If the testing will destroy the evidence, an officer must do everything possible to have a defense expert present to view the testing.

Example:

During an undercover investigation, an officer conducted a field test, in front of the suspected seller, to determine if the substance was cocaine. He did not take a small quantity for evidence because he felt this would jeopardize the investigation. The "buy" was never completed. Charges were dismissed against the seller by the trial court for loss of evidence. However, the Colorado Supreme Court held that the defendant's due process rights were not violated by the failure to obtain a sample for laboratory testing because an officer had no duty to gather and preserve evidence in the course of a preliminary investigation, prior to an arrest. However, the court did not rule out the possibility that

the officer had a duty to turn the porcelain plate he tested the substance in over to the lab after he realized the deal had fallen through and his test would become important evidence. *People v. Pope,* 724 P.2d 1323 (Colo. 1986).

At the time of Anderson's arrest on drug charges, the total weight or the drugs seized was 500.1 grams. When later analyzed by the Colorado Bureau of Investigation, the weight was 476 grams. Anderson contended that officers failed to preserve all the drugs seized. The court of appeals reiterated that the state is only obligated to preserve evidence with an exculpatory value that is apparent from the outset. Here, the slight discrepancy in the weight of the cocaine was easily attributable to the fact that the cocaine was weighed in paper sacks sealed with tape at the initial weigh-in, and without the sacks and tape at the second weigh-in. Furthermore, the court concluded that it could not see how the discrepancy, even if unexplained, could be exculpatory. *People v. Anderson,* 837 P.2d 293 (Colo. App. 1992).

(3) Blood Samples and Scientific Evidence

Blood samples should be preserved. If the blood will be destroyed because of testing procedures, the tester should take pictures and make an effort to contact the defense analyst to be present during the testing.

Examples:

In 1982, Greathouse's wife's body was found at the base of a cliff. An autopsy was performed and several blood and body fluid tests were performed. Greathouse was not charged with the murder of his wife until 1985. At that time, he requested the body fluid samples. The sheriff's officer gave Greathouse two test tubes but they did not contain enough blood to test. The trial court dismissed the charges. The Colorado Supreme Court ruled that any exculpatory value the samples may have had was not apparent in 1982 at the time the body was recovered, because police did not have sufficient knowledge to even suspect criminal conduct. The court therefore reinstated the charges. *People v. Greathouse,* 742 P.2d 334 (Colo. 1987).

Madson killed his girlfriend. Officers talked to Madson after the crime. An officer noticed a spot on Madson's shoe and, after determining that Madson was wearing the shoes at the time the murder occurred, the officer mentioned that the spot looked like blood. Madson conceded that it did. The officer then seized the shoes, analyzed the spot and determined that it was human blood. The blood was destroyed in analysis. Madson later argued that his inability to examine the blood violated his due process rights because the examination might have shown that the blood was not that of the victim or, if it was the victim's blood, it might show the alcoholic content of the blood. The court ruled, however, that Madson failed to prove that blood analysis could have revealed these factors. Therefore, the blood test was admissible. *People v. Madson,* 689 P.2d 639 (Colo. App. 1984).

(4) Officer's Notes

Officers should preserve their original notes of criminal activity, especially when they involve statements taken from witnesses or the defendant. However, destruction of such notes will rarely constitute a due process violation unless the defendant can establish those notes had an exculpatory value at the time they were destroyed.

Examples:

The destruction of an investigating detective's original handwritten notes of certain inculpatory statements of the defendant after the preparation of a written report did not constitute a due process violation where the detective testified that his written report precisely and accurately related the defendant's statements and there was no indication that the notes contained any exculpatory value that was apparent before they were destroyed. *People v. Erickson,* 883 P.2d 511 (Colo. App. 1994).

An officer made handwritten notes of the case, then the notes were typed verbatim. The court ruled that because the "typewritten report was identical to the original" the defendant's due process rights were not violated by use of the notes at trial. *People v. Nunez,* 698 P.2d 1376 (Colo. App. 1984).

A jewelry story was robbed, and two days later an officer received an anonymous tip from a woman who left a number where she could be reached. He called a detective and relayed the number to him, and that officer called the detective in charge of the investigation at home and gave him the number. The detective in charge wrote the number on the back of an envelope and called the woman who said she was at a pay phone and refused to give her name. He later lost the number. The Colorado Supreme Court later reversed the dismissal of the charges ordered by the trial court because the defendant did not prove that the number had an exculpatory value apparent before it was lost, or that the defendant would be unable to obtain comparable evidence. *People v. Gann,* 724 P.2d 1318 (Colo. 1986).

Compare with:

Officers arrested Casias in connection with a shooting. He was then taken to police headquarters where he agreed to make a statement. Audio and video recording equipment was set up in an interview room that was wired to a separate room and monitored by a separate detective. During the interview, Casias admitted to the shooting but claimed it was committed in self-defense. Later, it was discovered that the recordings of the interviews were unintelligible because one recording device had been set at the wrong speed and the other device had malfunctioned. As a sanction, the trial court suppressed both the recordings and the officers' recollections of the recordings. However, the Colorado Supreme Court reversed, holding that, unlike an intact recording which the police have a clear duty to preserve if it contains material evidence, here no evidence was actually "destroyed," and therefore no due process violation occurred. The court also noted that a sanction based upon these circumstances would discourage, rather than encourage, officers from recording their interviews with suspects. *People v. Casias* 59 P.3d 853 (Colo. 2002).

(5) Preservation of the Crime Scene

The court of appeals rejected the defendant's assertion that his right to due process was violated by the alleged failure of

police investigators to adequately preserve the crime scene: "Here, the trial court denied defendant's motion to dismiss, finding that he had only speculated as to evidence that might have been present at the scene and had failed to establish that any unpreserved items at the crime scene had any exculpatory value or that any evidence had been collected and destroyed by the prosecution. Moreover, the trial court found that defendant had failed to show any bad faith or intentional misconduct on the part of the prosecution or police." *People v. Perryman,* 859 P.2d 263 (Colo. App. 1993).

(6) Lost or Destroyed Physical Evidence

The loss or destruction of physical evidence will ordinarily not constitute a due process violation unless that evidence had an exculpatory value that was apparent at the time it was destroyed.

Examples:

In a prosecution for criminal trespass and theft, the court of appeals rejected the defendant's assertion of a due process violation because the police "lost" the jacket he was wearing the night the crimes were committed. Although the defendant claimed the jacket possessed an exculpatory value because prosecution witnesses failed to describe certain distinctive markings on it, the court of appeals concluded that the jacket possessed no apparent exculpatory value at the time it was lost and, indeed, was not even material to the issue of identity. "[The defendant's] identity was established as to these crimes through the testimony of the officer who had confronted him face-to-face while he was in the car and the officer who assisted in his apprehension as he tried to flee from the car. Neither [witness] relied on defendant's clothing as the basis of identification." *People v. Thomas,* 916 P.2d 582 (Colo. App. 1995).

The defendant's motion for sanctions against the prosecution for the loss of pubic hair samples in a sexual assault case was properly denied because, even if the hairs failed to show traces of the victim's menstrual blood, that fact would not necessarily exonerate the defendant. "Thus we conclude that no apparent exculpatory value had attached to the hair

sample prior to its loss and that the trial court properly denied the motion for sanctions." *People v. Schrecongost,* 796 P.2d 45 (Colo. App. 1990), *aff'd,* 810 P.2d 1068 (Colo. 1991).

Dismissal of vehicular homicide charges based on prosecutorial destruction of the vehicle involved in the collision after a specific request for its preservation by the defense was reversed by the Colorado Supreme Court and remanded for the district court to make specific findings regarding whether the evidence possessed an exculpatory value that was apparent at the time it was destroyed, and whether the defendant was unable to obtain comparable evidence by other reasonably available means. *People v. Enriquez,* 763 P.2d 1033 (Colo. 1988).

E. Constitutional Violations

Evidence gathered in violation of a defendant's constitutional rights is normally inadmissible in court. These violations are discussed extensively in chapters 2 through 10.

1. The Exclusionary Rule

The rule that provides that evidence seized in violation of a defendant's constitutional rights is inadmissible is called the exclusionary rule. The reasons for this rule are that:

a. Officers must be "deterred" from violating citizens' rights.

b. The court cannot appear to be condoning the officer's illegal acts by permitting the introduction of illegally seized evidence.

2. The Good Faith Exception to the Exclusionary Rule

Many courts across the country, including the United States and Colorado Supreme Courts, have ruled that evidence which would otherwise be inadmissible under the exclusionary rule, will be admissible if the officer acted in "good faith." This rule has been the source of much confusion and rumor among peace officers.

The main thing an officer should remember is that the rule does not reward ignorance; a court will not admit evidence just because the officers says he did not know the law and, in "good faith," just did the best he could. In fact, in most instances, the rule rewards the officer who

knows the law and acts in "good faith" reliance upon that law, even though the court later changes the law or rules that the officer was wrong.

Note: Additional cases discussing the application of the good faith doctrine can be found in the SEARCH AND SEIZURE – WARRANTS section above.

a. Colorado's Statute

Colorado's "good faith exception" statute, as set forth in Section 16-3-308, C.R.S. (2008), provides that:

a. Evidence obtained that is otherwise admissible shall not be suppressed if the court determines that it was obtained as the result of a "good faith mistake" by an officer.

b. "Good faith mistake" means a reasonable judgmental error concerning the existence of facts or law which, if true, would be sufficient to constitute probable cause.

c. "Technical violation" means a reasonable good faith reliance upon a statue which is later ruled unconstitutional, a warrant which is later invalidated due to a good faith mistake, or a court precedent which is later overruled.

d. It is the "public policy" of the state that, when evidence is sought to be suppressed based upon the conduct of an officer, that officer may assert that his or her conduct "was taken in a reasonable, good faith belief that it was proper," and in such instances the evidence so obtained is not subject to suppression.

It is "prima facie evidence" that the conduct of an officer was performed in the "reasonable good faith belief that it was proper" if the officer establishes that the evidence was obtained pursuant to and within the scope of a warrant.

b. Reliance Upon Case Law

When an officer knows and in good faith relies upon case law, the courts might approve the officer's conduct and admit the evidence, even when the court "reverses" itself and rules the case law was wrong and the officer's conduct was unconstitutional.

Example:

An Arizona narcotics officer was killed in Mincey's apartment by Mincey. Officers and a prosecutor secured the scene. Relying upon case law, the officers did not obtain a search warrant. They then searched the residence for four days and collected crime-related evidence against Mincey. The United States Supreme Court later ruled that a warrant must be obtained after a murder scene has been secured. Therefore, all evidence obtained after securing the scene was suppressed. When the case was remanded for a new trial, the prosecutor offered the evidence under the good-faith rule. The trial and Arizona Supreme Court ruled that evidence should be admissible when an officer relies upon case law and the case law is later reversed. Therefore, the evidence was admissible. *State v. Mincey,* 636 P.2d 637 (Ariz. 1981).

c. Reliance on Statute or Ordinance

When an officer knows and relies in good faith upon a statute or ordinance, the courts might approve the officer's conduct and admit the evidence, even when the court decides the statute or ordinance and the officer's conduct were unconstitutional.

Example:

A Michigan officer arrested DeFillippo for violation of a city ordinance. In a search incident to the arrest, the officer found narcotics. The Michigan court ruled that the ordinance was unconstitutional. Therefore, the evidence seized in the search incident to the arrest was not admissible. The United States Supreme Court ruled that when an officer in good faith relies upon a statute or ordinance to make an arrest, the evidence gathered as a result of that reliance should not be suppressed. *Michigan v. DeFillippo,* 433 U.S. 33 (1971).

d. Mistakes in the Drafting of Warrants

In situations in which an officer obtains a warrant, and that warrant is later determined to lack probable cause or be otherwise deficient, the "good faith" exception may nevertheless validate the search. The statute, in effect, creates a presumption that the officer was acting in good faith if he or she was acting pursuant to a warrant:

"Police officers are not appellate judges. The determination by an appellate court that a warrant is invalid does not mean a police officer's reliance upon that warrant was objectively unreasonable. The courts encourage officers to obtain warrants before invading individual privacy, and it is police misconduct that the exclusionary rule seeks to deter Hence, both by operation of precedent and common sense, a warrant that has failed appellate scrutiny can nonetheless form the basis for good faith execution by a reasonable police officer. Only if no reasonable officer would have relied upon that warrant should we defeat that officer's good faith and hence the good faith exception." *People v. Altman,* 960 P.2d 1164 (Colo. 1998).

Examples:

Officers learned that Altman had purchased hydroponic growing equipment, which is commonly used for indoor marijuana cultivation. The equipment was transported in a rental car to a residence, although the officers determined that the occupant of the residence had two other cars registered to him which were parked at that residence. The officers also learned that the electrical usage at the residence had been two to three times higher than that for surrounding residences, and two to three times higher than the previous resident's usage Based on these facts, which were set forth in an affidavit, the officers obtained a search warrant due to their suspicion that marijuana was being cultivated inside the residence. A search revealed a 96-plant marijuana "farm." Although the Colorado Supreme Court questioned whether the affidavit established probable cause, it nevertheless concluded that it was not a "bare bones" affidavit, and, "giving credence to [the officer's] experience and training and considering all of the facts indicating possible criminal activity, we find his reliance upon the affidavit to be reasonable." *People v. Altman,* 960 P.2d 1164 (Colo. 1998).

A body was discovered on a Pueblo ranch in May 1995, and the coroner's examination revealed that he had been shot in the head with a .22 caliber firearm. The victim's girlfriend told police that the victim and Young left Texas together and were driving to New Mexico to see the victim's brother. She described the victim's truck and indicated that the victim had a .22 caliber revolver with him when he left. The victim's brother told police that Young and the victim had been at his house in May 1995, and that Young told him that he had pawned several items in order to purchase drugs which he

planned to take to a ranch in Pueblo, where he had worked previously. The brother told police that Young and the victim had left and were headed to Estes Park, and that the victim had his .22 revolver when they left. Officers confirmed that Young had previously worked on a ranch in Pueblo, that he had a "violent past," that he had a severe drug problem, and he was known to carry weapons. Officers also confirmed that Young had been seen in Estes Park in May 1995 and that he owned a truck described by the victim's sister and brother. Based on this information, which was included in an affidavit, officers obtained a warrant to search Young's truck and discovered crime-related evidence. The Colorado Court of Appeals assumed for purposes of its analysis that the affidavit failed to establish probable cause to search the truck. However, "because the officers' reliance on the warrant was objectively reasonable, the good faith exception to the exclusionary rule applies, and the trial court's ruling denying defendant's motion to suppress must be sustained." *People v. Young,* 987 P.2d 889 (Colo. App. 1999).

3. Limitations to the Good Faith Exception

The good faith exception applies in situations in which it was objectively reasonable for an officer to rely on the warrant. However if no reasonable officer would have relied upon the warrant, the objective good faith is absent and the good faith exception does not apply. The courts have defined four situations in which the good faith exception is inapplicable:

a. where the issuing magistrate or reviewing judge was misled by a knowing or recklessly made falsehood;

b. where the issuing magistrate wholly abandoned his or her judicial role;

c. where the warrant is so facially deficient that the officers cannot reasonably determine the particular place to be searched or things to be seized; and

d. where the warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely reasonable.

United States v. Leon, 468 U.S. 897 (1984); *People v. Altman,* 960 P.2d 1164 (Colo. 1998).

Examples:

An affidavit alleged in conclusory fashion that an informant had seen methamphetamine carried into a barn near Randolph's residence and had seen an individual smoking methamphetamine in Randolph's trailer. The affidavit also alleged that the informant knew that Randolph had sold marijuana in the past. The affidavit also listed five separate buildings on Randolph's property but did not state any information connecting criminal activity to each of those buildings. The Colorado Supreme Court held that the affidavit was conclusory or "bare bones," and that the officers failed to corroborate the details in the affidavit or narrow the search with particularity. The court concluded that the officer's reliance on such a facially deficient affidavit was unreasonable, and the good faith exception was therefore inapplicable. *People v. Randolph,* 4 P.3d 477 (Colo. 2000).

Officers obtained a search warrant based upon an affidavit which the trial court later determined contained three intentional false statements or statements made with reckless disregard for the truth. In upholding the suppression of the evidence obtained as a result of the search pursuant to the warrant, the Colorado Supreme Court held that "the affidavit submitted in support of this warrant could not support objectively reasonable reliance by [the officer] because it was partially based upon his own recklessly made falsehoods. Moreover, we agree with the trial court's determination that [the officer] knew or should have known that the warrant could not support a probable cause determination." The good faith exception was therefore inapplicable. *People v. Kazmierski,* 25 P.3d 1207 (Colo. 2001).

4. Independent Source Exception

Evidence that was obtained unconstitutionally might be admissible at trial if there was an "independent source" for the evidence. Under this exception, the unconstitutionally obtained evidence may be admitted if the prosecution can establish that it was also discovered by means independent of the illegality.

Examples:

An undercover agent purchased drugs from Schoondermark. Officers confronted and arrested him outside his house in the front yard and, because of the cold weather and the presence of a young child, the officers took Schoondermark into the house. A search of Schoondermark revealed the marked bills used to purchase the

drugs. Officers also observed drug paraphernalia in plain view in the living room. A detective drafted an affidavit for a warrant and did not refer in any way to the materials seen in the house. The warrant was authorized and drug-related evidence was seized from the house. The Colorado Supreme Court ruled that it was unlawful to have taken Schoondermark into the house, so the plain view observations were tainted. However, the evidence might be admissible because the warrant was not based upon any information obtained during the illegal entry. The case was remanded to the trial court to determine whether the officers would have sought the warrant even it they had not entered the house and observed the incriminating evidence. *People v. Schoondermark,* 759 P.2d 715 (Colo. 1988).

Officers conducted a "controlled buy" of narcotics using two informants. After the informants purchased the drugs from Morley, they informed officers that the occupants were disassembling a methamphetamine lab inside the apartment and that they had end-product methamphetamine inside the apartment. An officer then left the scene and obtained a search warrant. Before the officer returned with the warrant, two of the three occupants left the apartment and were stopped by officers. Fearing that the third occupant would become alarmed by the failure of the two occupants to return and destroy evidence, the officers entered the apartment without a warrant. Five minutes after entering the apartment the officer arrived with the search warrant, and drug-related evidence was recovered. The Colorado Supreme Court held that, despite the unconstitutional entry into the apartment, the warrant was obtained independently of any illegality because (1) the warrant procurement procedures were initiated well before the illegal entry; (2) the affidavit in support of the warrant relied only on facts learned during the undercover operation and not upon any information learned after entry into the apartment; and (3) no other evidence was introduced that would otherwise subvert a conclusion of independence was presented. *People v. Morley,* 4 P.3d 1078 (Colo. 2000).

Cruse was arrested on an outstanding arrest warrant, and while being booked the officer detected an odor on Cruse's clothes and body consistent with the manufacture of methamphetamine. Cruse told the investigator where he was living, and upon arrival the officer noticed a faint odor consistent with the production of methamphetamine coming from the front and side of the house near an air cooler. The officer walked past the air cooler to a side basement door, and then entered a garage where he observed plastic packaging materials which he recognized to be precursor

chemicals for the production of methamphetamine. A dog trained to detect narcotics was brought to the scene and alerted to the presence of an unknown narcotic odor. A warrant was then obtained for the search of the house and car, and illegal drugs were found. Assuming the officer's entry of the garage and the dog sniff search were unconstitutional, the Colorado Court of Appeals held that the lawfully obtained information contained in the affidavit established probable cause, and the warrant would have been issued even in the absence of the illegally obtained information. However, the case was remanded to the trial court to determine whether the officers' observations of the packaging materials or the results of the dog sniffed affected their decision to seek a warrant. If not, then the independent source exception would be applicable. *People v. Cruse,* 58 P.3d 1114 (Colo. App. 2002).

Officers observed the open door of a grain bin and, despite a sign posted on the bin prohibiting anyone from removing wheat, they noticed wheat spilled in front of the door. A recent rain made tire tracks of a vehicle pulling a trailer leading away from the bin distinct and easy to follow to Bartley's driveway. The officers saw the tracks proceed up the driveway and out of sight. They then flew over the property and took aerial photos of a truck and trailer parked near Bartley's house. Based on an affidavit alleging these facts, a search warrant was issued and Bartley's property was searched. Officers discovered the trailer half-full of wheat, and Bartley was charged with burglary and theft. The Colorado Supreme Court ruled that, where an affidavit contains illegally obtained evidence as well as evidence derived from independent and lawful sources, a search warrant may be valid if the lawfully obtained evidence, considered by itself, establishes probable cause. Here, while the aerial photos of the truck and trailer may have been illegally obtained, the court validated the search warrant on the basis of the officers' observations of the open bin door, the spilled grain, and the tire tracks. *People v. Bartley,* 817 P.2d 1029 (Colo. 1991).

5. The Inevitable Discovery Exception

Evidence that is unconstitutionally obtained might nevertheless be admissible if the evidence or information would have ultimately or inevitably have been discovered by lawful means. *Nix v. Williams,* 467 U.S. 431 (1984). Under this exception, the court focuses on whether the evidence would have been discovered as a matter of course if independent investigations were allowed to proceed, and "the court must be convinced that the evidence *would* have been discovered, not that it

might or could have been discovered." *People v. Welch,* 58 P.3d 1065 (Colo. App. 2002). Evidence is not admissible under this exception based on nothing more than a judge's speculation or hunch that evidence would have been discovered anyway. Rather, the state must prove that there was a reasonable probability that the evidence would have been discovered in the absence of police misconduct and that the police were pursuing an independent investigation at the time the illegality occurred. *People v. Breidenbach,* 875 P.2d 879 (Colo. 1994).

Example:

When Welch's boyfriend attempted to end his relationship with Welch she purchased a revolver, dropped her car at her cousin's house, and left the keys in the mailbox, and then returned to her apartment where she shot her boyfriend while he was sleeping. After calling 911, police arrived to find Welch lying on the floor in a fetal position. Believing she was a victim of an assault, officers transported her to the hospital for treatment. During her contact with officers, Welch made no statements regarding what had happened. The following day, officers impounded her car without a warrant and seized a gun box and incriminating documents from the car. Based on the location of the victim's wound, which was not consistent with suicide, the nature of Welch's relationship with him, evidence that Welch's wounds were self-inflicted, Welch's refusal to cooperate with police, and a lawfully obtained note giving next-of-kin information for both Welch and the victim, the Colorado Court of Appeals concluded that Welch's "car would have been seized and searched and the evidence introduced at trial would have been found, even if an illegal seizure had never occurred, had the independent investigation been allowed to proceed." Therefore, the evidence was admissible. *People v. Welch,* 58 P.3d 1065 (Colo. App. 2002).

After being detained, the defendant asked the officers to retrieve his fanny pack from his car. Inside, the officers discovered cocaine. The court held that when the defendant was arrested, his car was going to be towed and impounded pursuant to departmental policy. Thus, the cocaine in the fanny pack would have been inevitably discovered. *People v. Milligan*, 77 P.3d 771 (Colo. App. 2003).

6. Attenuation

Under the attenuation exception to the exclusionary rule, evidence need not be excluded simply because it would not have come to light "but for" the illegal action of the police. The reviewing court should consider

whether the evidence was obtained by exploitation of that illegality or, instead, by means sufficiently distinguishable to be purged of the primary taint. Evidence is admissible when the connection between the lawless conduct of the police and the discovery of the challenged evidence had become so attenuated as to dissipate the taint.

Example:

Sheriff's deputies illegally entered the defendant's home to serve civil process upon him. The defendant then menaced the officers with a shotgun. The court held that the commission of a new offense was sufficiently attenuated from any illegality. *People v. Doke*, 171 P.3d 237 (Colo. 2007).

Officers entered the defendant's home when they knocked on the door and smelled marijuana coming from inside. They then contacted the defendant, who was work, and he consented to a search of his home. The court held that the consent was sufficiently attenuated from any illegal entry because the defendant voluntarily drove home from work even though he was aware that officers were waiting there for him, the defendant spoke to one of the officers while driving home and volunteered information about the marijuana on the premises, and when the officer arrived the defendant immediately consented to the search and helped the officers find the drugs. *People v. Benson*, 124 P.3d 851 (Colo. App. 2005).

7. Impeachment

Relevant and reliable evidence seized in violation of a defendant's constitutional rights may be used to impeach the defendant if he or she elects to take the witness stand. The reason is that a defendant should not be permitted to take the witness stand and perjure himself or herself. However, unreliable evidence gathered in violation of a suspect's rights (e.g., an involuntary statement) is not admissible, even for impeachment purposes.

F. Privileges

A person sometimes has the "privilege" to keep another person from testifying. These privileges take three forms:

a. A privilege to keep a witness off the stand to testify;

b. A privilege to keep the witness from testifying about conversations between the witness and the defendant.

c. A privilege of an officer to refuse to disclose the identity of an informant.

Note: Never fail to take a statement just because the privilege may apply.

1. Testimonial Privilege: Spouses

A defendant traditionally had the power to keep his or her spouse off the witness stand. This power has been greatly limited. The United States Supreme Court has ruled that, under federal law, the privilege belongs only to the person testifying. Therefore, in a federal case a witness who wishes to testify may do so against his or her spouse. *Trammel v. United States,* 445 U.S. 40 (1980).

The Colorado legislature has limited this privilege in a state case, such that a spouse may testify against his or her spouse in class 1, 2 or 3 felonies, even if the non-testifying spouse objects. Section 13-90-107(1)(a), C.R.S. (2008); *People v. Ford,* 100 P.3d 540 (Colo. App. 2004). Furthermore, the privilege does not apply when a spouse commits a crime against the other spouse or the children of either of the spouses. Section 13-10-112, C.R.S. (2008); *People v. Corbett,* 656 P.2d 687 (Colo. 1983).

2. Communication Privilege

The courts respect the importance of confidentiality of communications between the defendant and his or her:

a. doctor
b. lawyer
c. spouse
d. minister
e. accountant
f. psychologist or therapist

These communications may not be revealed unless the defendant expressly or impliedly waives the privilege. 13-90-107, 5 C.R.S. (2008).

3. The Informer Privilege

"The informer privilege is in reality the government's qualified privilege to withhold from disclosure the identity of persons who furnish information of crimes to law enforcement officers . . . The privilege recognizes the general obligation of citizens to communicate their

knowledge of crimes to law enforcement officials and, at the same time, encourages that obligation by protecting their anonymity under appropriate circumstances." *People v. Bueno,* 626 P.2d 1167 (Colo. 1981). Only "when the disclosure of the informant's identity, or of the contents of his communication, would be relevant and helpful to the defense of the accused, or would be essential to a fair determination of a cause, the privilege generally should yield." *Id.*

There are two situations where the informant may have to be disclosed; they are:

a. when the defense makes a showing that the informant will provide information essential to the merits of a suppression ruling. If the issue is probable cause based on what the informant told police, the defense must show either that the informant does not exist or that he did not provide the information, before disclosure will be required.

b. when the defense makes a showing that the informant is necessary to determine the guilt or innocence of the defendant at trial.

The courts will consider the following factors in deciding whether to order disclosure:

a. whether the informant was an eye or ear witness;

b. whether the informant is available or could be made available;

c. whether other witnesses can show it is likely the informant's testimony will be different than other witnesses' testimony;

d. whether the defendant knows or could find out who the informant is; and

e. whether the informant was deeply involved in the crime.

People v. Garcia, 752 P.2d 570 (Colo. 1988).

G. Burdens of Proof

In any trial or hearing, one side or the other has the burden of proof, or the burden of persuading the judge or jury that his or her side is right. The burden, or the amount of evidence and law which must be presented, differs depending upon whether it is a trial or a hearing.

1. Trials

The state has the burden in a trial to prove beyond a reasonable doubt that the defendant committed the crime. Much more importantly, the state must disprove the defendant's theory (the defense) beyond a reasonable doubt. In order to understand this burden, imagine the trial as a football game. The state gets the ball in its own territory. In order to prove the defendant guilty, the state must move the ball to the defendant's goal line.

Now that the state has proved the defendant's guilt beyond a reasonable doubt, the defendant gets a chance to explain his legal defense. If the defendant moves the ball one foot, the state may not have disproved the defense beyond a reasonable doubt.

2. Hearings

At hearings, the state's burden is much lower than trials. Whether the burden is by a preponderance of the evidence, or by clear and convincing evidence, an officer should know that it is usually basically: does the judge believe you? If you always tell the truth when testifying, most judges will "bend over backward" for you when it comes down to a credibility contest between you and witnesses for the defense.

Finally, every officer must know that when officers obtain a warrant, the burden is on the *defendant* to show that probable cause did not exist.

H. Suggested Techniques

Many of the Rules of Evidence relating to the admissibility of evidence are very confusing. The complicated rules are of little concern to you. The rules which apply to you are not that difficult if you consider the following suggestions when gathering evidence.

1. Relevance

The biggest problem facing prosecutors at trial is that officers often miss or do not gather relevant evidence. Trials are won and lost by attention to detail. While investigating a case, ask yourself the following:

a. What are the elements of the crime?

b. What criminal state of mind must be proven?

c. What defense is likely?

d. Is there any way that I can ask questions of the suspect or witnesses which will help to:

   1. prove the elements?

   2. show the relevant "guilty mind" of the suspect?

   3. disprove the defense?

e. If there is any question whether the evidence is relevant, err on the side of trying to obtain it (with a warrant if it is a physical object.

Remember: When evidence is not gathered at the first opportunity, it is usually gone forever.

2. Reliability

Whether evidence is reliable is almost irrelevant to an officer. Get statements from everybody in sight and try to get the story from the "horse's mouth." Remember, however, that involuntary statements are unreliable and, therefore, not admissible.

3. Undue Prejudice

The most important aspects of this section are:

a. If you know of any other "bad acts" by the defendant, be sure to relate them to the prosecutor. Too often, officers know a lot of relevant information on the defendant, but do not bother to tell the prosecutor.

b. Never refer in court to the defendant's picture as being a "mug shot."

c. If there is any question about the admissibility of "other bad acts" by the defendant, be sure to discuss them with the prosecutor before you mention them in court.

4. Foundation

Be sure to document the who, where, when, etc. every time you gather any evidence.

Be sure the evidence is "tagged" and properly preserved. When evidence is not properly gathered, preserved and documented it is far more difficult, and sometimes impossible, to get it admitted at trial.

5. Constitutional Violations

By far, the most complicated problems facing officers in the proper gathering of evidence, is the violation of a suspect's rights. These issues are discussed extensively in the **SEARCH AND SEIZURE, STATEMENTS** and **IDENTIFICATION** chapters.

6. Privileges

Privileges have little to do with the officer's responsibilities. Never fail to take a statement from anyone who wants to talk to you about it; including spouses.

7. Burdens of Proof

The biggest misconception officers must overcome in the gathering of evidence is that probable cause is meaningful in a jury trial. Gather your evidence with the full realization that the defendant's guilt (including disproving the defense) must be proved beyond a reasonable doubt. Almost all evidence regarding a defendant's guilt must be gathered by you. By the time the case gets to the prosecutor it is usually too late to gather any more important evidence.

8. Finally

a. Get to know a good prosecutor well enough that you can:

   1. sit down over a beer with him or her and discuss a case;

   2. sit in on a trial with him or her;

   3. call him or her in the middle of the night if you have a problem.

b. Read a transcript of a "good" trial.

c. When you know you are going to trial:

   1. know your report, and those of your fellow officers, "backwards and forwards."

   2. talk to the prosecutor assigned to the case.

      a. find out what questions the prosecutor will ask you.

b. find out what questions the defense attorney is likely to ask you.

Chapter 12

CRIMINAL PROCESS

I. INTRODUCTION

This chapter discusses the stages in the prosecution of a criminal case. Some officers think that after an arrest on probable cause has been accomplished, their job is complete. As you read this chapter, you will see that you are a very important part of the entire criminal justice process.

II. FIRST APPEARANCES

After an officer makes an arrest, the accused must be taken to the nearest available county or district judge "without unnecessary delay." Rule 5(a)(1).

A. Purpose of the First Appearance

The purpose of the first appearance is for the judge to tell those accused:

1. Their Fifth Amendment rights – that the defendant need make no statement and any statement made can and may be used against the defendant.

2. Their right to counsel. Also, if indigent, the right to request court appointed counsel or consult with the public defender before any further proceedings are held.

3. Any plea they make must be voluntary and not the result of undue influence or coercion.

4. Their right to bail, if the offense is bailable, and the amount set by the court.

5. The nature of the charge(s).

6. Their right to a jury trial.

7. Their right, in certain cases, to demand and receive a preliminary hearing within a reasonable time (to occur within 30 days of the demand unless good cause is shown) to determine whether probable cause exists to believe that the offense charged was committed by the defendant.

B. Unnecessary Delay

The biggest issue relating to taking an accused to a judge is what is "unnecessary delay." If officers obtain evidence from an accused (usually statements) during this unnecessary delay, the evidence may not be admissible at trial.

1. Necessary Delays

A "necessary delay is one reasonably related to the administrative process attendant upon the arrest of an accused . . . Such delays are usually associated with fingerprinting, photographing, taking inventory of personal belongings, preparation of necessary charging documents, reports, and other legitimate administrative procedures." *People v. Raymer,* 662 P.2d 1066 (Colo. 1983).

2. Prejudice

In order to get evidence suppressed due to a delay in the first appearance, the accused must show that the delay was the reason why the evidence was obtained.

Example:

Raymer and two other men robbed the attendant of a self-service gas station and then Raymer shot the attendant with a shotgun. Later, they did the same thing at another station. The first robbery was in Lakewood and the second in Denver. Raymer was arrested by a Lakewood officer at 10:15 a.m. on December 22. Raymer was put in the Adams County jail about 1:00 p.m. Raymer was then transported to a Denver jail at about 2:00 p.m. Raymer waived his rights and confessed about 2:00 p.m. (about 4 ½ hours after Raymer's arrest). Raymer received his first appearance about two days after his arrest. The Colorado Supreme Court ruled that:

> "Where . . . delay is occasioned by the decision of law enforcement officers to conduct a custodial interrogation of the defendant before presenting him to a judicial officer for a proper advisement of rights, then clearly such a delay is not a 'necessary' delay within the intendment of Crim. P. 5(a)."

The court then sent the case back to the trial court for a determination of whether the 4 ½ hour delay was an unnecessary delay in order to obtain a statement. If it was, the confession must be suppressed. *People v. Raymer,* 662 P.2d 1066 (Colo. 1983).

C. Suggested Techniques

Before arresting a suspect and taking him to a first appearance, officers should consider the following suggestions:

1. Pre-Arrest Statements

If possible, get statements before you take a suspect into custody.

2. Post-Arrest Statements

If the arrestee will talk, get statements as soon as possible after the arrest. If there is a delay between the arrest and first appearance, be prepared to testify what administrative procedures required the delay.

3. The First Appearance

a. Be prepared with any information that will influence the judge in the setting of bond:

1. Previous failures to appear.
2. Whether the suspect is presently out on bond.
3. Previous felony record.
4. The basic facts of the case.

4. Statements After First Appearances

If you do not get statements before a defendant's first appearance, it is unlikely that will be able to obtain additional statements from the defendant. Once a defendant has an attorney appointed, the attorney will tell his or her client to refuse any interview requests and invoke the right to remain silent.

III. PRELIMINARY HEARING, GRAND JURY

A preliminary hearing is a court hearing where a judge listens to the evidence presented and decides whether there is probable cause to believe the defendant committed the crime charged. A grand jury has a similar purpose although the process functions differently.

A. Difference Between a Preliminary Hearing and Grand Jury

The main difference between a preliminary hearing and a grand jury is that the defense attorney and the defendant are present at the preliminary hearing and can cross-examine the state's witnesses. Grand jury proceedings are "sealed" to all parties except the prosecuting attorney and sworn grand jury investigators, and witnesses are ordered not to discuss their testimony given before the grand jury.

Note: Defendants charged with class 1, 2 or 3 felonies are entitled to a preliminary hearing if requested. Defendants charged with misdemeanor offenses, or class 4, 5 or 6 felonies are not entitled to a preliminary hearing (unless the felony defendant is in custody and is unable to post bond). Further, a defendant charged with a class 4, 5, or 6 felonies who has posted bond may still be entitled to a preliminary hearing if that offense carries the potential of mandatory prison time or indeterminate sentencing.

B. Hearsay

Officers at preliminary hearings or grand jury proceedings may testify to hearsay statements made to them.

Example:

Williams sexually assaulted and killed a 12-year old girl. An officer at the preliminary hearing testified that he talked to an acquaintance of Williams on the day of the murder who noticed scratches on Williams' face, hands, and leg. The officer also introduced a written, signed statement from another witness. This witness stated that Williams told her that he had been "messing with a little girl in the Curtis Park Projects" (the area where the victim lived). The court ruled that hearsay "may be considered for purposes of establishing probable cause" at the preliminary hearing. *People v. Williams,* 628 P.2d 1011 (Colo. 1981).

C. Suggested Techniques

Before testifying at a preliminary hearing or grand jury an officer should consider the following. Although the purpose of a preliminary hearing is to determine whether probable cause exists, defense attorneys will use the hearing as an opportunity to lock witnesses into statements about the incident. If at trial, an officer testifies differently then what he or she testified to at the preliminary hearing (or motions hearing), the defense attorney will confront the officer with a transcript from the previous hearing to point out the inconsistency. This process, called "impeachment," is used to show that if an officer testified differently about the same topic previously, that his or her

testimony is unreliable. Keep in mind that although there is no defense attorney (or defendant) present during a grand jury proceeding, if charges are brought, the defense will be entitled to copies of the testimonial transcripts. For these reasons, prepare for a preliminary hearing and/or grand jury like you would a trial.

1. Know your report thoroughly.

2. Remember that because hearsay is permitted, you may be testifying as to what other witnesses said. Be certain to know the content of other officer's reports if required.

3. Read all statements made.

4. Answer all questions specifically. Do not give more information than is asked for.

* If you have testified at a previous hearing for the same case, request that the prosecutor provide you a copy of the transcript(s) so that you may review your prior testimony.

IV. ARRAIGNMENT

If the judge or grand jury decides that there is probable cause that the defendant committed a crime, the defendant is bound over for arraignment. The arraignment is a formal court proceeding where the defendant enters a plea to the charge(s).

V. PRETRIAL HEARINGS AND PROCEDURE

After arraignment various hearings and processes occur.

A. Discovery

Discovery is the process by which the opposing attorneys on a case share information concerning the case. The prosecutor and defense attorney are required by law to disclose to each other much of the evidence that they intend to present at trial. Secret evidence and surprise witnesses are the stuff of Hollywood—with very few exceptions, the defense will have access to all of the reports and evidence that law enforcement compiles as part of its investigation. The following discusses those obligations.

1. Disclosure to the Defendant

The prosecutor, pursuant to Rule 16 of the Colorado Rules of Evidence, must make the following available to the defense:

a. All police, arrest and crime or offense reports.

b. All statements of the defendant.

c. Names and addresses of all witnesses

d. All statements of witnesses and/or co-defendants.

e. Grand jury testimony of all witnesses.

f. Reports or statements of experts.

g. The results of physical or scientific testing of evidence.

h. Any physical objects held as evidence.

i. Prior convictions of the defendant and any of the state's witnesses.

j. Electronic surveillance information.

k. Any evidence which tends to "negate the guilt of the accused" or "would tend to reduce the punishment" relating to the offense.

l. Any other evidence which the defense can get the court to order the prosecutor to disclose.

Informants

Normally the prosecution is not required to disclose the identity of an informant. However, a court will order the disclosure of an informant if:

a. The informant was a witness to the crime.

b. The defense can show the informant lied; or,

c. The defense can show the informant did not give the information an officer claims was provided.

Officer's Internal Investigation Files

When an officer's disciplinary record is relevant to the case (e.g., the suspect is injured during the arrest) the court can order that the officer's disciplinary file be produced. The court will then review the file in private and disclose to the defense any information which is relevant.

2. Disclosure to the Prosecutor

A prosecutor may request that the defense disclose:

a. The "nature of the defense."

b. The names and addresses of witnesses.

c. Reports or statements of experts.

d. Notice of alibi.

3. Impeding Defense Investigations

A witness may not be advised "to refrain from discussing the case with opposing counsel" or to hide evidence. Rule 16, Part III(a)

Note: A witness is under no obligation to cooperate with either the prosecution or the defense.

4. Failure to Disclose

The failure of a prosecutor to disclose can result in a continuance of the trial, the refusal of the court to permit the introduction of the evidence or, in extreme cases, dismissal. However, a court is under an obligation to impose a sanction for non-disclosure that is the "least drastic" possible to ensure compliance with the prosecutor's discovery obligations.

B. Pleas

Over 90 percent of cases set for trial are "plea bargained." Plea bargaining is the negotiation between the prosecutor and the defendant—often through defense counsel—to resolve the case without going to trial. In general, plea bargaining is considered a necessary tool of judicial economy; if every case filed went to trial, the criminal justice system would grind to a halt. Although no defendant is entitled to a plea bargain, there are many reasons why cases are plea bargained. Some of the more common reasons include:

1. A person's absence of prior criminal history or mitigating circumstances.

2. The prosecutor gets no greater sentence going to trial than allowing a plea to a lesser charge.

3. Can be a win-win scenario for the victim(s) in the case, in that . . .

   a. the defendant takes responsibility by pleading guilty to an offense.

   b. spares the victim the need to go through the trial process and confront the defendant in that setting.

   c. Removes the uncertainty and potential prejudices of the jury process.

4. The case has infirmities that may not be able to be overcome at trial.

C. Motions

Both the prosecutor and defense attorney may file motions asking the court to do something. In many cases, motions are filed to ask that the court keep certain evidence out, but in other instances they are filed to try and include certain evidence.

VI. TRIALS

The following is a very brief discussion of the process of a jury trial.

A. Jury Selection

The court calls a number of potential jurors to the jury box.

1. Examination of Jurors

The judge and then the attorneys ask questions of the jurors to determine if there are any legal reasons why they may not serve on a jury. The attorneys are then often given the opportunity to ask questions to potential jurors to explore any biases, prejudices, or reasons why, if selected, they would not follow the law and render a verdict based upon the evidence presented and not some other reason.

2. Challenges

A juror may be challenged and excused from the panel in the following ways:

a. Challenges for Cause

A juror may be discharged by the court "for cause" if they are unable to legally sit as a juror (e.g., not a U.S. citizen, not over the age of 18). Challenges for cause can also include jurors who refuse to follow the law (e.g., a juror who doesn't think that marijuana should be illegal and would not vote to convict even if the evidence showed the defendant's guilt.) Challenges for cause do not count against an attorney's allotted number of peremptory challenges.

b. Peremptory Challenges

Peremptory challenges permit both attorneys to excuse a select number of jurors without stating a reason. However, attorneys are not allowed to excuse jurors based on their race or gender.

B. Opening Statements

Both attorneys are then permitted to give opening statements. An opening statement is a brief overview of the facts which the attorneys believe will be shown through the evidence that is presented during the trial.

C. The State's Case

The state/prosecution has the burden to prove that defendant committed the crime "beyond a reasonable doubt." As a result, the state puts its case on first. The prosecutor attempts to prove the case by putting on witnesses and introducing physical evidence. During the testimony of each witness, the following process takes place:

1. **Direct Examination** – is the stage when the prosecutor calls a witness to testify and asks that person questions about the case. During direct examination, the prosecutor is required to ask questions in an open-ended format whereby the witness supplies the answer.

Example:

Prosecutor: Officer, where did you find the gun?

Officer: On the floor, approximately three feet away from Mr. Jones's body.

2. **Cross-Examination** -- is the stage that the defense attorney can ask questions of the state's witnesses. A defendant has a constitutional right to cross-examine every witness presented by the state. As opposed to the open ended question format of direct examination, an attorney on cross examination is allowed to ask leading questions. Leading questions are designed in such a way that the fact being sought is contained within the question and is asked in such a way as to limit the possible answers to only "yes" or "no."

   Example:

   Defense Attorney: Officer, isn't it true that you found the gun in the Mr. Jones's dead hand?

   Officer: No.

3. **Re-Direct** – is the stage where the prosecutor gets to ask follow up questions to the witness in response to the cross-examination.

4. **Re-Cross** – some judges will permit the defense attorney a last chance to ask questions of the witness in response to the re-direct.

D. Motion for Judgment of Acquittal

After the state's case the defense usually makes a motion for a judgment of acquittal. The essence of the motion is to assert that prosecution, through the evidence presented, has failed to establish the elements of the crime(s) for which the defendant is being tried and therefore, the judge should, in effect, dismiss the case and not permit the jury to deliberate. A judge can grant the motion if the evidence is such that no reasonable person could find the defendant guilty beyond a reasonable doubt based on the evidence that has been presented. If the judge denies the motion, the case will be given to the jury to determine a verdict.

E. The Defense Case

Because the state maintains the burden of proof, the defendant is not obligated to put on any kind of a defense. The state must prove the defendant guilty; a defendant has no legal obligation to prove his or her innocence. Further, the

defendant has a constitutional right not to testify. The decision to testify is exclusively that of the defendant and not that of the defense attorney. If the defendant chooses not to testify in his or her own defense, the jury will be instructed that it may not consider that as part of its deliberations. If a defendant chooses to put on a defense, evidence will be presented to support the defense in the same fashion as the presentation of the state's case (i.e., the prosecutor will cross-examine the defense witnesses).

F. Jury Instructions

Once the sides have "rested," the judge will instruct the jury on the law of the case.

G. Closing Arguments

After the jury has been instructed on the law, the attorneys argue their cases. Closing argument is an attempt to put the facts and law together in a way that persuades the jury that the defendant is guilty or not guilty.

XV. SENTENCING

If a defendant is convicted (either by guilty plea or a jury verdict) the judge will impose a sentence. Usually this is done at a separate hearing a short time after the trial or guilty plea.

Officers can play a very important role in sentencing. The judge's understanding of the crime depends a great deal on the officers. The officers' reports are used by the probation department to prepare a description of the crime for the judge. Often the prosecutor will want the officer(s) to testify at the sentencing hearing.

XVI. POST-CONVICTION PROCEEDINGS

A. Probation/Parole Revocation Hearings

If a convicted defendant is placed on probation or released on parole, he or she is given certain rules that must be followed. One rule always includes that the defendant must not commit any new law violations.

If the defendant does break the law, or violates other conditions that have been imposed, the probation or parole can be revoked. In the absence of the defendant formally admitting to violating probation or parole, the state is required to prove the violation. This is process is referred to as a revocation hearing. A probation revocation hearing is held before a judge. A parole revocation hearing is conducted before a parole board.

In some respects, these hearings are like preliminary hearings. There is no jury, hearsay can be used, and the defendant has a lawyer who will cross-examine the witnesses and try to prevent the state from proving the case. Usually probation or parole officers provide the bulk of testimony at these hearings. If the violation is a new criminal offense, and that new offense has not been resolved in a plea or a trial, the state has the burden of proving that new offense beyond a reasonable doubt. If there are other "technical violations" (e.g., failure to report to the probation/parole officer, failure to complete drug counseling), the violation must be proved by a preponderance of the evidence.

B. Post-Conviction Relief

Upon conviction, a defendant can request relief from the judge by claiming that the conviction was illegal or the sentence should be reduced. This might lead to a hearing before the judge. It is rare that officers are involved in these hearings, except when they involve a possible sentence reduction.

Chapter 13

REPORT WRITING

I. INTRODUCTION

This chapter discusses the importance of an officer's report, some principles of clarity, and the legal problems which naturally flow from an officer's report.

II. IMPORTANCE

If you ask a law enforcement recruit why they want to become a peace officer, you will never hear that it is to become a better writer. Yet, report writing is a critical component to the successful investigation and prosecution of cases. Officers often underestimate the importance of a well written report, as well as the significance that it will play later in the process. It is imperative to understand that the reports that you write are a reflection of the quality of your work and affect your reputation within your own department, with prosecutors, and even with defense attorneys and judges. The officer that establishes a reputation for producing well written and thorough reports will often spend less time going to court because both prosecutors and defense attorneys know that he or she does complete investigations. It also helps immensely when testifying to have written a thorough report. In contrast, officers who "testify" well, but who write unclear and inaccurate reports have often been skewered and embarrassed on the stand.

A. Intra-Agency Review

In most agencies, a superior officer will read and sign off on a report prior to the filing of a case. When an officer writes an unclear, inaccurate report and/or one filled with spelling and grammatical errors, the superior may question that officer's competence.

B. District Attorney Review

When a case is filed with the District Attorney's Office, it is usually only the reports that a prosecutor has to evaluate the case. Reports that are poorly written, confusing, or conflict with other reports may result in the district attorney's refusal to file the case.

C. Defense Attorney Review

Judges, prosecutors, and defense attorneys will tell you: **The officer's report is often the most potent weapon in the defendant's arsenal at trial.** In many cases (maybe most) the only defense the defendant has is to show the

jury that there is a reasonable doubt that the officer was correct or truthful in his or her report. Even one misstatement can lead a naïve juror to believe that nothing the officer says is true or accurate. Therefore, a good defense attorney will make the officer who testifies "eat" every conclusion, inconsistency, opinion, exaggeration, and misstatement in the report.

1. Discovery

Every officer must understand that after formal charges are brought against a defendant, the officers' report(s) concerning the crime must be disclosed to the defense attorney. Failing to disclose reports or not including complete information about an officer's investigation can result in a judge barring evidence from coming into trial or even worse dismissing the case outright.

2. Defense Preparation

The competent defense attorney will go through the officers' reports word by word looking for inconsistencies, exaggerations, and gaps in the investigation to exploit at trial. At trial, if an officer introduces a new fact that was not contained within his or her report, the defense attorney will seize upon the opportunity to try and make the officer appear as though they are trying to bolster and improve the case by adding false information.

Example:

Defense Attorney: Officer, on direct examination you testified that my client, Mr. Jones told you that he had seven drinks that night, correct?

Officer: Yes, that is correct.

Defense Attorney: But you didn't write that he told you he had seven drinks that night, you wrote that he told you he had a "several drinks," correct?

Officer: Yes. I did not write in my report that he said he had seven drinks.

Defense Attorney: When you went through the academy were taught the importance of writing accurate reports, correct?

Officer: Yes.

Defense Attorney: When did you write this report?

Officer: About an hour after the initial traffic stop.

Defense Attorney: So the information was fresh in your mind at the time you wrote the report?

Officer: Yes.

Defense Attorney: And you didn't say "seven drinks" in your report did you?

Officer: No.

Defense Attorney: Are you telling this jury, that you remember the details of this event, better today – a year and a half later – than you do an hour after this happened when you wrote your report?

Lesson: Write every report with the idea that if the fact doesn't appear in my report, it didn't happen.

This type of questioning is often more prolonged than the example, but with the same intended purpose of trouncing the credibility of the testifying office in front of the judge and/or jury.

III. PRINCIPLES OF CLARITY

Report writing can be tedious, especially at the end of a working day. At the end of the shift, you are often tired, cranky, and just wanting to go home. The temptation may be to write a cursory report so you can just get done. It may be easy to justify it at that time by rationalizing that you can do a more complete job later or that the case will just get plea bargained so why worry about it. It is crucial though that you think clearly in order to report clearly. Although this manual is in no way intended to be a lesson in grammar, every officer must realize that if the report is mistaken or confusing, it can have a devastating effect upon the case. The following very simple suggestions should help you in writing clearer, more accurate reports.

A. Dictating

Never dictate your report "off the top of your head." Always, *at least*, write out an outline of exactly what you want to say, preferably in chronological order of events. Usually, give a simple summary of the case at the beginning so those reading your report will know "where you are going" in your report.

B. Words

Use short, simple words.

1. Never use big words when little words will do the job.

2. If you are not sure of the meaning of the word, do not use it.

3. When referring to more than one victim, suspect, or officer, use their names rather than:

   a. he, she, they
   b. victim #1, subject #2, officer #4856

4. Write "I" or "me," not:

   a. undersigned officer

   b. this officer

5. Never use the words

   a. it should be noted

   b. indicated

C. Sentences

Use short sentences.

D. The Active Tense

It is very important that you always use the active tense. Start your sentences with the person who did the act; then what the person did; then who (or what) the subject did it to.

Note: As you read the examples in this sourcebook, notice how they are written in the active tense.

1. Active Tense

Officer Jones found a gun in Brown's nightstand drawer.

2. Passive Tense

A gun was found in Brown's nightstand drawer.

Note: Who found the gun?

E. Paragraphs

Restrict each paragraph to one topic (e.g., vehicle, clothing, evidence, etc).

Always proofread your reports. Often there are a number of changes that could be made in a report to make it more clear and accurate.

Remember: You can conduct a great investigation, but much of that time and effort can be damaged if you produce a poor report.

IV. DOCUMENTATION

Documentation is simply detailing the events of your investigation in writing. The following are important principles of documentation. Some of these changes may make the difference between a conviction and acquittal.

A. Personal Knowledge

It is important to distinguish in your reports those parts of the investigation that you took part in, as opposed to what information you received from witnesses or other officers. If you spoke to a particular witness, make that clear. If you found a piece of evidence document it. If another officer gave you a piece of evidence, it is critical that you document who you received it from. Details matter!

B. Contact Information

Identifying all witnesses is critical. Regardless of how you may perceive the insignificance of a witness, always get each witness's contact information including: full name, date of birth, address, and phone numbers. If you at least obtain that basic contact information, that witness may be able to be re-contacted later if necessary.

C. Hearsay

Hearsay can be a complicated legal concept that even lawyers with years of experience have difficulty understanding. In essence, it is when a person relays a statement made by someone else. There are different types of hearsay, some of which are admissible during a trial, and others that are not. You don't have to understand all of nuances of hearsay, but it is critical that you accurately attribute the sources of the statements including identifying all of the persons through which the statement traveled.

Examples:

Jane Doe stated that her husband, John, came home drunk started to argue with her. She stated, "He called me a bitch, and then punched me in my right eye."

Officer Smith told me that he interviewed the suspect, Bill Jones, and that Jones told Officer Smith, "I shot David Smith."

I spoke with Sara Johnson who told me that a day after the assault, she received a phone call from her boyfriend, Mike Brown, in which he stated, "I'm sorry that I hit you. I didn't mean to hurt you."

Detective Black called me and told me that the victim's aunt, Kate Smith, had called him and told him that her niece, Emily Green, had told her that that her father, David Green, had fondled her three times. I called Kate Smith. Ms. Smith reported that last Tuesday, she was driving her niece, Emily Green, to a birthday party. Emily told Kate Smith, "Daddy made me touch his pee-pee." Kate identified Emily's father as David Green. I asked Kate if she had asked Emily any questions in response to this question. Kate said she asked Emily if this had ever happened before. Kate told me that Emily told her that it had happened "three times before."

D. Statements

An officer should always obtain statements from all witnesses. It is important to restate that although some witnesses may seem insignificant from your vantage point, it is always critical that you obtain statements and contact information for all witnesses. Despite your own perceptions of what is most relevant facts or witnesses, you can never anticipate every issue that may become the crux of a trial. Remember that defense attorneys will always try and seek out of the soft spots in your case. If you fail to get the contact information from a witness or fail to get statements from a witness, there is a good chance the defense attorney will try and utilize that to their advantage and to your detriment.

1. Suspects

A suspect's statement is often a crucial piece of evidence at trial. Suspects will often admit to the crimes that they have committed in whole or in part, so it is critical to accurately report what they say to you. Even when a suspect denies committing the crime, he or she often provides important details or omissions from his or her version of events. Just like any other witness, these statements lock the suspect into

a story. For these reasons, it is important to document everything a suspect tells you regardless of its apparent value.

a. Admissibility in Court

A voluntary statement given after a waiver of rights (if the suspect is in custody) is admissible whether unrecorded, written, or on tape. A defendant's own written statement can be an effective tool in that it is hard during trial for a defendant to deny making the statement when it is in their own handwriting. Also, audio and video recordings are often preferred methods of taking a defendant's statement, because a jury will consider a recording to be stronger evidence.

b. Approach

An officer should always start by taking an oral statement from a suspect. Avoid taking notes unless the statement is long (it will make the suspect nervous). After a suspect is "tied into" the story, either:

1. Write out the main parts of the story, ask the suspect to read it and ask if it is correct, and ask the suspect to sign or initial it.

   Note: It will be admissible even if the suspect does not sign it.

2. Ask the suspect if he or she will give a tape recorded statement (to avoid misquoting).

It is dangerous to summarize the specifics of a taped statement in your report.

Example:

An officer relates in the report that the suspect dropped the rape victim off in front of her home. The taped statement reflects that the victim told the officer that she was let out some distance from her home so that the suspect would not know where she lived. This inconsistency (and others) creates grave doubts in the jurors' minds as to the credibility of the victim.

2. Hostile & Recanting Witnesses

Sometime witnesses don't want to cooperate with the investigation and prosecution of a case for any number of reasons. Further, other witnesses will be cooperative during the initial investigation but will no longer be once the case goes to trial. (This is a common occurrence in domestic violence cases.) Therefore, the best practice to get the most information out of a witness the first time you contact them. Witnesses who seem "friendly" to the investigation and prosecution of the case may change their outlook on a case and do so quickly. Do it the first time; you may not have another chance.

There will be times when you contact a witness that is clearly hostile towards you and your investigation. Often it is a friend or relative of the suspect who will do what they can to mislead you as to what really happened. However, a witness's lack of cooperation or even his fabricated version of events can ultimately be helpful to a case. Comparing a hostile witness's statements against evidence or other witness statements may show that witness's bias, thereby demonstrating that he is lying to protect the defendant. Therefore, make every effort to obtain statements from even the most hostile witness.

If the witness won't cooperate, it can be just as important to document what that person is saying or how he or she is responding to your request. Witnesses who are hostile to you on scene may try and show up at trial to aid the defendant. Making it clear that you tried to get a witness's account of what happened and noting the response can help discredit, in the eyes of a judge or a jury, whatever the newly concocted version of events may be. Hostile witnesses, including defendants, will frequently assert that he or she did not say what the officer claims, or that he or she wasn't even given the opportunity. One possible tactic is to ask them to write out the statement. By assuring the witness that he can write out what happened in his own words, it takes away any argument that he was misquoted or that he wasn't permitted to give his account of events. The witness that fails to provide any kind of oral or written statement, can skewered by an able prosecutor rather easily.

Example:

Prosecutor: On direct examination you testified that you saw the Mr. Smith (the victim) attack your friend Mr. Jones in the bar, correct?

Witness: Yes, that is what happened.

Prosecutor: You then further testified that it was clear that Mr. Jones, the defendant, was acting in self defense, correct?

Witness: Yes, he was acting in self defense.

Prosecutor: You were there when the police arrived, correct?

Witness: Yes.

Prosecutor: Police officers spoke with you, correct?

Witness: Yes.

Prosecutor: You told them that you "didn't see anything," correct?

Witness: Yes, but they were trying to put words in my mouth.

Prosecutor: Isn't it true that Officer Johnson asked you to fill out a written statement?

Witness: Yes.

Prosecutor: Would you agree with me that if you wrote your own statement that it would be your own words detailing what happened that night?

Witness: Yes.

As previously noted, some witnesses will recant (take back) what they told the police or other witnesses about an event. Just as officers can be impeached with their previous statements, so can other witnesses. During trial, a witness can be confronted with the statements that were made previously to the police. If that witness denies having made the statement or claims not to remember making it, the prosecutor can then call the police officer who heard the statement and that officer can testify as to what the witness said.

E. Property Descriptions and Values

Always list all property involved, including any distinguishing characteristics (serial number, trade name, scratches, etc.) and the value. Inaccurate descriptions or incomplete lists of property can cause many problems with a case and may end up making it difficult or impossible to prove.

Examples:

As part of a multi-defendant burglary ring case, an officer booking in evidence carelessly miss-copies the serial numbers of the stolen property recovered during a search warrant. The numbers distinguish property that was found in the various bedrooms throughout the house, and thus are attributable to different defendants. The prosecutor uses the officer's report as the basis for the complaint and incorrectly lists the wrong to stolen property to the wrong defendant.

While inventorying evidence from a theft, an officer mistakenly writes down the value of the stolen item as $150.00 when the true value is $1,500.00. As a result, the case is charged as a misdemeanor and not a felony.

F. Times

Time is often a critical component of a case. It is always important to document the times of particular events. Generally, you should include the following times within your reports:

1. time you were dispatched
2. time you arrived
3. time you cleared the scene
4. time you contacted the suspect or other relevant witnesses.
5. any other significant times (i.e., the beginning and end times of an interrogation).

G. Apparently Insignificant Facts

It is impossible to know at the beginning of an investigation what apparently insignificant facts will become important and result in the arrest and conviction of the perpetrator. For that reason, an officer should err on the side of including too many details rather than too few details.

Examples:

The victim was picked up while hitchhiking, taken to a remote area and raped. When telling the story of the rape to detectives she noted that the suspect played a tape of the *Ohio Players*. Later, when the suspect was arrested a warrant was issued for, among other evidence, the tape. Because the defendant testified that he had never seen the victim before,

the tape became strong circumstantial evidence that the victim was in the suspect's vehicle.

Officers responded to a silent alarm at a department store and found two suspects in the garage and excrement on the floor. At trial the suspects said they ran out of gas, one of them got sick and that they were looking for a restroom. One officer, however had noted in his report that the officer had found the suspect's car near the store and had *driven* the car to the impound lot. The jury concluded that, because of the thoroughness of the report, that if gas had been needed the officer would have stated that in his report. The suspects were convicted.

H. Information Tending to Disprove or Minimize the Suspect's Guilt

Information that tends to minimize or disprove the suspect's guilt should be documented in your report. The reasons for this are:

1. The Rules of Evidence require that any information that tends to minimize or disprove the suspect's guilt must be turned over to the defense. If evidence favorable to the defendant is withheld from the defense, the case may be mistried, reversed, or dismissed.

2. The prosecutor can be better judge a case if he or she is aware of any infirmities the case may have. If the prosecutor is aware of all the facts, both favorable and unfavorable, he or she can better assess what to do with the case (i.e., offer a plea bargain or make none at all).

3. An officer who candidly states all of the facts, rather than just those that are prejudicial to the defendant, will gain credibility with a judge and/or jury.

Example:

An officer arrests the suspect for a burglary. After taking a statement, the officer notes the suspect's admissions in his report, but neglects to note that the suspect denied involvement in the burglary. The defense attorney during cross-examination establishes that the officer was not trying to objectively investigate the crime but was intent on "getting my client" no matter what the facts were.

I. Some Things Which Should Not Be Documented

A police report should document facts, not assumptions, opinions, conclusions, or theories of the officer.

1. Opinions

A report should not contain opinions. Rather, the report should state the facts underlying that opinion. If you have an opinion about the case, always tell the prosecutor in person so that the opinion will not be a subject of cross-examination.

Example:

An officer responds to a domestic violence call. He speaks to a female who called the police, but when interviewed she is reluctant to answer questions and is not cooperative in answering questions. Further she has faint red marks on her throat. The officer notes in her report that the witness was "evasive and seemed to be trying to avoid answering questions," and "that the red marks observed may have been self inflicted." Later, it is learned that the defendant had previously threatened her that if she ever cooperated with the police that he would kill her.

The officers opinion that she was "evasive" and that the wounds "may have been self inflicted," will likely become key elements of the defense case, with the defense attorney asserting to the jury that even the police thought that she made it up, and thereby positing that the police must have thought the defendant was innocent.

2. Theories

Your documented factual or legal theories of the case often come back to haunt you at trial.

a. Factual Theories

Example:

An officer caught a burglar but found none of the stolen property. The officer then theorized that an accomplice was involved. At trial, the defense attorney used the officer's report to persuade the jury that even the officer could not believe that the defendant committed the crime alone.

3. Assumptions

When writing your report, never assume anything. Include only facts which you saw, heard, smelled, etc. If you are not absolutely certain something occurred, find out or leave it out.

Example:

An officer reported and testified that he saw the suspect write out a confession. Actually, the officer had looked through the window of the interrogation room and observed the witness writing. Later, the interrogating officer told the reporting officer that the suspect had confessed. At trial the defense attorney convinced the jury that if the officers would lie about one thing they would lie about everything.

4. Conclusions

Never put conclusions in your reports.

Example:

An officer, at a very early stage in the investigation, stated in his report the conclusion that the suspect was guilty. This conclusion was based upon very little evidence to link the suspect to the crime *at that time.* The defense attorney, at trial, used the officer's report to persuade the jury that the officers were so predisposed to convict the defendant that the officers could not fairly consider other evidence.

J. Writing with Preservation of Memory in Mind

Consider that the judicial system is often slow and that it may be months or even years after that the event that it goes to motions or trial. In the meantime, you may have handled hundreds of calls and cases. It's natural that over the passage of time you will forget what happened on a specific call. But when it comes time to recall the specific events of an individual incident, it is imperative that you get it right—you don't want a defendant getting off because you mixed up cases in your mind. Write details in your case that will help you recall the event. If something strange or unusual catches your attention find a way to incorporate it into your report. When you are reviewing your report months or years later, it may be that unusual bit of information that triggers your memory of the whole event.

V. SUGGESTED TECHNIQUES

The following are suggested issues to consider when writing your reports.

A. Overview

It is much easier to read and understand your reports if you give a quick short summary of the facts of your case in your first paragraph.

B. The Elements

As you write your report, consider the elements that must be proven. The failure to document the facts which establish the elements often results in the refusal to "file" a complaint.

C. The Facts

Your report should state the "facts and only the facts." Avoid conclusions, theories, and opinions. Always be as specific as possible in your description of the facts.

D. Suppression (Constitutional Issues)

When appellate courts (this includes both state and U.S. supreme courts) make decisions that interpret the Constitution, they often provide a template or a to-do list for how a matter is to be conducted in order to be deemed constitutional. As a law enforcement officer, it is necessary to understand court rulings on constitutional matters, as it affects how you conduct your investigations.

It is crucial, to avoid the suppression of evidence, that you include detailed information about the issues in your report. Remember that if the information is not in your report the court will often rule that a fact did not happen. If your report is mistaken, the court will often rule that the event did not happen as stated by the officer. Finally, avoid stating the legal theory for your conduct.

1. Searches and Seizures

Always specifically state the underlying facts supporting a search or seizure. If, for example, you fail to state in your report a reason for a stop or arrest, the court will presume that reason does not exist.

2. Statements from Suspects

Always state the specific information for the admissibility of statements from suspects. State who was present, when the statement was taken and where it was taken. State who gave the *Miranda* warnings, exactly what the suspect said, and any voluntariness factors that existed. Finally, state specifically what the suspect said even if it tends to show the suspect did not commit the crime.

E. Witness Statements

One of the biggest problems for prosecutors at trial is the officer's report relating an incorrect statement of a witness or victim. Be very, very certain that your report states exactly what the witnesses say and do not "put words in their mouths."

F. Rebutting Defenses

Try to include any facts that would rebut obvious defenses to the crime, especially information given to you by the suspect.

Chapter 14

TESTIMONY

I. INTRODUCTION

Testifying is an experience that many officers dread—especially those who have never done it. However, when required, an officer's testimony is a critical component to the success of a case, whether it be for a motions hearing or at trial. By reading and following the suggestions in this chapter, your courtroom testimony should be much more predictable and, therefore, more comfortable. As any experienced attorney will tell you, though, no amount of "studying" can take the place of being in court and testifying a few times in front of a jury. If you do not have this experience you should keep the following advice in mind as you prepare to testify.

A. You Are a Witness, Not an Advocate

Most officers like to think they should help the prosecutor win the case. Although you may be invested in seeing the person that committed the crime be held accountable, it is important that you approach your testimony as objectively as possible. Accept that the facts and evidence "are what they are," for better or worse. While testifying, you should never try to shade the facts or distort the truth to try and secure a conviction. Doing so may cause a judge or a jury to view the officer as biased and untruthful and thereby fostering doubt about the case and result in a mistrial or an acquittal. Remember that sewing the seeds of doubt is all defense attorneys are really trying to do – shading a case to make it better plays right in their hand. More so, the consequences of bolstering your testimony are not limited to an individual case. Every time a police officer is caught on the stand being untruthful, regardless of their intentions, the public becomes more willing to accept the notion—frequently propagated by defense attorneys—that law enforcement will lie, manufacture evidence, and seek to convict the wrongly accused. Do not risk your credibility and that of the profession by exaggerating or trying to fill in unsubstantiated details or try and otherwise to "improve" the case.

B. You Must Testify From Personal Knowledge

As a witness you should testify to only those facts you know of your own personal knowledge. When you look at your testimony in this way, it is simple. What could be easier than testifying only to what *you* saw, heard, smelled, or experienced? Generally the only exception to the personal knowledge requirement is an "expert" witness, who if qualified, may evaluate

reports generated by another person(s) and utilize that information, or sometimes hypothetical circumstances, and render an opinion.

II. PRE-TRIAL PREPARATION

Being prepared is essential when testifying. However, officers can become complacent about preparation because often they get called in to testify, only to find out that after sitting at the courthouse for long periods of time they are told that the case was resolved and they may be excused. After this occurs a number of times, an officer may be lulled into thinking that this will always happen. Officers with any amount of testifying experience can probably point to the instances where they went in not knowing the case as well as they should and were "torn up" by the defense attorney. Although preparation involves knowing your report, there are many other aspects to it.

A. At the Scene

Preparation for the courtroom begins at the crime scene. In order to prepare yourself at the beginning of an investigation, always keep in the back of your mind, "How do I prepare this case as if it is going to trial?"

1. Creating the Visual Case.

We are a visual society. Capturing the essence of a scene visually can be essential to its presentation at trial. Words often cannot capture what can be done with photographs, maps, diagrams, etc. Digital photographs or video are effective and inexpensive ways to present the scene to the judge or the jury. When testifying, it may be far easier to introduce a series of photographs or a map or diagram of the area to help set the scene so that the jury can more completely understand what happened during the incident and/or how you conducted your investigation. Jurors' memories of evidence is often better when the testimony is supplemented with visuals.

It is often helpful during trial preparation to meet the prosecutor at the crime scene and to walk them through it. Working with the prosecutor to utilize evidence such as photos, video, audio (911/Dispatch), and the physical evidence in a visual format to compliment your testimony will achieve far better results than just speaking alone.

2. Thorough Evidence Collection

In many cases a defense attorney is able to capitalize on an officer's failure to gather all of the evidence at the scene or properly document actions in the report. Television shows like CSI have created great

expectations, and sometimes unrealistic ones, for the types of evidence collected. Although inconvenient, those expectations often require you to think about items that may become an issue at trial. Defense attorneys are also aware of jurors' expectations and will try and key on what was not collected, intimating to the judge or jury, that if law enforcement had collected particular pieces of evidence, it may have absolved the defendant.

This perception has driven many in law enforcement to collect evidence that may not otherwise be considered useful to be collected and analyzed for such things as DNA or fingprints, even though the results may be inconclusive, just to show that the investigation was thorough.

B. Your Report

1. Writing Your Report

Although the Report Writing chapter discussed the importance of your report, it bears repeating: Your report will destroy you in court if it contains inaccuracies, discrepancies, exaggerations, theories, conclusions, or opinions. Always keep in the back of your mind as you write your report, "How can I justify this in court?"

Remember: Document just the *facts*.

2. Reviewing Reports

Always review your reports and the reports of your fellow officers.

Remember: The defense attorney will have reviewed all of the reports for inconsistencies between them.

Example:

A fellow officer misstates a fact in his report or fails to note a fact you put in your report. At trial, the defense attorney, during cross-examination, will make it look like *you* were mistaken (or lying). However, such mistakes, discrepancies, or omissions are usually easy to explain if the officer has discussed them with the prosecutor and is prepared to meet them.

C. Evidence

In order to introduce a piece of physical evidence (e.g., a gun, the drugs, the DNA), a witness is required to testify about it (where did it come from, how is it associated with the case or the defendant, what steps were taken to prevent it from being tampered with). Prior to testifying, you should consult with the

prosecutor as to what pieces of evidence he or she intends to introduce through you. If it is physical evidence, you want to review it to make certain that you can testify correctly about those pieces.

D. The Scene of the Crime

A defense attorney who can convince a jury that an officer is mistaken about the crime scene will argue that, if the officer cannot even accurately describe the crime scene, how can he or she be believed on other issues. Therefore, always try to visit the crime scene before testifying. Talk to the prosecutor and visit the scene together. That way, as you testify, you and the prosecutor will be visualizing the scene exactly the same way.

E. Interview With the Prosecutor

It is crucial in every case that is going to trial that you thoroughly discuss the case with the prosecutor.

1. Weaknesses

Always be prepared during the meeting to discuss weaknesses in the case, such as discrepancies in reports. Never withhold information from the prosecutor even if it may hurt the case. A prosecutor must know what all the evidence will be in order to properly prepare for weaknesses.

2. Testimonial Experience

Prosecutors should ask you how many times you have testified. It is especially important if you have never testified before, or have done only a few times, that you speak up. Ask any questions you may have. Once trial starts there is little or no time to address the things that you do not know.

3. Anticipated Questions

Be sure to ask the prosecutor what to expect on direct and cross-examination.

Note: Occasionally an officer is subpoenaed to testify for the defense. If this occurs, be sure to notify the prosecutor in order to discuss your anticipated testimony.

4. Limitations on Testimony

During the various court proceedings that lead up to trial, judges may impose limitations on what witnesses may say and what evidence may be introduced at trial. It is critical for you to know if there any subjects that will not be broached or must be handled delicately during trial. Although prosecutors should prepare you in advance, it does not always happen. Saying something that the court has ruled off limits will likely result in a mistrial.

5. Sitting In On The Trial

Most witnesses who testify during a trial are generally subject to a **sequestration order** by the court which means that they cannot be present in court while another witness is testifying. There are two notable exceptions to this order: the defendant and an **advisory witness**. An advisory witness—most often the lead officer—is allowed to sit with the prosecutor throughout the entire trial even if he or she is testifying. Prosecutors appreciate having advisory witnesses as they can provide insights into the investigation, respond to what witnesses or the defense are putting forth, offer up questions that should be asked, watch the jury for reactions to events during trial, and many other things. Officers who sit as advisory witnesses almost always come away from the experience having a greater understanding of the trial process, as well as recognizing ways improve future investigations.

III. APPEARANCE

The jury's impression of your personal appearance is important. If you will not be in uniform, always dress "up" and conservatively. Consult with the prosecutor as to whether you should appear in uniform or in civilian clothing.

IV. DEMEANOR

Your demeanor in court is as important as your appearance and testimony. It is often difficult for officers to walk the "demeanor tightrope." For example, an officer should not be cocky, nor should he or she be timid. Rather, the officer should be confident. The best way to avoid extremes is to remember that you are a professional. If you act like a professional, the jurors will perceive you as a professional. The jurors will then respect you and listen to your testimony.

A. The Oath

As you approach the witness stand, take instructions from the judge or the bailiff. The judge will typically have you raise your hand (no Bibles involved) and have you openly state that "you swear or affirm that you will tell the truth and nothing but the truth."

Note: The only thing the jurors have to do during this time is watch you. If their initial impression is that you are serious and professional, they will be much more receptive to your testimony.

B. The Witness Stand

1. Positioning

After you have taken the witness stand assume a relaxed position, but do not slouch.

2. Microphone

Typically the witness stand is equipped with a microphone. In many instances it is used to amplify your voice so that everyone in the courtroom can hear you. Also, in the absence of a court reporter, it may be linked to a recording system that is preserving the testimony for appellate purposes. While testifying, you want to be conscious of the microphone and that you are speaking near it so that it is picking up what you say.

3. Looking At The Jurors

Testifying can sometimes make for an awkward conversation in that it is the prosecutor or the defense attorney who is asking you the questions, but it is the jury or the judge to whom you are really directing your answers, because they are the ones who are making the ultimate determination.

The following are some suggestions to help you in adjusting to this three way conversation.

a. After taking the stand, look momentarily at the jurors. Then await questions from the attorneys.

b. If an answer is very brief, you may continue to look at the attorneys. However, if an answer requires more of an explanation, direct your answers to the jurors or the judge.

4. Answering Questions

a. Answering what is only asked of you

b. Compound Questions

A compound question is where there is really more than one question contained within what is presented as a single question.

Example:

Prosecutor: Officer Brown, did you talk to the victim and collect the gun while on scene?

If the officer did both, it might not be a big deal. However, if the officer only spoke to the victim, but did not collect the gun then the question cannot be answered succinctly. If you recognize a compound question, you can respond a couple of different ways.

Example:

Officer: You are really asking me two questions, could you rephrase the questions?

or

Officer: That is really two questions. But as to the first part, I did contact and interview Mr. Jenkins on scene, however, as to the second part of the question, I did not collect the gun. Officer Rogers collected the gun.

5. Helping the Prosecutor

When testifying, the best thing you can do to help the prosecutor is to remain as professional and as impartial as you possibly can be.

6. Dealing with the Defense Attorney

There is a great temptation by officers to want to get into a verbal sparring match with the defense attorney. Reluctant to agree to anything, some officers want to fight every defense question showing contempt for defense counsel and their cause. Don't give in to this temptation. Defense attorneys love it when officers engage them and it is often their strategy to try and bait officers into doing it.

One of the tactics used by defense attorneys is to initially ask a handful of innocuous questions that the officer should agree with. However, if the defense attorney senses any resistance by the officer, they will try and push the matter, hoping to show that the officer will stubbornly fight them on every point of fact, thereby trying to project to the jury that the officer is biased, irrational, or vindictive.

What defense attorneys cannot stand is the officer who is pleasant, professional and forthcoming, answering defense questions as truthfully and with the utmost candor as possible. Juries respect the honesty of the officer and it acts as a deterrent to the defense from trying to attack the your credibility.

Example:

Defense Attorney: Officer Jones, on direct examination you testified that when you contacted Mrs. Smith, you observed her to have blood shot, watery eyes, and slurred speech, correct?

Officer: That is correct.

Defense Attorney: Officer Jones, isn't it true that a person can have blood shot watery eyes and not be under the influence of alcohol?

Officer: That's true.

Defense Attorney: Isn't it true that a person can have slurred speech and not be under the influence of alcohol?

Officer: That's also possible.

Frequently, an officer will get caught in the trap of thinking that by agreeing with the defense attorney's questions, that they are agreeing with the defense's theory of the case (i.e., Mrs. Smith wasn't driving under the influence of alcohol). By listening to the questions closely and answering objectively what was asked, Officer Jones diffuses the questions and shows to the jury that she is upfront and honest. The fact that Officer Jones agreed that there could be other reasons why Mrs. Smith showed these signs is largely insignificant because of all of the other combined evidence in the case that shows that she was really DUI.

7. Surprise Questions

Defense attorneys will almost certainly ask you questions that you cannot anticipate, and occasionally prosecutors will too. Simply listen

to the question and answer it to the best of your ability. If at any time you don't understand the question, you may ask the attorney to rephrase it.

Note: This will rarely occur if you and the prosecutor are prepared. It's always worth asking the prosecutor if you can see a list of questions that they intend on asking you. It also helps to review the questions so that if they are factually incorrect or worded inaccurately, you can have input on how they are phrased.

8. Hostile/Offensive Questions

Facing a blistering cross-examination can one be one of the most challenging events you will go through in your law enforcement career. Although ethical rules, the prosecutor's objections, and a judge's rulings should prevent a defense attorney from trying to impugn your reputation and make you out to be the bad guy, it will nevertheless happen. Realize that if there are no apparent defenses, attacking the police and the investigation will be the default choice. It is essential, however, that you never get mad or argue with the defense attorney no matter how hostile or offensive the questions. If you ignore the hostility and continue to answer with confidence, you will make points with the jury. If the jury believes you have been unjustly abused, they will take it out on the defense attorney in their verdict.

C. Conversations Off The Stand

Officers must be aware of the effect of their conversations upon a trial.

1. Around Jurors

An officer must be extremely careful about conduct around jurors. The goal is for jurors to perceive you as professional, kind, courteous, and sensitive, off the stand as well as on the stand.

You never know when a juror may be around (e.g., in elevators, restrooms, etc.) so never say anything in the courthouse you would not want a juror to hear. Even if you are not at the courthouse for a jury trial you must be just as careful. There will be jurors from other cases, and your actions can affect how those jurors view other officers.

a. Talking to Jurors

Talking to jurors while a trial is going on is to be absolutely avoided. Typically when a jury is being sworn in, the presiding

jury will inform the jurors that the attorneys and witnesses have express instructions not to talk to them and for the jury not to take it personally if a witness refuses to talk to them or even acknowledge them. If a juror tries to engage in conversation of any kind, politely walk away without saying anything. If they persist, simply say that you are not allowed to speak with them and walk away. Report what happened immediately to the prosecutor. The prosecutor will typically report it to the judge and the defense attorney and a record will be made on it, to prevent any allegations later that there was any kind of effort to have contact or somehow otherwise to influence the juror.

b. Talking to the Prosecutor

You should never discuss the case with the prosecutor or even the defense attorney when a juror could be present. Beware of your surroundings in the hallway, the elevator, and the lunchroom. If you need to discuss the case, go to a safe location where you are sure that no possible juror could hear you. During breaks between testimony, you may talk to the prosecutor about your testimony or the prosecutor may ask you questions about other aspects of the investigation that came out through your testimony. Defense attorneys will sometimes try and assert to the judge that this is in violation of the sequestration order—it is not, and there is strong case law that supports this position.

c. Other Witnesses

When a court orders a sequestration order, it bars you from discussing your testimony or another witness's testimony while the trial is proceeding. When you are sitting in a conference room with a bunch of your fellow officers waiting for one another to testify, do not discuss the case! Defense attorneys have been known to come into the conference room and pretend to make a phone call or look for something just to see if witnesses are exchanging information about the trial. DO NOT LET THIS HAPPEN. Talk about anything but the case itself. After the trial is over, you are free to discuss the case with whomever.

Note: If you are the advisory witness and have the opportunity to observe another witness testify and that triggers some question(s) regarding that witness's testimony, you may not go and follow up with the witness about the question. However, you can pass on the information to the prosecutor and he or she may inquire of the witness.

2. With Defense Attorneys

Defense attorneys will often make efforts to try and talk to you prior to even just prior or during a break at trial. It is your decision whether to talk to the defense attorney or not—the choice is yours to make. Some argue that you should make yourself available to the defense because it will demonstrate your objectivity and will steal away any chance for the defense to suggest that your failure to do so suggests your bias or that you are fearful of defending your own case.

If you decide to talk with a defense lawyer, be prepared and very aware of what is happening around you. Do not let a lawyer's friendly attitude cause you to let your guard down. Be cognizant of what they are asking and if they are laying traps for you in trial. Often, the defense attorney will have an investigator of their own present when they meet with you. The investigator will write a report of the conversation with you, and may be called to testify to impeach your testimony. If you do agree to meet with defense counsel and their investigator, request as a condition of your meeting, that the defense investigator provide you with a copy of any report he writes. If you feel you are misquoted in the report, then you may ask that it be corrected. If they fail to correct it and try and use it against you in trial, you can often demonstrate to the judge and jury that they are acting in bad faith in that you tried to get them to correct the error.

V. TESTIMONY

Testimony of witnesses forms the "heart" of the trial. This testimony is given during direct or cross-examination.

A. General Rules

Whether you are testifying on direct or cross-examination, there are certain general rules of testimony which you should be aware of and follow:

1. The Court Reporter

In most felony cases, the motions hearings and trial will be transcribed by a court reporter. Court reporters create a short hand record of everything that is said in the proceeding. These are later made into the transcripts in which the reader can see word-for-word what was said by all of the parties involved. Misdemeanor cases and preliminary hearings are often recorded through the use of audio equipment and can later be transcribed by someone listening to the recording. Transcripts are incredibly important because when a defendant appeals a case, an

appellate court reviews the transcripts and the evidence admitted to determine if there was any kind of error committed that may require action (e.g., a new trial). Therefore, whether there is a courter report present or the proceedings are being recorded, there are a number of rules that you need to adhere to in order to "make a good record":

a. Speak Clearly

If you are a fast talker or just nervous, you may face the wrath of the court reporter—they will usually caution you if you are going too fast. If the proceedings are only being recorded, you need to be mindful that someone is going to have to listen to you and then accurately transcribe what you are saying. Also, keep in mind that most witness stands are equipped with microphones—this is not only to amplify your voice so that everyone can hear, but it also often linked to the recording system. Be sure that you are speaking into the microphone so that the judge, jury, and court reporter can hear you, and (in the absence of a court reporter) that the recording system can accurately pick up what you are saying.

b. Describing in words in what cannot be seen

As was previously discussed earlier, creating a visual trial is often essential to conveying to a judge or jury what actually happened. Yet, when making a record you have to make sure that a person not present at the trial (e.g., an Assistant Attorney General trying to prepare the case for appeal) can read a transcript and match it up to the evidence. As a result, remember that certain non-verbal things, such as pointing to something, make complete sense to everyone present at the trial; but cannot be easily conveyed in a transcript. For example, if you were testifying in a resisting arrest/assault on a peace officer case, you may be able to effectively convey to the jury how the fight played out by gesticulating and using your arms and body to effectively convey what happened, but in order to make an effective record, you need to be describing in words the gestures that you are making so that what you are showing the jury can be captured by your words and effectively relay the action to someone who wasn't there.

2. Style Tips

a. Police Jargon

Cops and lawyers are notorious for taking something simple and muddying it with so much technical jargon that it sounds stilted and awkward to the average jury.

Example: I was traveling southbound in the number three lane, when I observed a vehicle traveling ahead of me with a defective lighting system. I initiated a traffic stop and contacted the suspect. Upon contacting the suspect, I observed the suspect to have possible indicia of intoxication.

Simplifying speech will benefit you in the long run. Explain it as though you would explain it to an elementary school student.

Better Example: I was in my patrol car going south in the far right hand lane, when I saw a car in front of me with a right broken tail light. I pulled the car over and contacted the driver. When I got to the window, I immediately noticed that the driver had a strong odor of alcohol as he talked to me, and I could see he had blood shot, watery eyes. Also, when he talked to me I could hear that he was slurring his words.

Note: When talking about a suspect always use the word suspect or his or her last name. Never refer to the suspect by his or her first name.

b. Direct Quotes

What people say is often of great significance in a trial. Where you have quoted a person, you want to make certain that you are providing exactly what they said as they said it to the judge and the jury. If you quote a witness or defendant's statement, do not paraphrase, state it exactly. If you cannot remember the exact verbiage used, you may ask to refer your report.

3. Volunteering Information

In general, you should answer only the question asked. However, there may be times when an attorney's questions may reflect a lack of understanding of events or context—perhaps as a result of inadequate preparation with the prosecutor, or in the case of the defense attorney a deliberate attempt to narrowly construe and reframe a fact or point to their favor. Under those circumstances, it may be warranted to provide details that correctly align the question or point being explored with the facts and context in which they occurred.

4. Objections

Objections between the attorneys during your testimony can be confusing. If an attorney objects, stop what you are saying, or don't begin to answer the question. Sometimes the attorneys will make arguments in open court and the judge will make a decision by "sustaining", or "overruling" the objection. Other times, the attorneys will ask to "approach the bench" whereupon they will huddle up near the judge and whisper their respective arguments to the judge so that the jury cannot hear what is being said. Afterwards the judge will typically state aloud what his or her ruling is. If the court "sustains" the objection, the officer may not answer the question; if the court "overrules" the objection, the officer may then answer the question. If it is unclear to you how to proceed, you may ask the judge if you can answer the question, or you can ask the attorney to restate the question.

B. Direct Examination

Direct examination is the phase of testimony where an attorney asks questions of a witness that they are "calling" to testify. In criminal cases, it is typically the prosecutor who will call a law enforcement officer to the stand to testify. The purpose of direct examination is to have the witness explain what happened and/or describe his or her role in the case. The content is largely unregulated (although there are exceptions that are usually specific to the case), but there are procedural requirements:

1. Open Ended vs. Leading Questions

During direct examination, a lawyer is required to format questions in such a way that the witness is supplying the answer. This is in contrast to the leading question that, by design, contains the answer within the question and compels the witness to answer only "yes" or "no."

Example – Open Ended Question:

Prosecutor: When you arrived on scene, did you contact anyone?

Officer: Yes, I contacted the reporting party, Julie Jackson.

Example – Leading Question

Defense Attorney: When you arrived on scene, you contacted Julie Jackson, correct?

Officer: Yes.

2. Refreshing Recollection

A witness must testify from his or her own memory of events. Therefore, as an officer, you are not permitted to walk into court and merely read your own report. However, if you fail to remember a detail that is contained within your report, you may be able to review it during testimony for purposes of having your memory "refreshed."

The procedure works as follows:

- You are testifying and the prosecutor or defense attorney asks you a question in which you cannot recall a particular detail.
- You may cue the lawyer by saying, "I don't recall, but I know that I detailed that in my report."
- The lawyer should then ask, "Would it refresh your memory if you reviewed your report?"
- To which you may then reply, "Yes."
- At that point, you may look at your report. Once you find the detail in your report, you are not permitted to read it, but rather you should lay the report down or turn it over and then answer the question from your now-refreshed memory.

Although having your recollection refreshed is a great relief mechanism to help you out, it doesn't supplant the need to prepare and know your case well. An officer who must continually have his or her memory refreshed during a trial will convey an image to the jury as someone who is sloppy, uninformed, and disinterested. Over-reliance on this approach will affect your credibility. The exception may be when there are extensive direct quotes that need to be testified to very accurately. In that circumstance, it may be necessary to reference your report multiple times.

3. Admitting Physical Evidence

The process of admitting evidence is not inherently difficult, but there are rules that must be followed. The steps that are required to get a piece of evidence into evidence are referred to as foundations. **Foundations** are questions that must be asked of a witness through whom the prosecutor seeks to admit the evidence. The purpose behind foundation questions are to provide background information **(Authentication)** for the piece of evidence in question so as to allow the judge to make the necessary determinations as to whether a piece of evidence should be admitted (i.e., heard or viewed by the jury) or not.

The threshold issue for admitting physical evidence is identification: is this piece of evidence associated with this case? This may sound like a simple enough question, but the real purpose of this question is, through the words of the officer, to demonstrate how he or she knows the piece of evidence belongs to the case. This can take place in a couple of ways.

a. **Distinguishing Features** – there may be instances where a piece of evidence is so distinct that it is easily recognizable and cannot be confused with something else. Another method is where the officer has created a distinguishing mark or identifying information to make it distinct.

> **Example:**
> An officer responds to a homicide scene where he recovers the murder weapon – a samurai sword. The sword has a distinct handle as well as as blood stains on the blade. Due to the distinct nature of the weapon, the specific details of the weapon, including the blood stains, as well as the memory of a heinous crime scene, the officer can say unequivocally that he recognizes that as the specific weapon that he recovered at the crime scene.
>
> **Prosecutor:** Officer Smith, I am showing you what has been marked as People's Exhibit 1. Do you recognize it?
>
> **Officer:** I do.
>
> **Prosecutor:** How do you recognize it?
>
> **Officer:** I collected it at the scene.

"*How do you recognize it*?" is often the question that causes officers the most confusion. The question is really seeking to answer how the witness is associated with the piece of evidence as opposed to some quality about the evidence itself. When asked, some officers perceive the question as "have you ever seen this kind of object before?" To which they look at the prosecutor—who just insulted their intelligence—and reply, "It's a sword."

> **Prosecutor:** What is it?
>
> **Officer:** It is a sword.
>
> **Prosecutor**: Can you describe how you found it?

Officer: When I arrived on scene, as I approached the front yard of the house, I saw a man lying in the front yard, face up, with blood all over his shirt. About three feet away from him, closer to the house, I saw that sword lying on the ground.

Prosecutor: Is the sword in substantially the same condition as when you collected?

Officer: Yes.

Prosecutor: Move to admit.

b. **Chain of Custody** – is a method for authenticating an item of evidence when it has touched multiple hands. The purpose is to document who has had contact with the piece of evidence and what has been done with it. The process is significant when identifying non-readily identifiable evidence (e.g., drugs, DNA samples, serology samples), but may also be necessary when a readily identifiable object has been subjected to laboratory testing. The purpose is to account for all of the possible hands that have handled it since it was collected, and to show if it could have been tampered with or subject to manipulation.

Example:

Prosecutor: Officer, can you describe the process you used when collecting the sword?

Officer: Yes, after the scene was secured, I began taking photos of the scene to show where everything was located. After photographing the sword, I put on gloves, picked up the sword, and placed it into a plastic evidence bag. I then filled out an evidence tag in which I wrote down all of the relevant details including the case number, the date, where it was found, and who found it. I then took it to my patrol car and secured it in the trunk. When I cleared the scene, I returned to the police department I sealed the evidence bag, I covered the seal with evidence tape and I booked it into evidence.

Prosecutor: Is the sword in substantially the same condition as when you collected it?

Just because a piece of evidence isn't exactly like you saw it when you collected, doesn't mean it is not admissible; however, you do need to describe any differences so that the court can determine if

those differences are so significant that it compromises the essential nature of the evidence. The rules favor admission.

> **Officer:** Kind of—when I originally saw the sword that night, the blood on the blade was fresh and now it is dry. Also, when I collected it, the sword did not have the grey powder on the handle that it does now. Other than that, it looks the same as when I collected it.
>
> **Prosecutor:** Do you know what the gray powder is from?
>
> **Officer:** The sword was submitted to the state laboratory to have fingerprint, DNA, and serology tests performed on it. The grey powder is used during the fingerprint process.
>
> **Prosecutor:** To your knowledge were those tests performed?
>
> **Officer:** Yes, I submitted the request for fingerprint, DNA, and serology tests to be performed on the sword. Upon completion, I was sent notification by the lab informing that those tests were completed.
>
> **Prosecutor:** Your honor, I move to admit People's Exhibit 1 subject to further testimony.

Here, the prosecutor, through the testimony of the officer, has elicited the necessary testimony to establish the **foundation** and **authenticate** one link in the chain of custody. The prosecutor has sought to admit the piece of evidence, but will first need to put on the other people who handled it, specifically the lab people who handled the sword and completed their tests on it.

4. Photographs

Photographs are always ideal ways to supplement your testimony by "showing' the judge or jury what you saw or explaining the crime scene. Especially with the common use of digital cameras, it is easy and inexpensive to get many photographs during an investigation. To be admitted into evidence, it is not required that the photographer testify. A proper foundation for a photograph only requires that someone can testify that the image accurately reflects what was actually observed.

Economizing the Process: It is common for many photographs to be introduced during a trial, therefore, prosecutors may try and streamline the foundational process by seeking to introduce the photos in bunches.

Example:

Prosecutor: Officer, I am showing you what has been marked as People's Exhibits 1-12. Do you recognize these items?

Officer: I do.

Prosecutor: How do you recognize them?

Officer: I was present at the scene when they were taken and I reviewed all of them prior to trial.

Prosecutor: What are they?

Officer: They are photographs that were taken of the defendant's car, on scene, after the collision.

Prosecutor: Do these images accurately reflect what the defendant's car looked like after you arrived on scene?

Officer: Yes.

Prosecutor: Move to admit People's Exhibits 1-12.

5. Diagrams, Charts, Maps, Etc.

Diagrams, charts, and maps are often valuable in helping a jury visualize the events and investigation of a case. Sometimes it will be necessary to testify using diagrams, charts, or maps. Even if you did not create the exhibit, it may be admissible, provided that you can provide the necessary foundation.

Example (Map)

Prosecutor: I am showing you what has been marked as People's Exhibit 10, do you recognize it?

Officer: I do. It is a map.
Prosecutor: How do you recognize it?

Officer: I am familiar with the area since it is part of my sector that I regularly patrol.

Prosecutor: Would it assist your testimony to use the map to explain what occurred on the night in question.

Officer: Yes.

Prosecutor: Move to admit People's 10.

C. Cross-Examination

Officers mostly dread cross-examination because they know that a defense attorney will nitpick every facet of their investigation and may try and trash their credibility along the way. Yet, understanding what a defense attorney is really trying to accomplish will better help you prepare for cross-examination and lessen some of the anxiety that goes with being cross-examined.

Remember that it is a defense attorney's ethical obligation to "zealously" defend their client. Further, it is the client's ultimate decision whether to take a case to trial irrespective of the defense attorney's advice on how to proceed. Taken together, those two factors mean that regardless of whether the case is "good" or "bad" for the defense, a defense attorney is going to play the cards (available defenses) that he or she is dealt. If you are willing to consider the bigger picture of how a case can be defended, you will cope much better with cross-examination and likely improve your investigations.

Consider this: when boiled down, a defendant really only has three substantive defenses to any type of criminal case:

1. Building Defenses

a. Alternative Suspect - the essence of the defense is that someone else committed the crime.

(1) Alibi – Alibi asserts that the defendant was someplace else and therefore could not have committed the crime. The defense is required to notify the prosecutor if they intend on raising alibi at trial. Therefore, you and the prosecutor will know well ahead of time if the defense is trying to assert that the defendant wasn't there. To introduce alibi evidence, the defense must notify the prosecutor at least 30 days before trial, and provide "names and addresses of the witnesses the defendant will call to support the defense of alibi."

(2) Misidentification – to find someone guilty of a crime, it must necessarily be proven that they are the one who committed the crime. While it is obvious in some cases, clearly there are instances where there is no identifying witness (e.g., in many murders, the only witness is dead). In other cases, the witness may have only seen the perpetrator

briefly or the suspect may have worn a mask. Therefore, in some cases, the defense will try and show that witnesses could be uncertain as to the identification. In other instances, where identification is made through means such as fingerprints

b. **Affirmative Defenses** – are defenses that are sanctioned by the law. Affirmative defenses basically acknowledge that the defendant engaged in the conduct, but either had a legally protected right to do so, or due to some legally recognized infirmity, the defendant will not be held criminally responsible.

(1) **Defense of Person/ Property/ Premises** – acknowledges that the defendant engaged in assaultive behavior, but that they were acting out of some legally protected right of self defense, defense of others, or defense or property or premises.

(2) **Consent** – often in sex assault cases (e.g., date rape), the defense is that the contact was consensual between the parties involved.

(3) **Insanity/ Impaired Mental Condition**

(4) **Intoxication** – Generally, intoxication is not a defense. However there are some nuances that require elaboration.

(a) **Involuntary Intoxication** – this may conjure images of Hollywood where a person is drugged and then unwittingly commits a crime. Although the circumstances where this may occur is certain to be extremely rare, it nevertheless is recognized as a defense.

(b) **Voluntary Intoxication** - is not an affirmative defense, however there instances where a jury can consider it. In crimes where the mental state is knowingly or recklessly (referred to as General Intent crimes) intoxication is not a defense. Where the mental state requirement is intent/intentionally (a specific intent crime) self induced intoxication, the jury may consider whether or not the intoxication negated the mental intent.

Common sense tells you that where the facts or a version of the facts would approach the existence of an affirmative defense, the defense attorney will be exploring this on cross-examination.

Anticipating and investigating your cases with these things in mind will likely save you on the stand. Defense attorneys, when possible, will try to paint to the jury that the police jumped to conclusions as to what happened, and didn't explore what could have been legitimate lawful reasons for the conduct or neglected to investigate more regarding some infirmity that the defendant possessed at the time.

c. **The witness is lying.** In cases where the the lay witnesses know the defendant, this type of defense may be employed. Domestic violence, sex assault, and child abuse are all classic instances where a defense attorney will take aim at the victim trying to establish that the crime was fabricated in whole or in part out of revenge, jealously, embarrassment, etc.

Many officers will review a case and wonder to themselves why a defendant is pushing the case to trial. Remember that it is ultimately the defendant's decision, not the attorney, as to whether they choose to go forward with trial. However it is absolutely crucial to your successful courtroom performance that you understand in advance why defense attorneys ask certain questions and how to handle these questions.

If you keep the following things in the back of your mind at all times during cross-examination, you cannot go wrong: you are required to testify only to matters which you remember from **personal knowledge**; simply tell the truth about facts you know from personal knowledge.

2. Leading Questions

The very first and most important rule all attorneys learn about cross-examination is "you never ask a question you do not know the answer to." This is accomplished by asking "leading" questions, i.e., "putting words" into the witness's mouth. Rarely will a competent defense attorney ask anything but leading questions on important issues. Therefore, the attorney will expect a "yes" or "no" answer.

3. Purposes

There are two purposes of cross-examination. One is to bolster the defendant's story. The other is to "impeach" the officer or other witnesses.

a. Bolstering the Defendant's Story

Many of the defense attorney's questions will focus upon issues which will substantiate and corroborate the defendant's story.

b. Impeachment

Many of the defense attorney's questions will be directed toward the impeachment (discrediting) of the state's witnesses. The main ways a witness is discredited are:

(1) Prior Inconsistent Statements

Example:

Officer's testimony is different from a prior report.

(2) Bias, Prejudice

Example:

Defense attorney tries to show that the officer, who was armed with very little evidence, is out to "get" the defendant.

(3) Ability to Perceive, Recollect, or Narrate

Example:

The officer forgets details of the crime scene.

D. Essential Testifying Skills

1. Listen to the Question

One of the most difficult problems of communicating is that people simply do not listen. When the defense attorney asks a question, focus all of your attention on what he or she is asking.

2. Be Fair

An officer will be a much more effective witness if he or she appears to be fair. There will *always* be questions asked of you by the defense attorney which will call for answers that are helpful to the defendant. If so, your frank answer will impress the jury that you are fair. Then, when you get to say something bad about the defendant the jury will trust and believe you.

3. Understand What is Being Asked and Why

As stated above, all defense attorneys know they must ask only leading questions about important issues on cross-examination.

a. Unclear Questions

For a defense attorney to ask only leading questions, he must either be very prepared or very smart, because most adverse witnesses just will not cooperate in their own destruction. Therefore, the defense attorney must be prepared for any answer. If the questioner gets "untracked" by the witness, he must quickly decide what series of questions will not only get him back "on the track" but also eventually result in the impeachment of the witness.

Even the best prepared defense attorney is forced, then, to ask leading questions off the "top of his head." These questions often do not come out clearly. When they do not, simply tell the attorney, "I do not understand the question."

Note: Do not say this to stall for time (the jury will see right through this) and do not do it on a lot of easy questions (the jury will think you are either dumb or being difficult).

b. Hostile or Offensive Questions

Hostile or offensive questions are, of course, asked to put the officer in a bad light with the jury. Usually these questions are objected to by the prosecutor as argumentative. If the prosecutor does not object to these questions, keep your poise and answer the question politely as best you can.

c. Friendly Questions

A defense attorney who begins asking "friendly" questions is not trying to be friendly. He is trying to get you to change your demeanor from professional and businesslike to unprofessional and social. Therefore, if an attorney asks if he can call you "Bob," etc., you might want to answer "if you wish." But do not allow yourself to start calling the defense attorney or his client by their first names. And do not let your guard down. Also, avoid laughing at a defense attorney's jokes. Usually, the defense attorney wants the

state's witnesses to laugh so the jury will think the case is not all that serious.

d. Compound Questions

Compound questions are questions in which two questions are asked at once. Unless you can take the questions one at a time and answer them, ask the attorney which question you should answer first.

e. Rapid-Fire Questions

Rapid-fire questions are used by a defense attorney to throw an officer off balance. An officer can counter this type of questioning by pausing after every question and refusing to speed up his answer to keep up with the attorney. By doing this, an officer can control the pace of the testimony.

Note: If a defense attorney interrupts you while you are talking, stop talking; do not try to talk through the defense attorney's next question. If the prosecutor does not object to the interruption and you need to finish your answer, wait until the attorney finishes the question, and then ask the court if you may be permitted to finish your last answer. Jurors, like everyone else, get irritated by an attorney who interrupts a witness' answer.

4. Know How to Answer

Again, the best policy in answering questions on cross-examination is to tell the truth. Having said that, you must understand that the defense attorney is there to help the defendant and hurt anyone who testifies against the defendant. Your answers, therefore, must be geared to be fair and firm also.

a. Certainty

An officer cannot possibly be certain of the answers to every question asked on cross-examination. An officer must know when it is crucial to be absolutely certain of the answers and when it is not necessary, and sometimes dangerous, to be sure. Of course, no matter how important or unimportant the issue, if you are sure or unsure, tell the truth and say so.

(1) Unimportant Issues

A popular trick among defense attorneys is to ask an officer about a lot of minor details. The officer who answers with certainty is then "locked into" the answer and may later be shown to be incorrect. After that, the officer is not only uncomfortable about the rest of the answers but the attorney can argue that if the officer was mistaken (or lied) about one fact, he should not be believed on others.

Example:

An officer is asked which day it was that the crime occurred. When the officer answers, "Tuesday," the defense attorney asks how the officer knows this. The officer gives an elaborate explanation and against states with certainty it was Tuesday. The officer is then shown that the crime occurred on a Friday. After that, every time the officer states that he is certain about an answer, the defense attorney asks, "Are you as sure about that answer as you were that it was Tuesday?"

(2) Approximations

Sometimes it is better to approximate than give an exact answer. This is especially the case when the answer involves times or distances. Sometimes when you tie yourself into an exact distance, time, color, age, etc., a defense attorney will prove that you are inaccurate and thereby damage your credibility. Unless you are absolutely certain of the exact distance, time, color, etc., do not state it with certainty.

Examples:

(a) It was 30 to 40 feet.

(b) It was about 25 feet.

(c) It happened at approximately 3:00.

(3) Important Issues

If the issue is important and you are certain of the answer be sure to answer with certainty. Especially important are those answers which tie the defendant to the crime such as where

the evidence was found, the identification of the defendant, and statements which the defendant made.

(4) "I Don't Know"

There is nothing wrong with an officer answering, "I don't know" or "I don't remember." However, if the information requested should be known by the officer, it should be in the officer's report.

(5) Guesses

Never guess unless asked to do so (and no objection is raised). The best response when you think you know the answer is "I don't know for sure, but I think . . ." Often the defense attorney will interrupt at this point and say "We don't care what you think officer, we need to know what you know." (The jury, however, will want to know what you think and will think the defense attorney is a jerk for cutting you off).

(6) Bluffs, Exaggerations

Bluffs and exaggerations have probably gotten more officers into trouble on the stand than any type of answer. Never bluff or exaggerate.

b. Cleverness

An officer's clever answers almost never "come off" right with the jury. The jurors usually take their oaths and responsibilities very seriously. They, therefore, usually view the clever officer as inconsistent, sometimes even offensive. Besides, the last thing an officer wants to create is an atmosphere of levity.

c. Lies

Occasionally an officer will misstate the facts in order to justify his or her actions. This is a very dangerous mistake.

Example:

An officer with reasonable suspicion to stop the driver of a car sees a dead body in the back seat during the detention. During the suppression hearing the defense attorney encourages the officer to say that the defendant was speeding

(as further justification for the stop). After the officer states that the suspect was also speeding, the defense attorney destroys the officer's credibility by showing that the suspect was not speeding and that no citation was issued. Consequently, the judge doubts the officer had reasonable suspicion.

d. Correcting Mistakes

If you make a mistake or misstatement in your testimony, ask the judge if you can correct it. The jury will be impressed by your candor if you do that. If, on the other hand the defense attorney points out the misstatement, your credibility will be destroyed.

e. Looking to the Prosecutor for Help

Many officers, when asked a tough question on cross-examination, look to the prosecutor for help. This is a mistake which will hurt your credibility with the jury. If an objection is appropriate, the prosecutor should object. If no objection is made, answer the question truthfully.

f. Explaining Your Answer

The worst thing that can happen to a cross-examiner is to permit the officer to explain an answer. The attorney will go to great lengths to keep the officer from answering anything but "yes" or "no." However, sometimes a question simply cannot be answered with a simple "yes" or "no." If the question cannot be answered by a question that calls for a simple "yes" or "no" answer, tell the attorney the question cannot be so answered.

Example:

An officer takes a statement from a defense witness. The officer does not consider the statement very important, so he does not document it in his report Later, at trial, the defense witness testifies differently from his statement to the officer. The prosecutor, therefore calls the officer to the stand to "impeach" the defense witness with his "prior inconsistent statement." After the officer explains the inconsistent statement to the jury, the defense attorney asks on cross-examination:

(1) How Not to Answer

Q: Officer, did you write a report about this incident?

A: Yes, sir

Q: The purpose of your report is to document all of the important facts about this incident?

A: Yes, sir.

Q: Did you purposefully leave out any important facts when you wrote your report about this incident?

A: No, but I didn't . . .

Q: (interrupting) Officer, just answer the question, "yes" or "no."

Q: Officer, let me show you defense exhibit "G." Do you recognize that exhibit (attorney throws report on witness stand like it is garbage)?

A: Yes

Q: What is it?

A: My police report.

Q: Officer, would you look this report over and find any documentation of your conversation with [the defense witness].

A: (After looking report over for a minute or two) It's not there.

Q: Officer, don't you think this conversation is important?

A: Yes, but not . . .

Q: (interrupting) Officer, please; Your Honor, would you instruct the witness to just answer the question.

Judge: Yes; Officer, just answer the question.

Q: Officer, would you explain whether the statement is something you just happen to recall after six months or something you just made up after six months?

(2) How to Answer (Anytime a Defense Attorney Asks Why you Did Not Put Something in Your Report)

Q: Officer, you wrote a report about this incident didn't you?

A: Yes, sir.

Q: And isn't it true that the purpose of your report is to document all important facts about a crime?

A: That is not exactly true. The report is only a summary of the facts of a case and facts which I might later forget.

Q: Officer, aren't you required by your department to document all important facts in your report?

A: If I know what facts are going to be important, I always include them; I can't always know what will later prove to be important.

Q: Well, isn't a statement by a defense witness important?

A: It didn't seem so at the time.

Q: Why not?

A: I don't expect when a witness gives me a statement that he will change his story.

Q: Officer, did you just recall this witness's statement after these six months or did you make it up.

A: Neither; I never forgot it.

Q: I'd just like you to answer officer why you wouldn't put this statement in your report so the jury could believe that it really occurred?

A: I investigate many cases and I must write a report for each. If I were to write up every detail, I wouldn't have time to do anything else.

Note: The one cross-examination question which every attorney is taught never to ask is a "why?" question. The reason is, of course, that by asking a "why" question the questioner loses control. The officer in this case destroyed the defense attorney because the officer was prepared and refused to answer "yes" or "no" to a question which needed explanation.

E. Mistrial Bait

A mistrial is a decision by the trial judge that the trial cannot go on. This section discusses testimony by officers which causes mistrials.

1. Other Bad Acts

A defendant is on trial only for the crime charged. When an officer mentions any other "bad act" of the defendant without specific authorization by the prosecutor, the judge will often declare a mistrial. The following are some situations where officers have caused mistrials by implying that the defendant had committed other bad acts.

a. Mug Shots

Never refer to the defendant's photograph as a mug shot or to give the jury an impression the picture was obtained from the departmental files reflecting that the defendant has a prior criminal record.

b. Other Conduct

Officers often accidentally mention other bad conduct while explaining the facts. For example, an officer who says he was investigating the defendant on an unrelated crime when the officer obtained the evidence may cause a mistrial.

2. Assertion of Fifth Amendment Rights

An officer must never testify that the defendant asserted his or her Fifth Amendment rights. Never testify before a jury that the defendant was advised of his or her rights and refused to make a statement, or asked for an attorney.

VI. PRETRIAL HEARINGS

Here are some important things an officer should remember when testifying at a pretrial hearing:

A. Preparation

It is just as important to prepare for a pretrial hearing as it is for trial. Always read over your report, the reports of all your fellow officers and any statements taken. Also, be sure to discuss your testimony with the prosecutor.

B. Knowledge of the Law

The most important thing an officer can bring to the suppression hearing is a knowledge of the law as related in this manual. With that knowledge, an officer is far less likely to be "chewed up" by a good defense attorney. The following are a few examples of situations where officers would not have testified as they did if they had known the law:

1. Standard Procedure or Departmental Rules

When officers testify that they did whatever they did because of "departmental policy," "standard operating procedure," or "routine," it is often the "kiss of death" for the officer's conduct.

Examples:

"We frisked everyone present at the scene (of the execution of a search warrant) as part of our standard operating procedure." *See Ybarra v. Illinois,* 444 U.S. 85 (1979).

Officers entered Brandt's home under arguably emergency circumstances but they described the entry as "just normal procedure" and "standard procedure." The court stated that "it is inconsistent to describe on the one hand the search as standard procedure and then on the other hand to claim that exigent circumstances necessitated this particular search." This was one big reason why the evidence was suppressed. *People v. Barndt,* 604 P.2d 1173 (Colo. 1980).

Every officer must understand that it can rarely help to testify that they acted because of department rules and regulations and it may hurt the case a great deal.

There are, of course, exceptions to this rule, the most common being inventory searches. The reason why it is somewhat important

for the court to know that the officers acted in accordance with their departmental policy when conducting an inventory is to show the court that the officers were not just acting on their own in deciding when to conduct an inventory search.

2. Legal Conclusions

Although an officer should know the law better than the lawyers and judge, the officer should avoid stating the legal reason for the conduct. The officer should just testify to the facts supporting the legal theory. If a defense attorney asks an officer for his legal theory for his conduct, the prosecutor should usually object; if the prosecutor does not object the officer should do his best to answer the question.

a. Reports

If an officer relates the legal reason for his or her conduct in a report, the defense attorney will be able to cross-examine the officer about the theory at the pre-trial hearing.

b. Testimony

Officers often, at the prompting of defense attorneys, explain their legal basis for their conduct.

Examples:

An officer testified that he searched a vehicle incident to arrest. Although the search was arguably justified under an inventory theory, the search could not be justified under the search incident to arrest theory. One of the reasons the court suppressed the evidence was that the officer was obviously looking for evidence, not protecting the suspect's property. *People v. Grana,* 527 P.2d 543 (Colo. 1974).

An officer stops a suspect on reasonable suspicion. As a result of the stop the officer obtains crime-related evidence against the suspect. At the suppression hearing, the defense attorney asks the officer if the suspect was free to leave after the stop. The officer responds, "no." The defense attorney then tries to get the officer to testify that the suspect was "in custody" when, in fact, the suspect was only being detained.

C. Credibility

Often the only way the courts can determine whether evidence is admissible is whether or not the officer is believable. The most important thing an officer can take into a pretrial hearing is good credibility. Officers who have ever "hedged" on the facts will not be believed at later hearings.

VII. SUGGESTED TECHNIQUES

Always review the entire file and to over your testimony with the prosecutor before testifying.

Chapter 15

CIVIL DISPUTES

I. INTRODUCTION

A "civil" dispute is a dispute between two private parties (as opposed to a criminal case which is a dispute between the state and a private person). Officers who are called to the scene of civil disputes often do not understand the civil laws well enough to properly handle the problem. Furthermore, civil disputes can often escalate to violence and criminal offenses because of the strong emotional bases for the disputes.

Because the Colorado legislature and courts are tending more and more to "create" laws supporting the rights of the "underdog" or poor and helpless, the officer is put in a precarious position when these disputes arise.

The purpose of this chapter is to explain the practical and legal issues relating to the civil disputes that are most commonly encountered by the officer. These disputes are:

1. Domestic disputes
2. Landlord-tenant disputes
3. Repossessions

II. GENERAL RULES

The following are general rules that officers should consider in dealing with all civil disputes.

A. Professional Attitude

The most important thing an officer should bring to the scene of a civil dispute is the ability to project a professional attitude. Officers who approach the problem with poise, courtesy and authority are far more likely to accomplish their purpose and maintain the respect of the public.

B. The Law

It is crucial in the area of civil disputes that officers know the law.

1. Keeping the Peace

The most important legal responsibility of the officer at the scene of a civil dispute is to keep the peace.

2. Legal Advice

Civil disputants usually do not know the law. They often will, however, attempt to tell the officer what the law is, or ask the officer for legal advice.

Example (Domestic Disputes)

"It is nobody's business what I do in my own house."

Example (Repossessions)

"This property belongs to me."

Avoid arguments with people who tell you what the law is as it will get you nowhere. Also avoid giving legal advice to civil disputants.

3. Legal Questions and Action

What officers must learn to do is ask questions relating to the legal rights of the parties and take action accordingly.

Example:

"Do you have a court order?"

III. DOMESTIC DISPUTES

Domestic disputes represent one of the most difficult and potentially violent aspects of an officer's job. Most of the victims of domestic disputes are women and children and most of the offenders are men. Therefore, this chapter approaches the problem from that perspective, even though the same law applies no matter who is the offender or victim.

A. Protection

Both as a practical and legal matter, the first concern for officers must be the protection of themselves and the disputants. Because of the extreme emotional involvement of the participants, an officer must realize that these

situations are very volatile and potentially violent. Officers must remember, too, that their first and most important legal duty is to keep the peace.

B. No Court Order

Where there is no court order, an officer should first determine whether a crime has been committed.

1. Crime Committed

If a crime has been committed (usually assault or trespass), the officer should *strongly* consider an arrest of the offender. If the offender is arrested the officer should:

a. get statements from everyone, including the arrestee (if possible);

b. document and take photographs of injuries;

c. follow departmental rules.

2. No Crime Committed

If no crime has been committed, an officer should try to discuss with each participant a "treaty" according to departmental rules.

3. Violence Imminent

If it appears that the emotions of the participants are so high that the officer expects violence, the officer may want to do one of the following.

a. Shelter House

If a woman is a potential victim, the officer may want to refer to a shelter or safe house.

b. Emergency Protective Order

A second alternative available to the officer is an emergency protective order from a judge. *See* Section 14-4-103, 5 C.R.S. (2002).

(1) Chronic or Violent Offender

An officer should obtain this order only if in his or her judgment the offender is a chronic or violent offender within the household.

(2) Procedure to Obtain

An emergency protective order is very easy to obtain. The following is the procedure.

(a) On-Call Judge

Section 14-1-103 requires that every Colorado county or district must have a judge on call to consider and issue emergency protective orders.

(b) Immediate and Present Danger

The officer must call the judge and explain why there is an immediate and present danger of domestic abuse by an adult related to or living in the same residence as the potential victim.

(c) Verbal Protection Order

If the judge determines that there is immediate and present danger, the judge has the authority to orally order:

i. a person to not injure or molest the potential victim;

ii. a person out of the home;

iii. temporary care of any minors to one of the parties.

(d) Documentation

After (or while) listening to the judge's order, the officer must write down the order, sign it, and hand the paper to the person being restrained. The order must be filed with the court as soon as possible.

(e) Time Limits

The potential victim should be informed that the order is enforceable only until the close of the next court business day.

(f) Violation of the Order

If the person being restrained violates the order, he or she may be arrested.

The failure to take some reasonable action when violence appears imminent can result in liability.

Example:

A woman called officers about an assault by her former husband. The officers responded but declined to arrest the man or take any reasonable steps to protect the woman. When the officers left, the man seriously beat the woman. She later sued the city and the police department. In a settlement, the civil defendants agreed to pay damages and agreed to a certain procedure in responding to domestic assault calls.

C. Court Order

1. Officer's Duty

If there is a court order relating to the dispute the officer has a duty to enforce the order. If there is a certified copy of the order and a certificate that the restrained party has been served and is in violation of the order the officer has a duty "to remove the violator from the premises or to arrest said violator," and bring him before the court which issued the order or to jail until the court is in session. Section 14-10-109, 5 C.R.S. (2002).

2. Divorce Actions

If a divorce action was filed after July 1, 1983, and a summons has been served upon the adverse party, *both parties* are automatically restrained from molesting or disturbing the other party. If either party produces a certificate of service or the potential violator admits service of the summons, the officer may remove the violator or arrest him the same as any other restraining order.

D. Child Custody Disputes

Officers do not have authority to "settle" child custody disputes. Officers do, however, have the authority and the responsibility to enforce court orders relating to child custody.

1. No Court Order

When an officer is required to respond to the site of a dispute relating to the custody of a child and no court order exists, the officer's authority is normally limited to returning the child to the natural parents as opposed to someone else.

Examples:

The mother and father of a child split up and one of them moves out taking the child with him. The other spouse calls police requesting that officers get the child back. The officers should normally decline to assist. The party should be instructed to contact an attorney.

A mother requests that officers assist her in getting her child back from the grandparents. Unless the grandparents have a court order it is normally proper to assist the mother.

2. Court Order

If a person has a lawful court order, the officer should assist the person in obtaining control of the child. The officers should show the court order to the offending party and inform that party that they are enforcing the order.

If the person holding the child also has an apparently valid order, the officers should tell the person seeking assistance to get a court order specifically directing the officer to proceed. When officers are specifically directed by court order to do something, they must proceed accordingly or they may be held in contempt or liable for money damages.

E. Emergency Protective Orders

As discussed above, officers may obtain an emergency telephonic order to provide immediate protection for a spouse. An officer may also request an emergency order for the temporary custody of children to be placed with one of the parents. The officers should serve the offending party with a copy of the terms of this order

Note: If it appears that a minor has been abused but is not in danger of immediate bodily harm the officer should contact the Department of Social Services. They can then determine whether the child should be removed from the home.

F. Suggested Techniques

1. The first thing you must do when responding to a domestic dispute is to ensure the safety of everyone concerned according to your departmental rules, policies, or procedures.

2. Next, determine the nature of the dispute.

3. Find out if there are any applicable court orders and whether the potential offender has received "notice" of the order

4. If there is no crime committed or existing court order, but you expect violence, consider obtaining an emergency protective order or taking the endangered party to a safe house.

5. If a crime has been committed or there is a restraining order in effect, and you decide to arrest, take statements from everyone and proceed according to department policies.

6. If there is no court order relating to the child's custody tell the party to get a court order unless the dispute is between a parent and another person with no apparent legal authority to have custody.

7. Avoid involvement in child custody disputes unless a party has an order which specifically directs you to do something.

8. If you have serious questions about the welfare of the children, especially about their health or safety, consider getting an emergency protective order and/or the assistance of the Department of Social Services.

9. Always check with your district attorney before doing anything in a child custody case, if there is time to do so.

IV. LANDLORD – TENANT DISPUTES

The two most common situations where an officer becomes involved in a landlord-tenant dispute are:

1. tenant lockouts

2. seizure of a tenant's property

A. Tenant Lockout

Landlords sometimes lock tenants out because the tenant does not pay the rent.

1. Court Order Requirement

Colorado law prohibits a landlord from locking a tenant out without a court order. A landlord who locks a tenant out without a court order is violating this law. Always look over the order in order to determine what the order specifically directs the officer to do.

Example:

A tenant calls the police and says that the landlord has locked him out because he is behind on the rent. The officer calls the landlord and, after determining that the landlord has not obtained an order, properly tells the landlord that he must let the tenant in.

2. Eviction Procedure

It is sometimes frustrating, but it is not difficult for a landlord to evict a tenant. The landlord must give the tenant three day's notice of the reason for eviction. After three days, the landlord must file a complaint in court. The tenant then has eight days to respond. If the tenant does not respond the court signs an eviction order.

B. Landlord Liens

Colorado law permits a landlord to seize certain items of a tenant's property as long as the landlord abides by the following statutory requirements.

Note: Courts in Adams and Denver counties have ruled that landlord liens are unconstitutional.

1. Personal Effects

The landlord may not take small kitchen appliances, cooking utensils, beds, bedding, wearing apparel, personal or business records, or other very personal effects of the tenant.

2. Peaceable

The landlord may take the items only at a reasonable time and in a peaceable manner.

3. Value of the Property

The landlord may not take more property than the amount owed to him by the tenant.

4. Interference with Tenant's Enjoyment

The landlord must not substantially interfere with the tenant's right to reasonably occupy and enjoy the premises while the landlord exercises the lien.

C. Abandoned Property

Any time a tenant complains about a landlord's seizure of property it is very unlikely that the property has been abandoned. In order for a landlord to lawfully seize abandoned property:

1. the landlord must first send a certified letter to the tenant.

2. the landlord must not have heard from the tenant in thirty days.

D. Suggested Techniques

1. Lockouts

a. Confirm that the person actually lives in the residence.

b. When you respond to a "lockout," find out if there is a court order. Only the sheriff can evict a tenant, so it might be well to check with the sheriff's department.

c. If the sheriff is not aware of the order, contact the landlord. If he does not claim there is an eviction order the officer may want to explain that under Colorado law an eviction order must be obtained to lock a tenant out.

d. If the landlord will not open the door, the tenant may enter his residence if he can do so with only minimal disturbance.

e. The tenant should be instructed to contact an attorney and get a court order specifically directing officers to do something.

2. Landlord Liens

a. If a landlord requests that you accompany him while asserting a lien, avoid going.

b. If a tenant objects to the seizure of property, tell the landlord to get an order from the court.

c. Avoid involvement except to keep the peace unless one of the parties has an order specifically directing officers to do something.

V. CREDITOR REPOSSESSIONS

A repossession occurs when the seller/owner of property takes the property back from the buyer/debtor after the buyer defaults on the payments. The repossessions can be accomplished by "self-help" or through order of the court. The following discusses repossessions and the officer's alternatives when responding to a dispute involving a repossession.

A. Self-Help

Self-help is a procedure where one party, without notice, takes the property of another because he claims he is enforcing a property right, usually a debt secured by the property (collateral) which is seized.

1. Self-Help Powers

Self-help can be used when:

a. no "breach of peace" is caused by the seizure of property;

b. the possessor or repossessor follows the procedure in the statute or contract

Example:

A mechanic made some repairs on a car. When the owner failed to pay the bill, the mechanic kept the car. The statute required the mechanic to file a court action to sell the car within 60 days of the seizure. When the mechanic failed to file the action within 60 days, the court ordered the mechanic to return the car and pay damages for unlawful holding of the car.

2. Breach of Peace

A breach of peace occurs when the repossessor does any of the following:

a. The repossessor enters any closed building or structure on the debtor's premises without consent.

b. The debtor or possessor of the property resists or refuses to permit the repossession.

3. The Officer's Role in Repossession

An officer should not assist a repossessor when the only legal theory for the repossessor's seizure is self help.

a. "State Action"

When an officer becomes involved in a repossession the officer, as a representative of the state, is in effect telling a debtor that the government's "might" is with the repossessor. In order for the repossessor to be able to lawfully enlist the services of the state the repossessor must have a court order directed to a peace officer. Otherwise it is a violation of the debtor's due process rights.

Example:

A sheriff aided a creditor in a repossession of property. The United States Supreme Court ruled that, by aiding the creditor, the sheriff deprived the debtor of his property without due process of law. *Fuentes v. Shevin,* 407 U.S. 67 (1972).

b. "Passive" Assistance

The law even prohibits "passive" assistance by an officer when the only theory for the repossessor's seizure is self-help.

Example:

An officer accompanied a creditor to a woman's home in order to repossess some furniture. The officer talked to the woman and she agreed to the repossession. The officer then left and the creditor repossessed the furniture. The court later determined that the mere presence of the officer was enough to have intimidated the lady and make her feel that she had

no choice but to surrender the property. *Beneficial Finance v. Wiener,* 405 P.2d 691 (Okla. 1965).

c. Responding to the Scene

If an officer is called to the scene of a self-help repossession, the officer needs to ask only one question: Ask the debtor if he or she wishes to give the property the creditor. If the debtor says, "no," tell the creditor that he must get a court order to repossess the property. If the debtor has already resisted the repossessor's seizure, a breach of the peace has already occurred and the officer should tell the repossessor to get a court order.

Example:

A repossessor gets into the debtor's car and starts to back it out of the driveway when the debtor comes out of the house and stands in front of the car. An officer responds and properly tells the repossessor to get a court order.

B. Court Order

If the repossessor has a court order, the situation is far different. The repossessor, armed with a court order, has a legal right to enlist the services of the state in seizing the property specified in the order.

Note: The order from the court instructs the *sheriff* to seize certain specified property at a specific address. Other law enforcement personnel do not have responsibility to assist a creditor and should avoid doing so.

C. Particular Property

The vast majority of repossessions relate to:

1. vehicles
2. household property
3. mobile homes

1. Vehicles

Vehicles are often repossessed by seller/creditors without a court order.

a. Self-Help

A repossessor may retake a vehicle in the street, driveway, public place, etc.:

1. without a court order

2. unless someone present objects.

b. Court Order

A repossessor may retake a vehicle from the buyer/debtor with a court order unless the buyer/debtor has filed for bankruptcy.

c. Personal Property in Vehicles

Even when a seller/creditor is lawfully entitled to seize the vehicle, all personal property in the car not covered by the security agreement must be returned to the buyer/debtor.

2. Household Property

It is very difficult for a seller/creditor to use self-help in repossessing household goods. However, many repossessors are very persuasive in obtaining consent to enter a debtor's residence.

a. Consent to Enter

Most often the repossessor seeks consent to enter. As long as the repossessor does not use deceit or trickery to enter, the entry is proper.

b. Consent to Repossess

A resident may consent to the repossession. However, if anyone present objects to the repossession the repossessor must leave.

c. Complaints from Residents

In the case of repossessions of household goods, the officer is usually called after the property has already been repossessed. In such circumstances the residents often want an officer to arrest the repossessor for trespass. Unless there is an impartial witness to the repossession or other evidence of non-consent, it is almost impossible to prove these cases.

D. Suggested Techniques

1. Avoid going to the scene of a repossession at the request of a repossessor, if the legal theory for the repossession is self-help.

2. If you do decide to go with a self-help repossessor, you should specifically tell the repossessor and the debtor that the debtor does not have to give up the property without a court order.

3. Normally, if you are called to the scene of a repossession a breach of the peace has probably already occurred. Tell the repossessor to get a court order.

4. If the repossessor has a court order specifically telling you (sheriff or deputy sheriff only) to aid in the repossession you may assist him by explaining the order to the debtor and maintaining the peace while the repossessor seizes the property specified in the order.

Chapter 16

CIVIL LIABILITY

I. INTRODUCTION

Civil suits against officers have been rising at an alarming rate. The main reason for this increase is that most lawyers are now aware of the many "causes of action" which may be brought against officers. The primary causes of actions are based upon the "Civil Rights Act," found in 42 U.S.C., Section 1983 and its companion federal statute, the "Civil Rights Attorneys Fees Act," found in 42 U.S.C., Section 1988. The attorneys fees section makes officers "sitting ducks" for suit any time officers violate a citizen's rights. The reason is that attorneys can now bring suit for minor civil rights violations, win a small award for their clients and "win" substantial fees for themselves.

The following is a brief discussion and overview of the various rights, duties and liabilities of peace officers as they relate to civil litigation.

A. Causes of Action

When an individual or group of individuals believe they have been injured or their property damaged as the result of improper, negligent, or intentional conduct of another, they are legally entitled to file a civil suit seeking redress for any financial, physical, and/or emotional damage which they have suffered. In order to file these suits, the "plaintiffs" must specifically identify each and every reason upon which they base their claims for relief. These reasons are called causes of action. Most causes of action filed against peace officers involve allegations of false arrest, false imprisonment, excessive force (civil assault and battery), and civil rights violations.

B. Governmental Immunity

It was once the law that officers could not be sued when acting within the course and scope of their employment because the state was immune from suit under the legal doctrine of sovereign immunity. However, sovereign immunity has been abolished in almost every state. The Colorado legislature has abolished the sovereign immunity doctrine, stating the "intention of the general assembly . . . to treat the public entity as if it were a private person." *See Martinez v. City of Lakewood,* 655 P.2d 1388 (Colo. App. 1982).

C. Amount of Awards

In addition to the increased number of civil suits filed against officers, the amount of damages awarded to prevailing plaintiffs has skyrocketed. It is not at all unusual for a judge or jury to award damages of hundreds of thousand of dollars to those complaining of police misconduct.

D. Payment of Damages

Usually if officers are successfully sued while acting within the scope of their employment the governmental employer is required to "indemnify" (pay the judgment for) the officer.

1. Punitive Damages

If, however, the officer acts recklessly, knowingly, intentionally, maliciously, or with willful and wanton disregard for an injured party's rights or feelings, a jury may award punitive damages to the plaintiff. These damages are awarded not to pay for the plaintiff's damages or injuries but to punish the officer and to serve as an example to other officers. *Ark Valley Alfalfa Mills, Inc. v. Day,* 263 P.2d 815 (Colo. 1953). These damages do not have to be paid by the officer's employer. Section 29-5-111, 9 C.R.S. (2002). Therefore, officers are personally responsible for this debt.

Note: This debt may not be discharged by bankruptcy.

2. Governmental Immunity Act

Also, if the officer was acting outside the scope of his or her employment the governmental employer is not required to indemnify the officer.

II. GENERAL – TORTS

The following is a general discussion intended to provide an officer with a fundamental understanding of tort law.

A. Torts v. Crimes

The following relates to the distinction between civil and criminal actions, that is, private versus public harm.

Note: In almost every case criminal conduct will also give rise to a cause of action in tort which may be asserted by the victim of the crime.

Example:

Citizen A, without provocation or justification, strikes Citizen B with a lead pipe across the shoulders and breaks his collar bone. In addition to criminal charges for assault brought against Citizen A by the People of the State of Colorado, Citizen B has a civil cause of action against Citizen A based upon Citizen A's intentional act. Citizen B may seek damages based upon the injuries received, the medical expenses, lost wages, pain and suffering, and possible exemplary or punitive damages.

1. Crime

A crime is an offense against the public in general. Crimes can be redressed only when an action is brought by the State or a subdivision thereof.

2. Tort

A tort is an injury or damage against a private citizen for which the citizen seeks personal compensation (money damages). It is redressed by the citizen (plaintiff) bringing suit against the person or entity which caused the injury or damage.

B. Types of Torts

In general, there are three basic categories of torts upon which civil actions against peace officers are based. It should be noted, however, that in the majority of cases, civil suits against officers will include causes of action asserted under all three of these general categories. While specific torts are discussed in detail later in this chapter, the following is provided to give officers a basic understanding of the fundamental theories.

1. Negligent Torts

A cause of action against an officer based upon assertions of negligence normally arises in a situation where an officer by his or her act or failure to act (omissions) causes injury to the plaintiff as a result of an error in judgment, accident, or mistake. In determining whether to assess liability against the officer, the finder of fact must weigh the conduct of the police officer against the standard of *"reasonable care."* In essence, this means that the judge or jury must decide if the officer acted as a "reasonably prudent person" would act when confronted with the same or similar circumstances. If an officer is found to have acted reasonably, then, regardless of the fact that the conduct may have resulted in injury to the plaintiff, the officer cannot be held liable to the plaintiff for damages.

Example:

An officer stops a motorist for an expired inspection sticker citation and, following a routine computer check, is informed that there is an outstanding traffic warrant on the driver. Despite the motorist's protestations that he paid the citation, the officer places him under arrest and transports him to the jail where he is booked, fingerprinted, and a strip search is conducted The motorist continues to protest that the warrant was issued in error and, in an attempt to render assistance, the officer against runs a computer verification and conducts a physical inspection of the warrant book to confirm the warrant's validity. The officer does not attempt to contact the issuing court to determine whether the citation had in fact been paid. Following the plaintiff's release from custody, it is determined, upon checking with the issuing court, that a clerical error had been made and that the motorist was correct in his assertion that the citation had been paid. The motorist then filed suit against the police officer and the municipality in the United States District Court, alleging false arrest, false imprisonment, and a violation of his constitutional rights.

Officers and/or their governmental employers may be held liable for negligence if all the following elements are present:

a. Duty to Plaintiff

Peace officers and their employers have a duty to conform to a certain standard of conduct, that of a reasonably prudent person, in their relationships with the public.

Note (from example): The court found that the issuing court and municipality, by devising a system upon which arrest warrants are issued, had a duty to the general public and to the plaintiff to assure that warrants are not issued in error. The court further found that the arresting officer had a duty to arrest only those individuals whom he reasonably believed to have violated the law (probable cause).

b. Breach of Duty

The plaintiff must establish that the officer and/or the department breached a duty to plaintiff.

Note (from example): The court found that the defendant governmental entity breached its duty to the plaintiff by allowing a warrant for arrest to be issued in error and that the officer was the instrumentality through which the breach occurred.

c. Proximate Cause

The breach of duty must be the legal cause of the injuries or damages suffered by the plaintiff. In other words, "but for" the breach of duty on the part of the defendant the plaintiff would not have suffered injury.

Note (from example): It is clear in this example that, but for the erroneous issuance of the bench warrant by the court and the subsequent arrest of the plaintiff in reliance thereon, the plaintiff would not have suffered injury or damage.

d. Damages

While it is not necessary for an individual plaintiff to establish specific physical injuries, loss of money, or loss of property, a plaintiff must establish that he or she was injured or damaged in some form as the result of the conduct of the defendant.

Note (from example): While the plaintiff did not suffer any physical injury as a result of his arrest, and further did not suffer any loss of property, it is clear that he was damaged as a result of his arrest and imprisonment on an invalid warrant.

e. Lack of Good Faith

If an action based upon negligence or a violation of an individual's constitutional rights (to be discussed later in this chapter) "qualified good faith immunity" is available to a police officer whose conduct is reasonable and undertaken in good faith.

Note (from example): In this case the court found that the officer's conduct in arresting the plaintiff based upon what he believed to be a valid arrest warrant was reasonable

and that he properly relied in good faith upon what he believed to be a valid court order. Thus, although the government was liable, the officer was not.

In deciding whether the qualified good faith immunity defense is available to an officer, the courts use a rule that peace officers performing discretionary acts are shielded from liability for civil damages only if their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800 (1982).

2. Intentional Torts

An intentional tort occurs when an officer intentionally, knowingly, recklessly, or willfully and wantonly acts or fails to act in a situation which results in damage to the plaintiff. As previously discussed, these torts are of particular concern to police officers because a finding of knowing, intentional, reckless, or willful and wanton conduct can subject the officer to a judgment of punitive or exemplary damages, for which the officer may be personally liable for payment.

Willful and wanton conduct is the doing of an act, or the failure to do an act, which creates a substantial risk of harm to another, and the person doing the act, or failing to act, is aware of such risk and thereafter purposefully does the act, or fails to act, without any reasonable justification, in disregard of the consequences or of the rights and safety of the other. This legal theory is intended to capture the three basic ideas which run through the cases:

a. That the conduct must create a higher than normal risk of harm;

b. That the defendant must be aware of the risk (i.e., act purposefully); and

c. That the defendant must have acted "heedlessly" (i.e., without justification, in disregard of the rights of others).

Example:

Two officers responded to a restaurant and bar where there was a call for assistance regarding a disturbance in progress. Upon their arrival these officers arrested several individuals. Witnesses testified that the officers assaulted and beat the men without provocation or apparent justification. There was testimony that the police officers held one of the

plaintiffs on the ground and repeatedly kicked him in the head, face, and body. Additionally, there was testimony that the officers handcuffed another plaintiff, threw him to the ground, and kicked him repeatedly. The assaults allegedly continued after the plaintiffs were taken to the hospital. The plaintiffs commenced an action in state court against the officers and were awarded a total of $7,500.00 in exemplary damages in addition to an award of actual damages. *Frick v. Abell,* 602 P.2d 852 (Colo. 1979).

3. Constitutional Torts

Constitutional torts occur when an officer violates a person's constitutional rights and that violation results in injury or damage to the plaintiff. The majority of suits alleging constitutional deprivations are brought under the United States Code, Section 42 U.S.C. 1983. They, in essence, allege violations of a citizen's Fourth and Fourteenth Amendment rights. These rights are discussed more fully in the **SEARCH AND SEIZURE** chapters of this book.

C. Civil Procedure

While the process followed in a civil suit is similar to that of a criminal case, there are a number of significant differences which a peace officer should be aware of.

1. Initiating a Complaint

A plaintiff filing a civil suit against the government or a public official/police officer in a Colorado state court must first give notice of the injuries or damages suffered. This notice must be filed within 180 days after the "discovery of the injury . . . ," and must contain a "statement of the basis of the claim, including the date, time, place and circumstances of the act . . . ." Section 24-10-109, 7 C.R.S. (2002).

Note: The Colorado legislature, in order to avoid the potential of a plaintiff "getting around" the notice requirements of suing a police officer in his individual capacity, has enacted section 24-10-118, which applies the aforementioned notice provisions to public officials and peace officers sued individually and when their governmental employer is not a co-defendant in the action.

While Colorado courts have held that the language of the statute is absolute, and that failure to comply with the 180-day notice requirement serves as a complete bar to a plaintiff's

seeking recovery under state tort law, the same does not hold true for actions founded upon a deprivation of an individual's constitutional rights asserted under federal statutes. Should a plaintiff fail to comply with the provisions of the Colorado Governmental Immunity Act, and file an action in either state of federal court, alleging a deprivation of constitutional rights as well as various state tort claims, only those claims arising under state law would be subject to dismissal.

2. Discovery

While only limited forms of discovery are permitted in criminal actions, a plaintiff's ability in a civil case to subject officers to interrogatories, depositions, and requests for production of documents is much broader in scope. The availability of extensive discovery in a civil suit, as opposed to its criminal counterpart, flows primarily from the lack of ability on the part of a civil defendant to assert the privilege against self-incrimination (unless criminal charges arising from the incident are pending during the course of the civil suit). As such, a civil plaintiff may require the officer to respond to any questions or produce any documents which are "reasonably calculated to lead to admissible evidence."

a. Interrogatories

Throughout the discovery process each side may require the other to respond to written questions seeking information concerning the incident itself, past similar incidents, medical information, education, training, experience, and, under limited circumstances, personal financial data. These written questions are called "interrogatories" and the responding party must swear to the accuracy of the answers given. As such, after certain conditions have been met, opposing counsel may use a party's responses to interrogatories as evidence or for purposes of impeachment at trial.

b. Depositions

In addition to written interrogatories, the parties in a civil suit may cause the opposing party or his witnesses to give oral testimony, under oath, at a deposition. The type of information elicited through a deposition is similar to that obtained by interrogatories; however, a deposition provides a greater opportunity for more in-depth and specific questioning in the areas described above. Throughout the course of any deposition, a shorthand/court reporter is present to place the witness under oath and to record all proceedings for transcription if necessary at a later time. Again,

the statements made in a deposition may, under certain circumstances, be introduced as evidence at trial or for the purposes of impeachment.

c. Production of Documents

Another method of discovery available to parties in a civil suit is the request for production of documents. In general, this involves requests by the opposing party for the production of items of documentary evidence such as police reports, pertinent policies, and procedures/rules and regulations, written or transcribed statements of witness, medical reports and bills, etc. Most important to a peace officer, however, are requests that the defendants produce prior civilian complaints or disciplinary actions involving the defendant officers.

While certain exceptions are available based upon an officer's legitimate expectation of privacy and right to confidentiality (*See Martinelli v. District Court,* 612 P.2d 1083 (Colo. 1980)), the court may require production of these documents for in camera inspection. This means that the judge will take the documents and review them in the privacy of his or her chambers to determine whether or not each specific document is subject to disclosure to the plaintiff and not protected by any of the privileges or objections asserted by the defendant officer. In most cases, only those documents which are relevant to the incident complained of by the plaintiff, if any exist, are discoverable unless the plaintiff has asserted claims against the employing governmental entity or the defendant's officer's supervisor based upon allegations of negligent hiring, training, supervision, or retention.

Example:

An officer with an extensive history of disciplinary actions taken against him as a result of numerous excessive force complaints, is sued by an individual who alleges that the officer assaulted and brutally beat the plaintiff without provocation or apparent justification. While past disciplinary proceedings against this officer may not be relevant to a determination regarding whether the officer in the specific incident complained of, used excessive force, it would be relevant in an action against the governmental employer or the chief of police alleging inadequate disciplinary procedures and retention policies.

3. Settlements

Even more civil suits than criminal cases are settled out of court. The primary motivating factor behind a settlement agreement is to avoid the tremendous risks which may accompany a trial on the merits. Also, sometimes suits are settled for "nuisance value" or for the "costs of defense." Nuisance value and costs of defense settlements have little relationship to the actual merits of the case and reflect only a determination on the part of the defendant and/or its insurer that the economic factors surrounding the potential costs of litigating the suit outweigh the benefits of a defense verdict should the matter proceed to trial.

Section 24-10-110(3)(b)(II) of the Colorado Governmental Immunity Act states that "the public entity shall not compromise or settle the claim without the consent of the employee unless and until it is established that the defense of sovereign immunity is not available to the public entity." As such, in all cases where the governmental employer is protected by the doctrine of sovereign immunity the defendant officer must be consulted and approve of any settlement offers.

4. Trials

Should defense counsel be unable to have a civil suit successfully dismissed following the filing of either motions to dismiss or motions for summary judgment, or should the parties be unable to reach a settlement, the civil suit will proceed to trial. While civil and criminal trials are essentially the same with respect to the majority of procedural aspects, there are three important differences which you should be aware of:

a. Burdens of Proof

One important difference between civil and criminal trials is that the plaintiff in a civil action need only prove his case by a "preponderance of the evidence" instead of the criminal burden of "beyond a reasonable doubt." To prove a case by a preponderance of the evidence, the plaintiff must only show that the incident "more likely than not" occurred in the manner in which he has alleged it to have occurred in the complaint.

One important exception to the burden of proof standard in a civil case involves the issue of an award of punitive damages against a defendant. In the state court system allegations giving rise to a cause of action asserted for punitive or exemplary damages must be proven "beyond a reasonable doubt" as in a criminal trial. As

such, should the finder of fact determine that an officer acted in a willful, wanton, or malicious manner only by a preponderance of the evidence and not beyond a reasonable doubt, punitive damages cannot be awarded.

b. Self-Incrimination

As previously stated in the section relating to discovery techniques, a civil defendant does not have the right to invoke the privilege against self-incrimination. The civil defendant may be compelled to testify at trial regarding the incident giving rise to the civil suit. Since police officers primarily testify in a criminal forum, officers are most surprised by that portion of the Civil Rules of Procedure which permit the plaintiff in a civil suit to call the defendant as a witness.

c. Witnesses

It is not at all uncommon for a plaintiff to call an officer/defendant as the first witness at trial. As a matter of trial tactics, this is most effective because an officer/defendant then has no opportunity to listen to the testimony of the plaintiff's witnesses prior to his own. As a result, it is necessary for the officer/defendant to have thoroughly prepared himself by reviewing all pertinent reports, statements or other documents immediately prior to the commencement of trial.

D. Who Can Sue

Anyone who has been injured or damaged by an officer's conduct may sue for damages. If the victim is dead or not yet born, the relatives or other personal representatives may sue on the decedent's or unborn child's behalf.

Example:

The plaintiff, Douglas, heard noises outside her home and, when she went to investigate, saw her sister and a police officer struggling. When she attempted to aid her sister, she was struck with a nightstick. She was five and one-half months pregnant at the time. The court ruled that Douglas' son (who was born by the time the suit was filed) could sue for injuries he suffered while a fetus. *Douglas v. Town of Medford,* 542 F. Supp. 1267 (D. Conn. 1982).

While certain portions of the Federal Civil Rights Act require that, in order for a party to seek redress under the statute, the person must be a citizen of the

United States, other portions require only that the plaintiff be a resident at the time that the injury or damage was incurred.

E. Who Can Be Sued

It is common in civil suits based upon officer misconduct for the plaintiff to sue many individuals or entities who at first blush appear to have no involvement whatsoever in the incident complained of. Frequently, a civil suit will name as defendants not only the officers directly involved in the incident, but also any other police officers who have filed reports or made statements concerning the incident. In addition, plaintiffs will often name the officers' direct supervisors, trainers, police department administrators, the employing governmental entity, as well as certain high level public officials such as the Governor, the Mayor, City Councilpersons, or County Commissioners.

1. The Officer

Any officer directly or indirectly involved in the incident of which the plaintiff complains will normally be named as a defendant in the civil complaint, both in an individual and official capacity.

2. Superior Officers

In addition to naming the officer or officers directly involved in the incident complained of, it is common for a plaintiff in a police misconduct suit to sue the officer's immediate supervisors as well as the top administrators of the police department based upon theories of negligent hiring, negligent training, negligent supervision, negligent retention, and negligent entrustment. In addition to these and other theories based upon the legal doctrine of vicarious liability (i.e., that supervisors are legally responsible for the acts of their subordinates), a supervisor may be named as a defendant based upon allegations that he or she had some personal involvement, participation, or encouragement of the wrongful conduct of the officer/defendant.

Again, as previously discussed, the plaintiff must establish a direct casual relationship (proximate cause) between the supervisor's act or failure to act and the plaintiff's alleged injuries. Claims for relief based upon allegations of negligent hiring, training, retention, or entrustment involve a breach of supervisory duty and imposes upon the supervisor or administrator the same liability as if the administrator or supervisor had actually participated in the wrongdoing. In order to establish liability against an officer's supervisor, the following elements must be pled and proven:

a. An affirmative legal duty to supervise the subordinate officers;

b. A failure to do so;

c. That the failure was negligent; and

d. That the negligence was the proximate cause of the plaintiff's injuries.

3. Governmental Entity Employers/Agencies

It is the rule rather than the exception that the governmental entity employer will be named as a defendant in a police misconduct suit. Causes of action asserted against the employing agency normally are founded upon one of the three following legal theories:

a. Respondent superior/vicarious liability;

b. Direct or secondary liability as an indemnator (insurer) under the Colorado Governmental Immunity Act and the Colorado Peace Officers' Act;

c. Direct involvement, such as a policy or custom on the part of the governmental agency which results in a deprivation of the plaintiff's constitutional rights. *Monell v. Department of Social Services,* 436 U.S. 658 (1978).

4. Other Defendants

As previously mentioned, a plaintiff's attorney will look for anyone even remotely involved in the incident or injury complained of to sue as a defendant in an officer misconduct action. It is obvious that the "shotgun" approach to civil litigation is intended to subject as many separate defendants as possible to potential damage liability. In doing so, plaintiffs are seeking a "deep pocket" from which they can be assured that the large damage judgment that they seek will be paid.

Of growing concern among lawyers who represent officers is the growing trend among plaintiff's attorneys to name trainers as defendants in officer misconduct suits. This most frequently occurs when the injured plaintiff is concerned about the difficulty in imposing direct liability to the officer involved or to his governmental employer. By bringing suit against a trainer or supervisory officials in a peace officer training academy, the plaintiff is seeking yet another pocket against which damages may be assessed.

Example:

An officer had a shotgun to the arrestee's head while the officer attempted to handcuff him. Unfortunately, the gun was discharged. The officer and his department were sued. The plaintiffs, however, alleged that the officer was trained in another city where he learned his arrest and handcuffing "technique." The court ruled that the city which trained the officer could be liable for negligent and/or inadequate training. *Sager v. City of Woodland Park,* 543 F. Supp. 282 (D. Colo. 1985).

F. In What Court Will the Suit Be Brought

1. Small Claims Court

While maximum damage limitations differ throughout the various jurisdictions in the state, it is fair to say that actions brought in Small Claims Court are normally for somewhat nominal amounts. However, the indemnification provisions of the Colorado Governmental Immunity and the Colorado Peace Officers' Act still apply.

2. State County or District Court

The amount of damages sought by a plaintiff is the determining factor in whether the suit is filed in state district or state county court. If the amount of damages requested does not exceed $15,000.00, the action may be brought in county court. This does not affect the plaintiff's ability to include in the complaint a cause of action based upon a violation of his or her constitutional rights and, therefore, a state court plaintiff may sue for damages under 42 U.S.C. Section 1983 and its companion, 42 U.S.C. 1988 in county or district court.

3. United States District Court

If the plaintiff is seeking damages for a violation of constitutional rights, the plaintiff will often file suit in the United States District Court. The fact that a plaintiff asserts that a constitutional right has been violated in federal court does not prevent the plaintiff from also raising claims based upon state tort law.

G. Scope of Employment

There is a tremendous rise in the filing of lawsuits against officers who have become involved in situations where they are outside of their municipal or county boundaries or off-duty. Because the Colorado Governmental Immunity Act and Colorado Peace Officers' Act require an officer to have

been acting in the scope of his or her employment in order to receive indemnification by the employing governmental entity, this initial determination is of utmost importance to a defendant/officer.

The mere fact that an officer was acting outside of his or her jurisdictional limits or in an off-duty capacity when the incident complained of occurs does not, in and of itself, mean that the officer was acting outside the course and scope of employment.

1. Factors

Many other factors must be weighed in determining whether the officer was acting within the scope of employment, including but not limited to:

a. whether or not the officer was violating established departmental policies and procedures/rules and regulations at the time of the incident complained of;

b. whether the officer was acting on behalf of his employer or for his own personal benefit when the incident occurred;

c. whether the officer was acting in accordance with a statutorily imposed duty when present during the commission of a crime or in an emergency situation.

2. Off-Duty Work

One of the most difficult situations to assess is when an officer is engaged in law enforcement related employment in an off-duty capacity. If an officer is sued as a result of conduct in an off-duty law enforcement related job, it must first be determined whether the officer was enforcing certain rules or regulations of the off-duty employer or acting in accordance with duties as a police officer by enforcing the law of the state, county, or municipality for which the officer is employed in a full-time capacity.

All officers *must* find out *exactly* when their off-duty employer is insuring them (and get it in writing). It would also be wise to consult with your governmental legal advisor to determine when you will and will not be "covered" by your governmental employer.

Example:

An officer was employed in an off-duty capacity as a night watchman on a construction site in an area where a variety of different developments were being built by various construction companies. While so employed, the officer observed several juveniles knocking over an outhouse on the construction site. Instead of merely chasing the juveniles away as he was authorized to do by his off-duty employer, the officer attempted to arrest the juvenile suspects and gave chase in his private automobile. An accident occurred and the juveniles were injured as a result. The officer's governmental employer determined that the officer was acting in an off-duty capacity and, further, was not acting within the course and scope of his employment as a police officer when attempting to apprehend the juvenile suspects. Due to the fact that this case was settled prior to trial, it is unclear whether the court would have upheld the municipal employer's determination that the officer's conduct was outside the course and scope of his employment as a police officer.

Note: It is clear, however, that if the officer had observed a crime taking place in one of the surrounding construction sites not owned by his off-duty employer and taken steps to apprehend the suspects and, further, acted in accordance with the rules an regulations/policies and procedures of the police department, the officer would have been acting within the course and scope of his employment and, as such, the municipal employer would have been required to provide a defense and indemnification to the officer.

3. Color of Law

Civil suits brought pursuant to 42 U.S.C. Section 1983 require that an officer be acting under "color of law" in order to be held liable for a violation of this section. An officer acting "under color of law" is merely exercising that legal authority which is granted pursuant to state or federal statute, rule or regulation, or municipal ordinance. It is important to note, however, that merely because an officer is found to have been acting under color of law does not in and of itself mean that he was also acting within the course and scope of employment as a police officer.

Example:

An officer exercises his legal authority to gain entry to a commercial establishment or private residence at which time he burglarizes the establishment or engages in some other criminal conduct. Such an officer can be shown to have been acting under color of law, but obviously outside the course and scope of employment as a police officer.

III. NEGLIGENCE

The general rule relating to officer negligence is that officers have a duty to act reasonably and prudently as determined by the standards in the community in which they work. Different circumstances, of course will require different conduct from officers.

Example:

Conduct which is negligent under ordinary circumstances may be reasonable and prudent in an emergency situation.

The following are a few of the most common (and expensive) problems arising from officer negligence.

A. Vehicle and Traffic Related Negligence

One of the most common circumstances in which officers are sued for negligence arises from an officer's negligent use and operation of their police vehicles.

1. Non-Emergency Situations

During routine patrol and other non-emergency situations, officers must obey the traffic laws just like any other citizen. When an officer violates a traffic law and an accident results, the driver of the police vehicle is in no better or worse situation than a private citizen involved in a car accident.

If the officer violated one or more traffic laws the injured party in a civil suit may assert the legal doctrine of "negligence per se" to establish the officer's liability. This simply means that, if a plaintiff can establish than an officer violated each and every element required to establish a traffic offense, then a presumption is created establishing the negligence of the defendant/officer which must then be overcome at trial. Should

this situation occur, it imposes additional difficulties in presenting an officer's defense.

Note: When officers take advantage of their positions to disregard traffic laws, citizens (and potential jurors) will almost always notice these violations of the law and carry their bad impressions with them into the courtroom should they be selected as jurors in an officer misconduct case. As a result, this form of misconduct almost always jeopardizes the position of respect which officers hold in the eyes of the general public.

Example:

An officer traveling approximately 85 miles per hour without emergency equipment and not in response to a crime in progress or other emergency situation, rear-ended a vehicle being driven by a private citizen. The officer was not only found liable in civil damages, but was also sentenced to a year in jail for his criminal misconduct.

2. Emergency Situations

During emergencies, officers are, of course, given the power to disregard certain normal traffic laws. Officers, however may not disregard their duty to act reasonably under the circumstances.

a. Statutory Authority

Some guidance is provided by Section 42-4-108, C.R.S. (2009), which sets certain guidelines for officers traveling in emergency situations. That statute provides:

1. The provision of this article applicable to the drivers of vehicles upon the highways shall apply to the drivers of all vehicles owned or operated by the United States, this state, or any county, city, town, district, or other political subdivision of the state, subject to such specific exceptions as are set forth in this article with reference to authorized emergency vehicles.

2. The driver of an authorized emergency vehicle, when responding to an emergency call, or when in pursuit of an actual or suspected violator of the law, or when responding to but not upon returning from a fire alarm, may exercise the privileges set forth in this section, but subject to the

conditions stated in this article. The driver of an authorized emergency vehicle may:

a. Park or stand, irrespective of the provisions of this title;

b. Proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation;

c. Exceed the [lawful speed limits] so long as said officer does not endanger life or property;

d. Disregard regulations governing directions of movement or turning in specified directions.

3. The exemptions and conditions provided [in this section 2(b), 2(c) and 2(d) to an authorized emergency vehicle shall apply] only when such vehicle is making use of audible or visual signals meeting the requirements of Section 42-4-213 and the exemption granted in [section 2(a)] shall apply only when such vehicle is making use of visual signals meeting the requirements of section 42-4-213 unless using such visual signals would cause an obstruction to the normal flow of traffic; except that an authorized emergency vehicle being operated as a police vehicle while in actual pursuit of a suspected violator of any provision of this title need not display or make use of audible and visual signals so long as such pursuit is being made to obtain verification of or evidence of the guilt of the suspected violator. Nothing in this section shall be construed to require an emergency vehicle to make use of audible signals when such vehicle is not moving, whether or not the vehicle is occupied.

4. The provisions of this section shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of [his] reckless disregard for the safety of others.

Note: The officer will be indemnified if successfully sued unless punitive damages are assessed or the officer is acting outside the scope of employment. Section 24-10-110(1)(b)(II), C.R.S. (2009).

b. Police Chases

While officers have statutory authority to engage in high speed chases in an attempt to apprehend a criminal suspect, recent trends would indicate that the basis for the officer's conduct will be highly scrutinized by the courts. Should it be determined that a chase was initiated when other options were available or other conditions which did not warrant the additional dangers accompanying a high speed chase or, further, should it be determined that the officer conducted himself in an unreasonable manner during the chase itself, severe consequences can result. *See, e.g., Foley v. Kilbrick,* 425 N.E.2d 376 (Mass. App. 1981)($200,000.00 verdict against the officer); *Mobell v. City and County of Denver,* 671 P.2d 433 (Colo. App. 1983)($385,000.00 award against an officer for leg injuries suffered by private citizen).

Note: It is most important that officers weigh the danger of the escaping suspect against the increased danger to the general public resulting from a high speed chase. If an officer knows or can ascertain the identity of the suspect, he should usually attempt to apprehend the suspect at a later date unless the suspect is imposing a "grave and imminent danger to the community."

It should be further noted that most departmental rules and regulations as wall as statutory guidelines prohibit an officer from exceeding the posted speed limit by more than 10 to 20 miles per hour when engaged in a high speed chase.

Examples:

(1) Negligent Behavior During the Chase

Officers observed a car in a parking lot occupied by boys appearing too young to have drivers licenses. The officers, thinking the car might be stolen, approached the suspect's vehicle. As they approached, the boys quickly sped away. The officers followed at speeds of up to 50 miles per hour in residential zones. The boys drove down a one-way street the wrong way and collided with the plaintiff's car, causing injuries to the plaintiff and damage to the plaintiff's car. The court ruled that the officers were negligent because the officers disregarded their duty to consider "the safety of

all persons and property during emergencies." *Tetro v. Stratford,* 458 A.2d 5 (Conn. 1983).

(2) Alternatives and Departmental Rules

An officer chased a known suspect at speeds of up to 115 miles per hour and the suspect collided with and killed another motorist. The court ruled that the officer was liable, mainly because his departmental guidelines required that an officer must discontinue a chase when the officer is able to ascertain the identity of the fleeing suspect.

c. Road Hazards

In addition to officers' liability for specific acts, officers may be held liable for their omissions or failure to act. A recent trend among courts today is to hold officers liable for failure to take responsible action once an officer becomes aware of hazards on a road, street, or highway. *See Martinez v. City of Lakewood,* 655 P.2d 1388 (Colo. App. 1982).

Example:

There was an oil spill on the roadway, which caused a truck to go off the road. Sand was then shoveled on the oil slick. Flares were set up but eventually burned out. An officer returned to check the oil spill and noticed that more sand was needed. He did not put out new flares. While waiting for more sand the officer observed a man on a motorcycle crash as a result of the oil spill. Later two vehicles collided. After that, flares and warning lights were placed and the fire department was contacted to wash the oil and sand off the roadway. The court ruled that the officer did not act reasonably because he failed to warn oncoming vehicles of the danger. *Naylor v. Louisiana Department of Public Highways,* 423 So.2d 674 (La. App. 1982).

d. Drunken Drivers

There is a split of authority among courts as to whether officers are responsible for accidents caused by drunk drivers who were previously cited and released. The current trend is to hold officers liable when they simply cite and release a drunken driver based upon the theory that it is reasonably foreseeable that an intoxicated person, when permitted to continue operating a motor vehicle,

could become involved in an accident. As such, a court must find that an officer "breached his duty" to the public in releasing a drunken driver and that the "breach" was a proximate cause of the plaintiff's injuries.

Example:

An officer stopped a driver whom he reasonably believed to be intoxicated, but released him after he was polite and stated that he had only consumed a couple of beers. The man then drove away and ran into a car killing three people. The widow and mother of two of the victims sued the officer for negligence and was awarded a judgment in the amount of $873,000.00.

B. Weapons Negligence

Persons dealing with firearms must exercise the highest standard of due care. Even a slight deviation from this standard may constitute negligence.

When an individual is injured or killed as a result of an officer's discharge of his weapon, the civil suit which usually follows will normally contain allegations of intentional misconduct, recklessness, gross negligence, willful and wanton conduct, and a "gross deviation from the standard of reasonable care" in addition to causes of actions based upon simple negligence. While the facts of each particular case will dictate the availability of an assessment of punitive damages against a defendant/officer, more often than not judgments in weapons negligence cases are assessed primarily as a result of a determination that the officer's conduct was negligent.

C. Failure to Protect

Officers are often called to the scene of disputes where injuries might result between the disputing parties. Because it is often the officers' duty to protect one party against another, the officers may be held liable when one party hurts another, even after the officers leave! In most cases, however, while a police officer owes a duty to the public at large, no duty is owed to individuals who are subsequently harmed by the negligent failure to apprehend or arrest a suspect. *Tomlinson v. Pierce,* 2 Cal. Rptr. 700 (Cal. App. 1960); *Evers v. Westerberg,* 329 N.Y.S.2d 615 (1972); *Everrett v. City of Inverness,* 224 So. 2d 365 (Fla. Dist. Ct. App. 1969).

Examples:

The plaintiff, Moore, apparently did some automobile repair work for a neighbor. When Moore went to the neighbor's home to get his money,

the neighbor's father threatened to kill Moore. Officers came to the scene and removed Moore from his neighbor's residence. When the officers left, the father shot Moore in the back. Moore filed suit against not only the individual who shot him, but the police officers who declined to take specific action against the father based on his threats. The plaintiff subsequently received a large award of damages against the Los Angeles Police Department.

Officers were called to the scene of an assault by a husband against his wife. The officers did not arrest the husband or take any real steps to protect the wife. After the officers left, the husband severely beat the wife. The police department and the city later settled a civil suit with the wife, and agreed to abandon its "arrest avoidance" policy in future circumstances.

D. False Arrest

While under certain circumstances a false arrest can be categorized as an intentional tort (e.g., intentional misidentification) normally suits based upon allegations of false arrest assert that the officer negligently arrested the plaintiff without probable cause. Suits asserting arrests without probable cause usually arise from warrantless arrests. However, an officer may be sued for negligence in arresting an individual based upon what the officer believes to be a valid arrest warrant.

1. Arrest Warrant

An officer who obtains an arrest warrant has qualified immunity if he reasonably believes the warrant and affidavit established probable cause to arrest

Example:

A Rhode Island state trooper obtained a warrant for the arrest of a prominent couple after hearing details of a "pot party" on a lawful wiretap. The grand jury subsequently did not indict the couple, and the trooper was sued. The United States Supreme Court ruled that the trooper had qualified (not absolute) immunity. The court ruled that immunity will be lost only where a warrant is so lacking in indicia of probable cause that the officer's belief that probable cause is stated would be unreasonable. *Malley v. Briggs,* 475 U.S. 335 (1986).

A peace officer has qualified immunity from liability for false arrest if, while acting pursuant to a warrant, the officer conducts an

arrest in the reasonable belief that the person arrested is the party identified in the warrant and that the warrant is valid on its face.

Examples:

In a suit alleging false arrest and a deprivation of constitutional rights, the plaintiff who had been arrested on charges of bank robbery pursuant to a judicially authorized bench warrant filed an action in United States District Court. When the robbery charges were withdrawn, the plaintiff sued several officers and FBI agents for an unlawful search and seizure. The court held that the defendants acted in "good faith" when they executed the facially valid warrant and were thus immune from liability. The court stated: "In the case at bar, plaintiff was arrested pursuant to a judicially authorized bench warrant which 'commanded' the U.S. Marshall 'or any authorized officer' to bring him to Philadelphia and answer the bank robbery indictment. The agents who executed the raid on plaintiff's home were not at liberty to disregard this order; indeed, they were duty bound to expeditiously comply with it. Moreover, they were neither obligated nor empowered to question its validity." *Druckenmiller v. United States,* 458 F. Supp. 193 (E.D.Pa. 1982).

Note: The "good faith immunity" will not attach should the defendant/officer have purposefully misinformed the court in order to obtain the arrest warrant. Officers who execute the arrest warrant but who were not involved in obtaining its issuance will be immune from liability if they can establish that they reasonably believed the warrant to be valid on its face.

A sheriff arrested Turner based on a warrant issued by a justice of the peace (Raynes). The warrant was for a crime that did not exist. The court ruled that the sheriff could not be liable, because the arrest warrant appeared valid on its face. *Turner v. Raynes,* 611 F.2d 92 (5th Cir. 1979).

2. Warrantless Arrests

As you know, an officer must have probable cause to believe that a crime has been, is being, or is about to be committed and that the person arrested is the individual perpetrating the offense in order to conduct a warrantless arrest. Of course, an officer may also rely on "emergency" or "exigent" circumstances when arresting an individual without a warrant. In conducting a warrantless arrest, the watch word again is

"reasonableness." An officer does not have the "duty" or obligation to only arrest those individuals who are later prosecuted and convicted of the crime for which they were arrested. The officer's only obligation is to act in a reasonably prudent manner in assessing the situation and in reaching the determination of probable cause for an arrest.

Additional problems arise, however, when an officer conducts an arrest based solely on statements given by third parties who are not members of the law enforcement community. Again, the officer must only act reasonably based on the information received from the third party complainant.

Example:

An officer called to a shopping mall in response to a clerk's report that she had just seen a person who had been "flashing around the area" contacted the party pointed out to him by the clerk. After talking to the man, the officer was going to release him, but mall employees "badgered" the officer into arresting the alleged flasher A month and one-half later, an investigation revealed that the man was not a "flasher" and the real perpetrator was apprehended. An Iowa jury awarded $1,250,000.00 to the man originally arrested. *Children v. Burton,* 331 N.W.2d 673 (Iowa 1982).

Note: Although this award was later reversed by the Supreme Court, officers should be careful about arresting individuals on misdemeanor charges based solely on the statements made by third parties.

E. Effect of Departmental Rules and Regulations/Policies and Procedures

Departmental rules and policies are designed as guidelines for officer conduct and may or may not impose a higher standard of care than that imposed by law. If department rules and policies are more strict than the standard set by statute, the officer will be held to the higher standards imposed by the department. Under these circumstances, plaintiff's counsel may introduce into evidence the departmental rules and policies to establish that the officer's conduct failed to comport with the standards imposed.

1. Presumption of Negligence

If the plaintiff is successful in establishing a violation of departmental rules or policies, a legal presumption is created establishing the officer's negligence. This is true even if the officer complied with the statutory standards, but did not meet the higher standard of care imposed by the

departmental employer. *Peterson v. City of Long Beach,* 594 P.2d 477 (Cal. 1977).

2. Immunity

In addition to creating a presumption of negligence, an officer's violation of departmental rules and policies will normally result in the loss to the officer of "qualified good faith immunity." As such, it is absolutely crucial that officers become thoroughly familiar with and act in total compliance with departmental rules and policies.

Note: It is also important that departmental rules and regulations are properly written and kept up to date so that officers are not accidentally "kicked around" in court because of their own rules.

Example:

An officer responded to a house where "shots had been fired" and where the woman had asked for police assistance for protection against her husband. As the officer got out of his car, he heard more shots. As a result, the officer, without backup, burst through the front door and, after being confronted by the husband who was armed with a shotgun, shot and killed him. The wife and the victim's family filed suit against the police officer alleging negligence and wrongful death. The jury ultimately determined that the officer was negligent because he disregarded his departmental rules and regulations which required officers to wait for backup assistance under the same or similar circumstances. The jury further found, however, that the officer's negligence was not the proximate cause of the decedent's injuries. As such, no damage award was assessed against the police officer. *City of Aurora v. Loveless,* 639 P.2d 1061 (Colo. 1981).

IV. INTENTIONAL TORTS

Officers who act with the intent to maliciously, recklessly or willfully and wantonly cause injury or damage to another can expect to be named as defendants in a civil suit filed by the injured party. Suits alleging intentional misconduct are of particular importance due to the potential assessment of punitive damages against the officer for which he may be personally liable for payment. It is also important for officers to understand that it is not necessary that an officer intend the *result* in order to be liable. The only requirement for liability is that an officer intend to engage in the *conduct* causing the injury or damage.

The following is a general description of certain specific intentional torts commonly asserted against officers and the various legal issues involved.

A. Excessive Force

Probably the most common cause of action asserted against officers involves the allegation that an officer used "excessive force" in contacting or arresting the plaintiff. "Excessive force" and "police brutality" are not torts in and of themselves. The specific legal cause of action involved is founded upon civil assault and battery. Additionally, an allegation of excessive force may constitute a portion of a cause of action alleging a deprivation of the plaintiff's constitutional rights.

1. Dismissals and Acquittals

Frequently, when an individual is charged, but not convicted, of resisting arrest, he will file suit against the officers involved for assault and battery. The mere fact that a plaintiff was acquitted of the resistance charge will not, in and of itself, give rise to a finding in civil court against the officer This is true because the prosecutor in a criminal matter has a significantly higher burden of proof to meet (beyond a reasonable doubt) than the plaintiff in a civil suit (a preponderance of the evidence).

2. Reasonable and Necessary Force

While an officer must use his or her own judgment in determining what force is "reasonable and necessary to effectuate the arrest" in any given situation, it is clear that liability may be imposed if an officer continues to exert force or "beat" an individual after the criminal defendant has abandoned his resistance to the arrest. An officer may also be subjected to liability if he exerts physical force in a situation where no force is warranted.

When assessing damages in an officer excessive force case, a jury must often consider the officer's use of a "dangerous instrumentality" when inflicting injury upon the plaintiff. This may involve the use of flashlights, batons, mace, handcuffs, and, of course, firearms. Additionally, certain particularly dangerous physical self-defense techniques such as the chokehold can subject an officer to an increased award of damages against him.

Note: Also remember that the trainer who instructed the officer in the application of certain self-defense techniques including the chokehold may be liable for damages should injury or death result from an officer's application of his training.

Examples:

a. Flashlights

An officer responded to the scene between a woman and her mother. The officer grabbed the woman to restrain her and she kicked him. In response, the officer hit the woman in the head with his flashlight and fractured her skull. The suit was settled for $175,000.00.

b. Batons

A former police chief arrested a man for disorderly conduct and in the course of the arrest, and without justification, beat him with his nightstick. In addition to civil damages, a criminal court sentenced the officer to six months in jail.

c. Mace

An officer arrested Griffith, but had trouble subduing him. When Griffith kicked and screamed inside the patrol car, the officer sprayed Griffith with mace. Griffith suffered injury to his head, face, and scalp. The court ruled that the officer could be liable for civil battery. *Griffith v. City of Monrovia*, 184 Cal. Rptr. 709 (1982).

d. Handcuffs

While an officer may handcuff any person who is arrested even if the arrestee does not resist, a common complaint against officers relates to the intentional tightening of the handcuffs so that the arrestee is subjected to pain, loss of circulation, and injury to the wrists.

e. Chokeholds

In circumstances where a chokehold is improperly administered, and injury or death results, an officer may be liable for civil damages, and may also be subject to criminal liability as well.

B. False Imprisonment

When an officer conducts an unlawful arrest or detention, the officer may be successfully sued for false imprisonment. However, regardless of the lawful nature of the initial arrest, a plaintiff may assert a cause of action alleging

false imprisonment if it can be established that, following the initial arrest, the defendant/officer intended to impose an "unlawful confinement" upon the plaintiff. Ignorance of the illegality of the detention will not remove this intent requirement and, in certain circumstances, the jail or detention officer may be subjected to liability along with the arresting officer.

In asserting a cause of action alleging false imprisonment, a plaintiff must also establish that the restraint or detention was imposed involuntarily and that he was aware of his confinement at the time it was undertaken.

1. Imprisonment

An officer should not be mislead by the term "imprisonment." A false imprisonment does not require actual detention in a jail or other similar facility. An unlawful confinement may take place on the street, in a hospital, in the plaintiff's home or vehicle, or, of course, at the police station or sheriff's department.

One of the key issues in determining whether a confinement has taken place is the plaintiff's perception of the circumstances (i.e., whether he or she feels free to leave). As such, the confinement need not be complete but may be temporary and for only a short period of time. Additionally, it is not necessary for actual physical restraints to be imposed. If the plaintiff implies through the words or conduct of an officer that he is not free to leave, then that alone may be sufficient to establish a confinement if this perception is found to be "reasonable" under the circumstances then existing.

2. Malice

While malicious intent is not an element necessary for the assertion of a cause of action predicated upon false imprisonment, it is a factor to be considered by the court in assessing damages.

If the officer was aware at the time of imposing the confinement that it was unlawful, or if the officer becomes aware of facts following the confinement that establish that the confinement is in error and he purposely delays the prisoner's release, then the officer may be liable for a judgment against him for punitive damages.

Note: Should you discover after an initial confinement the individual arrested is not the proper party, then immediate steps should be undertaken to facilitate the release of the prisoner. While this may not totally avoid a judgment for false arrest and imprisonment, it will certainly operate to reduce the plaintiff's recovery and will preclude a punitive damage judgment.

Example:

The female plaintiff, Jackson, went with a friend to a preliminary hearing for the friend's son, who had been arrested for robbery. At the preliminary hearing, the victim of the armed robbery told the officer that Jackson looked like the driver of the get-away car. The officer arrested Jackson and, although Jackson gave an alibi, she was held for 18 hours in jail. When the officers confirmed her alibi, she was released. The court ruled that the officers should have checked on the alibi of the plaintiff faster, and damages were awarded in the amount of $45,000.00

C. Malicious Prosecution

Many times civil suits involving officer misconduct arising from an alleged false imprisonment or arrest also contain a cause of action alleging that the plaintiff was maliciously prosecuted in a criminal proceeding. In proving the civil malicious prosecution claim, the plaintiff must establish that the defendant/officer instituted a criminal proceeding against the plaintiff which resulted in a finding in favor of the plaintiff and that the criminal action was either instituted or continued with malicious intent. It must further be established that there was no probable cause for the institution of the criminal proceeding and that the defendant incurred damages as a result.

While an officer's reliance upon the advice of a prosecuting attorney may operate as an absolute defense to a claim for malicious prosecution, this defense will not be available if the officer provided false information or omitted certain relevant facts when obtaining the arrest warrant or when obtaining advice from the prosecutor.

D. Abuse of Process

Abuse of process, while similar to the tort of malicious prosecution, differs in that it involves allegations arising from the improper use of lawfully issued court orders (e.g., an arrest warrant) to effectuate an objective not within the scope of the court order or process. Abuse of process claims normally arise from circumstances where an officer files criminal charges or obtains an arrest warrant merely to cover up his past or intended wrongdoing.

V. CIVIL RIGHTS VIOLATIONS

A. Civil Remedies

Increasingly, plaintiffs are bringing successful suits against officers to redress violations of their constitutional rights. As stated elsewhere in this chapter,

the majority of suits alleging deprivations of constitutionally protected rights without due process of law are brought under Title 42 of the United States Code, Section 1983. This statute, and its companion statutes, was originally known as the Klu Klux Klan Act and was designed to provide civil redress to individuals who were injured or damaged as a result of law enforcement misconduct and for which no relief was provided under state law.

Title 42, Section 1983 of the United States Code, now known as the Civil Rights Act, provides:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State of Territory, subjects, or causes to be subjected, any citizen of the United States or another person within the jurisdiction thereof to the deprivation of any right, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law suit in equity or other proper proceeding for redress.

While a civil rights plaintiff may bring suit directly under the United States Constitution (*see Bivins v. Six Unknown Named Agents,* 403 U.S. 388 (1971)), it is well established that once a claim for relief has been asserted under Title 42, Section 1983, all other direct claims for relief based upon various amendments to the United States Constitution are unnecessary and duplicitous. *See Shirley v. Bensalem Township,* 501 F. Supp. 1138 (E.D.Pa. 1980); *Edmonds v. Dillin,* 485 F. Supp. 722 (N.D. Ohio 1980); *Leite v. City of Providence,* , 463 F. Supp. 587 (D.R.I. 1978).

1. Negligence

Often, civil rights plaintiffs will assert claims under Section 1983 based solely upon allegations of simple negligence. The majority of courts where the question has been presented have held that mere negligence will not support a claim under Section 1983.

Examples:

Hayes v. Jefferson County, 618 F.2d 869 (6th Cir. 1982)(simple negligence is insufficient to support Section 1983 liability of high police officials and municipalities for inadequate training, supervision and control of individual officers); *Mills v. Smith,* 656 F.2d 337 (8th Cir. 1981)(conduct of individual officers in shooting plaintiff in back during arrest was negligent at most and plaintiff therefore may not prevail in his section 1983 claim against the officer); *Smith v. Hill,* 510 F. Supp. 767 (D. Utah 1981)(granting motion to dismiss; for liability to arise under section 1983, a defendant's conduct must be "reprehensible at least to the degree of gross negligence or deliberate indifference to fundamental rights

. . . [L]iability should not attach unless that failure was more than merely negligent").

Note: Additionally, certain decisions of the United States Supreme Court indicate that, where there are adequate and available state remedies, a cause of action for negligence may not be pursued under the Civil Rights Act. *See Paratt v. Taylor,* 451 U.S. 527 (1981).

2. Excessive Force

Use of excessive force by a police officer is a constitutional violation. The officer can be liable under the Civil Rights Act for the violation. *Lusby v. T.G. & Y. Stores Inc.,* 749 F.2d 1423 (10th Cir. 1984).

Example:

Police set up a roadblock in order to stop Brower, a fleeing suspect. The roadblock was set up in such a manner that Brower was blinded by a police car's headlights and slammed into the tractor-trailer used to block both lanes of the two-lane highway. Brower died as a result of this crash. An action was brought alleging that the use of this deadly roadblock was a violation of Brower's Fourth Amendment rights. The court ruled that setting up a roadblock which stopped Brower was a Fourth Amendment "seizure" if the way the roadblock as set up was "unreasonable." The police could then be liable for using "brutal, excessive, unreasonable and unnecessary force." *Brower v. County of Inyo,* 489 U.S. 593 (1980).

Here are some examples where officers were not held liable under claims of excessive force:

a. Officers were not liable for the death of a suspect who ran onto a busy freeway and was killed by a car while being chased by police. *Cameron v. City of Pontiac,* 813 F.2d 782 (6th Cir. 1987).

b. Officers were not liable for subduing and handcuffing a disorderly woman in the police station. *Lester v. City of Chicago,* 830 F.2d 706 (7th Cir. 1987).

3. Other Types of Claims

The following are selected examples of other areas where the courts have ruled on the potential liability of officers under the Civil Rights Act.

Examples:

Officers aided a private citizen in his efforts to repossess property pursuant to a court order of possession and writ of assistance. Accompanied by the private citizen, the officers first entered and searched Specht's private office and then went to her house. Specht was alone at home when two officers and three other men entered and searched the residence. One of the officers wrongly told Specht that he had a search warrant and that if the search was obstructed or if she did not cooperate, he would arrest and jail her. The officer refused to allow Specht to call her lawyer. The court ruled that the officers' conduct violated the Fourth Amendment, and was not objectively reasonable because they did not possess a search warrant, but only a writ of assistance, which was clear from the face of the order. Therefore, the court denied the officers' claim of qualified immunity. The plaintiff was awarded $225,000.00, including punitive damages. *Specht v. Jensen,* 832 F.2d 1516 (10th Cir. 1987).

Police were not liable for depriving a father of his visitation rights because that is not a constitutional deprivation. *Wise v. Bravo,* 666 F.2d 1328 (10th Cir. 1981).

Extracting an involuntary confession by psychological coercion is a due process violation which is actionable under the civil rights statute. *Rex v. Teeples,* 753 F.2d 840 (10th Cir. 1984).

Police were not liable for placing a suspect in an unduly suggestive line-up, where the suspect was never prosecuted. The court reasoned that there is no constitutional right to be free of suggestive lineups, only a right to a fair trial where that evidence is not used. Henslsy was never tried; therefore, he was not deprived of his right to a fair trial. *Hensley v. Carey,* 818 F.2d 646 (7th Cir.1986).

4. Attorneys Fees

One of the major contributing factors to the dramatic increase in the number of claims asserted under the Civil Rights Act is the availability of full compensation for attorney fees to the prevailing party pursuant to

Title 42, U.S.C., Section 1988. Section 1988 was enacted to encourage the filing of civil rights claims by persons who have been deprived of their constitutional rights without due process of law. Due to the fact that many civil rights plaintiffs are poor and cannot afford an attorney, Section 1988 is intended to assure compensation to plaintiff's counsel (other than by a contingent fee arrangement) for the successful pursuit of civil rights claims.

A prevailing defendant/officer in a civil rights case may also seek an award of attorney fees under Section 1988. However, an additional burden must be overcome. In order for a prevailing defendant to receive an award of attorney fees, it must first be established that the plaintiff's suit was frivolous, or that the plaintiff continued to litigate an action which he knew or should have known was without merit.

5. Conspiracies

Title 42, U.S.C., Section 1985 provides additional recourse to plaintiffs who have been deprived of their constitutional rights as a result of a "conspiracy" between two or more individuals. It provides in pertinent part:

If two or more persons in any State or Territory conspire or go in disguise on the highway or in the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws . . . in any case of conspiracy set forth in this section, if one or more persons engage therein do, or cause to be done, any act in the furtherance of the object of such conspiracy, whereby another individual is injured on his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

Officers must be aware of the fact that under Section 1985, they can be subjected to civil liability not only as a result of their involvement in overt acts in furtherance of the conspiracy but, also, may be subjected to liability as a result of their failure to act or their "omissions." Suits which allege a conspiracy among officers resulting in a deprivation of the plaintiff's constitutional rights many times assert claims against individual officers who did not actively participate in the incident, but merely failed to intervene when present during an ongoing civil rights violation.

Example:

Officers in a two-person patrol car stop a motorist for a traffic violation and, during the course of the contact, the officer driving the patrol car without justification brutalizes the motorist. His partner, while not participating in the actual beating makes no attempt to stop or restrain his fellow officer from exercising excessive force. The motorist sues both the officer who brutalized him and his partner who failed to intervene alleging, among other things, a cause of action founded upon Section 1985. While the primary award was assessed against the brutalizing officer, damages were also awarded against the partner based upon the failure to act or intervene.

B. Criminal Remedies

In addition to potential civil liability which may be imposed as a result of a violation of an individual's constitutional rights, an officer may also be subjected to federal criminal prosecution under Title 18, U.S.C., Section 241 and 242.

Section 241, Conspiracy Against Rights of Citizens, states as follows:

> If two or more persons conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured . . . then those persons are guilty of a federal misdemeanor offense punishable by a fine not greater than $10,000 or imprisonment for a period not to exceed ten years unless death should result in which case the crime shall be treated as felony and may be punishable by imprisonment for any term of years or for life.

Section 242 is entitled Deprivation of Rights Under Color of Law and states:

> Whoever, under color of law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any state, territory or district to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution of laws of the United States or to different punishments, pains, or penalties, on account of such inhabitant being an alien or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.

Example:

The officer/defendant stopped the victim for allegedly running a red light at 2:00 a.m. In the ensuing discussion the officer hit the victim with a flashlight causing severe injuries. The jury found the officer's use of force was unjustified and unnecessary and, therefore, a deprivation of the victim's rights. *United States v. Golden,* 671 F.2d 369 (10th Cir. 1982).

1. Double Jeopardy Issues

Criminal civil rights violations are investigated by the Federal Bureau of Investigation and may be pursued even when a state criminal investigation is resolved in favor of the defendant/officer. Thus, an officer may be charged and found not guilty in state court, be sued as a result of the same incident in state of federal court, and be criminally prosecuted in the United States District Court.

2. Indemnification

The impact that the bringing of a criminal charge may have with respect to the statutory duty of a governmental employer to indemnity and provide a defense to the defendant/officer must be determined on a case-by-case basis. An officer should carefully review departmental rules as well as municipal charter provisions and ordinances (where applicable) to determine what departmental action may be taken as a result of the filing of criminal charges.

C. Good Faith Defense

As discussed in previous sections of this chapter, the affirmative defense of "good faith" is available to officers even if the court should find as a matter of law that the officer lacked probable cause to arrest the plaintiff or that the officer exercised more force than was reasonable and necessary based upon the circumstances then existing. In order to establish this affirmative defense, an officer must:

1. First show that he acted in a good faith belief that probable cause existed or that the amount of force was necessary.

2. Secondly, that his belief was reasonable under the circumstances. Should the court determine that the objective standard or good faith has been met by a preponderance of the evidence, then the court must find in favor of the officer/defendant on the issue upon which good faith was asserted as a defense.

D. Punitive Damages

While traditionally the basis for an assessment of punitive or exemplary damages was the same in both state and federal forums, the case of *Smith v. Wade,* 461 U.S. 30 (1983) seems to indicate that in certain circumstances the plaintiff does not have to establish that the officer exhibited "actual ill will, spite or intent to injure," but must only establish that the officer showed a "callous indifference" or "recklessness" which results in injury or damage to the plaintiff in order to award punitive damages.

VI. SUPERVISOR LIABILITY

A very disturbing trend in police misconduct cases is the tendency of courts and juries to hold supervisors (even chiefs and sheriffs) responsible for the negligent conduct of subordinates.

A. Elements

The plaintiff must establish the following elements in order to establish liability:

1. An affirmative duty to supervise the subordinate.
2. Failure to supervise.
3. The failure was negligent
4. The negligence was the proximate cause of the plaintiff's injuries.

B. Foreseeability

While personal participation of the supervisor is not necessary, it must be established that the conduct of the subordinate which resulted in the plaintiff's injuries was "reasonably foreseeable." Knowledge of the particular misconduct of the subordinate office is not necessary to establish a claim under supervisory negligence and in some cases the plaintiff need only show that the supervisor knew or should have known of the particular propensities of the subordinate officer which resulted in the plaintiff's injuries.

Examples:

A supervisor, while aware of the propensity of a particular police officer on his team to use excessive force when contacting or arresting members of a particular minority group, continuously assigns this subordinate to a section of the community predominately populated by this minority

group. The officer, in accordance with his prior behavior, seriously injures a minority plaintiff without justification when initiating a stop and frisk. The supervisor may be liable to the plaintiff for failing to properly discipline the officer, continuing to retain the officer after several sustained incidents of excessive force, and for negligent assignment of the officer to an area in which he reasonably should have known the officer was likely to continue to engage in the exercise of unreasonable force.

Departmental rules and regulations require that an officer qualify on the range at least once a month. The defendant officer over a period of several years, continuously misses his range qualification or fails to qualify when he attempts to do so. While attempting to arrest an armed robbery suspect, this officer discharges his firearm and kills an innocent bystander. The officer's supervisor may be held liable for his failure to maintain proper qualification procedures and for his negligent entrustment of a firearm to an officer whom he knew or should have know was incapable of accurately firing his weapon.

A department makes no real effort to teach its officers the constitutional rights of citizens. Further, officers are not even told of new laws relating to officers' responsibilities. As a result of this "negligence" officers violate a plaintiff's rights. The department, including training supervisors and chief, may be held liable for the constitutional violations.

A supervisory officer becomes aware of the fact that a member of his team has a serious drinking problem on and off duty. While the supervisor does contact the subordinate officer and conveys his displeasure regarding the officer's consumption of alcoholic beverages while on duty, the supervisor takes no further steps to assure compliance. Several days later the officer, while on duty, becomes involved in a high speed chase while intoxicated and runs a red light subsequently striking a vehicle in the intersection and killing the driver. The supervisor may be subject to civil liability for his negligence in permitting an unqualified, unstable, or otherwise unsuitable employee to remain on duty.

Note: Should a supervisor become aware of a "problem in the ranks," he should make every effort to take whatever steps are necessary to counsel or discipline the offending officer. In order to protect himself form potential civil liability, it is advisable that the supervisor document each and every step taken to correct potential problems within his area of authority or control. This can involve as little effort as making a notation on a calendar or, depending on the circumstances, may

require a full report to the top level administrators in the department. It may be necessary in some instances to order an officer back to the training academy in order to retrain him in areas in which the supervisor feels he lacks certain skills, knowledge or judgment. Again, a copy of this retraining order should be maintained in the supervisor's personal file for his protection.

Finally, it must be noted that it is not necessary for a supervisory official to terminate, suspend or investigate every minor departmental infraction. But be aware of the potential liability for failure to act when you should do so.

VII. SUITS AND COUNTERCLAIMS BY OFFICERS AND GOVERNMENTAL EMPLOYERS

With increasing frequency, officers and their governmental employers are filing suits against citizens for damages and/or injuries which result from citizen misconduct.

A. Suit and Countersuits by Governmental Employers

1. Attorney Fees

As previously discussed, a governmental agency named as a defendant is required to provide a defense for an officer sued under the Civil Rights Act and may seek an award of attorney fees under section 1988 if the court determines that the plaintiff's suit was frivolous or groundless. An additional cause of action may be asserted under 28 U.S.C., Section 1927, if the plaintiff's attorney continues to litigate an action which he knew or should have known to be without merit or under certain other specifically defined circumstances.

Example:

The plaintiff, Harabulak, was cited for a number of traffic violations. Harabulak brought a police brutality case against the officer who served the summons. When the court found that the suit was "unreasonable and groundless" the court assessed attorneys fees against the plaintiff. *Harabulak v. County of Suffolk,* 654 F.2d 194 (2nd Cir. 1981).

2. Direct Suits

In addition to the assertion of counterclaims predicated upon the frivolous institution of a civil suit against the governmental agency or its officer/employees a governmental employer may seek redress for damages caused by a citizen to governmental property. These suits may be as commonplace as an action for damages to a patrol vehicle due to citizen negligence or as unusual as a claim asserted for destruction of jail property by an incarcerated prisoner.

B. Suits by Officers

As you know, an officer by accepting employment in the law enforcement field, does not impliedly consent to any tort including being battered by those he arrests. If an officer is injured or damaged as a result of citizen misconduct during an arrest or while contacting another party, an officer may sue for medical expenses incurred, property damage, loss of time from work, and pain and suffering.

Additional damages are available to the officer in the form of punitive or exemplary damages should it be determined that the citizen/defendant's conduct was willful and wanton in nature. Depending on the type of injury and the amount of damages requested, all civil avenues are open to a plaintiff/officer. However, in most cases the injuries received and damages incurred do not exceed the jurisdictional limits of the small claims court. As a result, the officer with no additional expense for attorneys fees may file an action in small claims court seeking damages to compensate him for his injuries.

While claims based upon assault and battery are by no means the only claims available to officers for injuries incurred during the course and scope of their employment (i.e. defamation, outrageous conduct, or automobile accident suits) these suits are by far the most common types of actions asserted by officer plaintiffs.

Finally, should the officer have been required to seek representation by private counsel as a result of a plaintiff's claims for punitive damages against him, the officer may assert a claim for attorney fees pursuant to 42 US.C. Section 1988 if he is successful in defending a civil rights claim asserted against him.

VIII. SUGGESTED TECHNIQUES

You are being sued more and more because of the emotionally charged atmosphere of the confrontations, the "deep pocket" of the government, the broadening of causes of actions and the fact that attorneys fees may be paid for plaintiffs in certain

circumstances. For those reasons, officers must be particularly careful to avoid "creating" situations where liability may result.

Note: You must not allow the fear of civil suits to deter you from the performance of your duties. If you use a little good faith and good judgment there is very little chance of "exposure" to you or your department.

A. Situations Where a Complaint May Be Filed

If you have reason to believe someone may file a suit against you, you should at a minimum:

1. Follow your department rules.
2. Explain the situation to the attorney who represents your department.
3. Carefully document in your report what happened.
4. Do not discuss the case with anyone except your supervisor and legal advisor. Do not explain the propriety of your conduct to the potential plaintiff or witnesses.
5. Always try to get an impartial officer to take statements from all witness as soon as possible.
6. If disciplinary action may result, be careful!

B. Situations Where a Complaint Has Been Filed

If you receive a complaint, you must file a response within a short period of time. Record the date and time you received the complaint, and how it was served, and give it to your supervisor or legal advisor.

Chapter 17

DEFINITIONS

The following are definitions of many of the terms used in this book.

ABANDONMENT

Persons abandon property when they throw it away, leave it behind, or deny possession or ownership of it.

When persons abandon property they normally lose their expectation of privacy in the property and their "standing" to object to admission of the property in court.

ADMINISTRATIVE WARRANTS

Administrative warrants are warrants which permit very limited intrusions (searches and/or seizures) on less than probable cause when the public interest (importance) is great and there is no reasonable alternative to accomplish these important state interests.

AFFIANTS

Affiants are persons (usually officers) who swear to the truth of affidavits.

AFFIDAVIT

An affidavit is a sworn statement that is used to state the grounds for issuance of a warrant.

ANONYMOUS INFORMANTS

Anonymous informants are persons who give officers crime-related information but who do not tell the officers who they are.

BAD ACTS

A bad act is any "bad" conduct by the defendant other than the crime which he or she is charged with. These bad acts are normally not admissible.

BURDENS OF PROOF

The burden of proof is the duty to prove that certain facts are true. The state (officer) almost always has the burden of proof on every pretrial and trial issue.

CAUSE OF ACTION

A cause of action is a legal basis for the filing of a civil suit.

CHAIN OF CUSTODY

A chain of custody is the documented "links" between the moment a piece of evidence is seized and when it is offered into evidence. These "links" are the officers and others who handled the evidence and the times and places where it was handled.

CLOSED CONTAINERS

A closed container is an object which holds another object and the officer cannot see through the container to see what is inside.

Normally, closed containers may not be searched on probable cause alone but may be searched incident to arrest.

CONFIDENTIAL INFORMANTS

Confidential informants are persons who are known by the state (officers) and who give officers crime-related information. These informants do not want to have their identities disclosed to the defense.

CONTACTS (CONSENSUAL ENCOUNTERS)

Contacts are discussions between officers and suspects where there is no control of the suspects by the officers; that is, a reasonable person in the suspect's position would feel free to walk away at any time.

CONTRABAND

Contraband is any article that is illegal to possess.

CORROBORATION

Corroboration is crime-related information from sources other than the informant which tends to confirm what the informant said, and thus helps to establish probable cause or reasonable suspicion.

CRIME-RELATED EVIDENCE OR INFORMATION

Crime-related evidence or information is evidence or information which is "tied to" or relates to a crime in any way.

DETENTION

Detention is the "freezing" of a suspect (or property) for a short reasonable period so that an officer can determine whether there is probable cause that a crime has been committed.

DISCLOSURE – DISCOVERY

In order to be "fair" the state and defense must disclose certain evidence to the other side before trial.

EMERGENCY

An emergency is an exigency usually relating to a life (or injury) threatening circumstance. In emergency circumstances an officer may enter premises, vehicles, or closed containers without a warrant.

EVIDENCE

Evidence (or crime-related evidence) is any information or item related to the crime in any way.

Evidence is admissible in court only if it is offered in accordance with the Rules of Evidence.

EXCLUSIONARY RULE

The exclusionary rule is the rule which says that evidence obtained by an officer in violation of a defendant's constitutional rights cannot be used in court. The main purpose of the rule is to deter officers from violating suspects' rights.

EXIGENCY

An exigency is a set of facts which calls for immediate action from officers. Under such circumstances officers may conduct limited warrantless searches and/or seizures.

If the exigency relates to preservation of evidence, officers are normally permitted to freeze or impound. If the exigency relates to a life or injury threatening situation (emergency) officers may do what is necessary to address the exigency.

FRISK

A frisk is a limited search for weapons in areas accessible to a lawfully stopped detainee. These searches are lawful only if the officer has a *specific* reason to fear for his or her safety.

FRUIT OF THE POISONOUS TREE

Evidence obtained later as a result of a violation of a defendant's constitutional rights is no more admissible than evidence obtained immediately or directly from the illegality.

HEARSAY

A hearsay statement is a statement which was originally made by a person out of court and not under oath. This statement is then repeated by a witness under oath in order to persuade the fact-finder that the statement is true.

IMPEACHMENT

Impeachment is cross-examination which discredits the witness by showing that the witness is mistaken or untruthful.

IMPOUNDMENT

Impoundment is the "freezing" of premises, vehicles, or containers until a warrant can be obtained, or the "freezing" of a vehicle for care-taking purposes.

INFERENCE

An inference is a conclusion which can be reached based on the facts presented.

INVENTORY

An inventory is a listing of property which comes into the possession of officers. An officer may inventory property which comes within the officer's lawful custody and must be searched in order to protect this property for the owner. A second reason is to protect the officer from false allegations of theft.

JUDICIAL NOTICE

A judge may take "judicial notice" of legal facts which are obviously true. This means these legal facts may be "admitted" as true without anyone actually testifying to the facts.

MIRANDA WARNINGS

Miranda warnings state the Fifth Amendment rights of a suspect to remain silent or have the assistance of an attorney. An officer must give suspects their *Miranda* warnings before questioning them if the suspects are in custody.

MODUS OPERANDI

Modus operandi is a method of operating. When the same modus operandi is used to commit the same type of crime, that fact is sometimes admissible against the defendant at trial.

NEGLIGENCE

Negligence is the doing of an act which a reasonable officer would not do or the failure to do an act which the reasonable officer would do.

OPEN FIELDS

Open fields are the areas of premises where a person has such a low expectation of privacy that officers may enter these areas without a warrant, probable cause or (normally) even reasonable suspicion.

OPINIONS

An opinion is a statement which is not "fact." Opinions are normally not admissible at trial.

PREMISES

Premises includes homes, businesses, structures, and the surrounding areas. Premises has a different meaning depending upon the circumstances in which it is used.

PRIOR INCONSISTENT STATEMENTS

A prior inconsistent statement is a statement made by a witness or the defendant which is different than the statement made at the deposition, hearing, or trial at which the witness or the defendant is presently testifying. These prior inconsistent statements are admissible at trial to "impeach" the witness.

PROBABLE CAUSE

Probable cause is the evidence necessary to arrest or (normally) to search. This is more evidence than reasonable suspicion but less than proof beyond a reasonable doubt.

"Probable cause to arrest" is that amount of information which would cause an officer of reasonable caution to believe that a crime has been committed and that it was committed by the person to be arrested.

"Probable cause to search" is the amount of information which would cause an officer of reasonable caution to believe that the specific crime-related property will be found in the place to be searched.

PROTECTIVE SWEEP

A protective sweep is a brief search throughout premises in order to determine whether dangerous suspects are present. Normally such searches are lawful only when a

dangerous suspect is arrested on the premises, and there is a good reason to believe other dangerous suspects are present.

REASONABLE EXPECTATION OF PRIVACY

Persons have a reasonable expectation of privacy in areas where the courts have decided there is Fourth Amendment protection. The higher the expectation of privacy (e.g., homes and closed containers) the more likely an officer will need a warrant to search on probable cause. The lower the expectation of privacy (e.g., front yards and vehicles) the less likely an officer will need a warrant to search.

REASONABLE SUSPICION

Reasonable suspicion is evidence sufficient to "freeze" a person or object for a short period in order to determine whether probable cause exists. It is less evidence than probable cause but more than a hunch or mere suspicion. It is that amount of objective information (facts) which would warrant an officer in suspecting that the particular person is engaged in criminal activity.

RELEVANCE

Relevant evidence is any evidence which tends to prove or disprove a material question at trial.

RELIABILITY OF IDENTIFICATIONS

Reliability is the rule that witnesses may identify a defendant in court even if a pretrial identification was unduly suggestive if there is an "independent basis" for the witnesses' identification.

RELIABILITY OF INFORMANTS

When probable cause or reasonable suspicion is based on hearsay, the reliability (believability) of the informants is very important. Reliability is the believability or credibility of the informant. Normally "citizens" are unreliable.

SEARCH

A search is an "intrusion" by the state (officers) into areas where a person has a reasonable expectation of privacy.

SEARCH INCIDENT TO ARREST

A search incident to arrest is the search of areas within the immediate reach of an arrestee at the time of a lawful arrest.

SEIZURE

A seizure occurs when state agents (officers) stop or take a person into custody or take possession of or control of a person's property.

STANDING

Defendants must have standing to contest an alleged violation of constitutional rights. In order to prove standing defendants must prove that their own rights were violated.

STOP

A stop is any indication by an officer that the suspect is not free to leave. A stop is unconstitutional unless it is based on at least reasonable suspicion.

SUBSTITUTE EVIDENCE

Substitute evidence are facts accepted by the judge without actual testimony or proof of those facts.

SUGGESTIVITY

Suggestivity occurs when an officer indicates to a witness that a particular person is the suspected perpetrator of a crime. This suggestivity may happen before, during, or after the identification.

TORTS

A tort is the breach of a duty which causes damage or injury to another.

VEHICLES

Vehicles are mobile instruments which carry persons or things from one place to another.

VOLUNTARINESS

Any time a statement or a consent search is sought by an officer the statement or consent must be voluntarily given. In order to determine whether the statement or consent is voluntary the courts consider the "totality of the circumstances."

TABLE OF AUTHORITIES

Cases

bshies v. People, 289 P. 1081 (Colo. 1930) 637
dams v. Williams, 407 U.S. 143 (1972) 50
Aguilar v. Texas, 378 U.S. 108 (1964) 393
Arizona v. Gant, 129 S.Ct. 1710 (2009) 111, 116, 117, 254, 255
Arizona v. Hicks, 480 U.S. 321 (1987) 188, 263, 380
Arizona v. Johnson, 129 S.Ct. 781 (2009) 46, 222, 248
Arizona v. Roberson, 486 U.S. 675 (1986) 544
Arizona v. Youngblood, 488 U.S. 51 (1988) 650
Ark Valley Alfalfa Mills, Inc. v. Day, 263 P.2d 815 (Colo. 1953) 750
Arkansas v. Sanders, 442 U.S. 753 (1979) 27, 293
Barnes v. People, 735 P.2d 869 (Colo. 1987) 602
Beckwith v. United States, 425 U.S. 341 (1968) 492
Bell v. Wolfish, 441 U.S. 520 (1979) 347, 348
Beneficial Finance v. Wiener, 405 P.2d 691 (Okla. 1965) 746
Berkemer v. McCarty, 468 U.S. 420 (1984) 518
Bernal v. People, 44 P.3d 184 (Colo. 2002) 577, 579, 592
Bivins v. Six Unknown Named Agents, 403 U.S. 388 (1971) 779
Blincoe v. People, 494 P.2d 1285 (Colo. 1972) 137
Brendlin v. California, 551 U.S. 249 (2007) 46, 222
Brower v. County of Inyo, 489 U.S. 593 (1980) 780
Bruton v. United States, 391 U.S. 123 (1968) 552
Bumper v. North Carolina, 391 U.S. 543 (1968) 326
Burdeau v. McDowell, 256 U.S. 465 (1921) 362
Cady v. Dombrowski, 413 U.S. 433 (1973) 274
California v. Acevedo, 500 U.S. 565 (1991) 253, 293
California v. Carney, 471 U.S. 207 (1985) 220
California v. Ciraolo, 476 U.S. 207 (1986) 136
California v. Greenwood, 486 U.S. 35 (1988) 210
California v. Hodari D., 499 U.S. 621 (1991) 45
Camera v. Municipal Court of San Francisco, 387 U.S. 523 (1967) 311
Cameron v. City of Pontiac, 813 F.2d 782 (6th Cir. 1987) 780
Campbell v. People, 814 P.2d 1 (Colo. 1991) 603
Carolina v. Butler, 441 U.S. 369 (1979) 533
Castaneda v. Superior Court, 380 P.2d 641 (Cal. 1963) 333
Chambers v. Maroney, 399 U.S. 42 (1970) 252
Chapman v. United States, 356 U.S. 610 (1961) 202
Charnes v. Olona, 743 P.2d 36 (Colo. 1983) 627
Children v. Burton, 331 N.W.2d 673 (Iowa 1982) 773
Chimel v. California, 395 U.S. 752 (1969) 174, 295
City and County of Denver v. Hinsey, 493 P.2d 348 (Colo. 1972) 606
City of Aurora v. Loveless, 639 P.2d 1061 (Colo. 1981) 774
Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) 312
Colorado v. Bannister, 449 U.S. 1 (1980) 220
Colorado v. Bertine, 479 U.S. 367 (1987) 275, 279
Colorado v. Connelly, 479 U.S. 157 (1986) 485
Colorado v. Spring, 479 U.S. 564 (1987) 528
Commonwealth v Dembo, 301 A.2d 689 (Pa. 1973) 350
Compan v. People, 121 P.3d 876 (Colo. 2005) 623
Connecticut v. Barrett, 479 U.S. 523 (1987) 536
Cowdin v. People, 491 P2d 569 (Colo. 1971) 232
Cox v. People, 735 P.2d 153 (Colo. 1987) 514

Crawford v. Washington, 541 U.S. 36 (2004) 626
Cupp v. Murphy, 455 U.S. 1 (1982) 178
Davis v. Mississippi, 394 U.S. 721 (1969). 84
Davis v. United States, 512 U.S. 452 (1994). 537
Delaware v. Prouse, 440 U.S. 648 (1979). 225, 312
Diebold v. People, 485 P.2d 900 (Colo. 1971). 606
Dillon v. Superior Court, 497 P.2d 505 (Cal. 1972) 146
Dolan v. People, 449 P.2d 828 (Colo. 1969). 623
Douglas v. Town of Medford, 542 F. Supp. 1267 (D. Conn. 1982). 759
Druckenmiller v. United States, 458 F. Supp. 193 (E.D.Pa. 1982). 772
Dunaway v. New York, 442 U.S. 200 (1979). 67
Dunlap v. People, 173 P.3d 1054 (Colo. 2007). 606
Eagan v. Maiselson, 350 P.2d 567 (Colo. 1960). 606
Edmonds v. Dillin, 485 F. Supp. 722 (N.D. Ohio 1980); 779
Enyart v. People, 201 P. 564 (Colo. 1921). 606
Everrett v. City of Inverness, 224 So. 2d 365 (Fla. Dist. Ct. App. 1969). 770
Evers v. Westerberg, 329 N.Y.S.2d 615 (1972) 770
Fishback v. People, 851 P.2d 884 (Colo. 1993) 630
Florida v. Bostick, 501 U.S. 429 (1991) 42
Florida v. J.L., 529 U.S. 266 (2000) 60, 93
Florida v. Jimeno, 500 U.S. 248 (1991). 270
Florida v. Royer, 460 U.S. 491 (1983) 41, 68, 316
Florida v. Wells, 495 U.S. 1 (1990) 306
Foley v. Kilbrick, 425 N.E.2d 376 (Mass. App. 1981) 768
Franks v. Delaware, 438 U.S. 154 (1978). 433
Frazier v. Cupp, 394 U.S. 731 (1969). 301
Frick v. Abell, 602 P.2d 852 (Colo. 1979). 755
Fuentes v. Shevin, 407 U.S. 67 (1972). 745
Gimmy v. People, 645 P.2d 262 (Colo. 1982) 586
Gregory S., 169 Cal. Rptr. 540 (Cal. App. 1981) 78
Griffith v. City of Monrovia, 184 Cal. Rptr. 709 (1982). 776
Groh v. Ramirez, 540 U.S. 551 (2004). 419
Harabulak v. County of Suffolk, 654 F.2d 194 (2nd Cir. 1981). 787
Harlow v. Fitzgerald, 457 U.S. 800 (1982). 754
Hayes v. Florida, 470 U.S. 811 (1985). 69
Hayes v. Jefferson County, 618 F.2d 869 (6th Cir. 1982) 779
Henderson v. People, 879 P.2d 383 (Colo. 1994). 137, 147
Hensley v. Carey, 818 F.2d 646 (7th Cir.1986). 781
Hernandez v. United States, 353 F.2d 624 (9th Cir. 1966). 290
Hunter v. People, 655 P.2d 374 (Colo. 1982). 553
Illinois v. Andreas, 463 U.S. 765 (1983). 306
Illinois v. Caballes, 125 S.Ct. 834 (2005) 342
Illinois v. Gates, 462 U.S. 213 (1983). 367, 404, 431
Illinois v. Lafayette, 462 U.S. 640 (1983). 307, 320
Illinois v. Lidster, 540 U.S. 419 (2004) 359
Illinois v. McArthur, 531 U.S. 326 (2001). 172, 190
Illinois v. Rodriguez, 497 U.S. 177 (1990). 200
In Re: One 1969 Chevrolet 2-Door, 591 P.2d 1309 (Ariz. 1979). 261, 275
In re: P.E.A., 754 P.2d 382 (Colo. 1988). 361
Jacobs v. Superior Court, 111 Cal. Rptr. 449 (Cal. App. 1974). 139
Johnson v. United States, 333 U.S. 10 (1948). 369
Katz v. United States, 389 U.S. 347 (1972) 137, 338, 345, 347, 362
Kirby v. Illinois, 406 U.S. 482 (1972). 592
Knowles v. United States, 525 U.S. 113 (1999). 115
Leite v. City of Providence, , 463 F. Supp. 587 (D.R.I. 1978). 779
Lester v. City of Chicago, 830 F.2d 706 (7th Cir. 1987). 780

Lorenzana v. Superior Court, 511 P.2d 33 (Cal. App. 1973).....126, 138, 144
Lusby v. T.G. & Y. Stores Inc., 749 F.2d 1423 (10th Cir. 1984).....780
Malley v. Briggs, 475 U.S. 335 (1986).....771
Manson v. Brathwaite, 432 U.S. 98 (1977).....592
Martinelli v. District Court, 612 P.2d 1083 (Colo. 1980).....757
Martinez v. City of Lakewood, 655 P.2d 1388 (Colo. App. 1982).....749, 769
Maryland v. Dyson, 527 U.S. 465 (1999).....248
Maryland v. Pringle, 540 U.S. 366 (2003).....102, 373
Maryland v. Wilson, 519 U.S. 408 (1997).....228, 247
McCray v. Illinois, 386 U.S. 300 (1967).....388
McGuire v. People, 749 P.2d 960 (Colo. 1988).....513
McNeil v. Wisconsin, 501 U.S. 171 (1991).....545
Mendez v. People, 986 P.2d 275 (Colo. 1999).....165, 166
Messiah v. United States, 377 U.S. 201 (1964).....548
Michigan State Police v. Sitz, 496 U.S. 444 (1990).....358
Michigan v. Chesternut, 486 U.S. 567 (1988).....44
Michigan v. DeFillippo, 433 U.S. 33 (1971).....658
Michigan v. Long, 463 U.S. 1032 (1971).....230
Michigan v. Mosley, 423 U.S. 96 (1981).....541
Michigan v. Summers, 452 U.S. 692 (1981).....82, 171, 448
Michigan v. Tyler, 436 U.S. 499 (1978).....173, 312
Mills v. Smith, 656 F.2d 337 (8th Cir. 1981).....779
Mincey v. Arizona, 438 U.S. 385 (1978).....164, 482
Minnesota v. Dickerson, 508 U.S. 366 (1993).....125
Minnesota v. Olson, 495 U.S. 91 (1990).....110
Minnick v. Mississippi, 498 U.S. 146 (1990).....545
Miranda v. Arizona, 384 U.S. 436 (1966).....488
Mobell v. City and County of Denver, 671 P.2d 433 (Colo. App. 1983).....768
Monell v. Department of Social Services, 436 U.S. 658 (1978).....761
Montoya v. People, 740 P.2d 992 (Colo. 1983).....627
Muehler v. Mena, 544 U.S. 93 (2005).....83, 448
Naylor v. Louisiana Department of Public Highways, 423 So.2d 674 (La. App. 1982).....769
Neil v. Biggers, 409 U.S. 188 (1972).....588
New Jersey v. T.L.O., 469 U.S. 325 (1985).....360
New York v. Belton, 453 U.S. 454 (1981).....287
New York v. Quarles, 467 U.S. 649 (1985).....550
Nicholas v. People, 973 P.2d 1213 (Colo. 1999).....551
Nix v. Williams, 467 U.S. 431 (1984).....663
Ohio v. Robinette, 519 U.S. 33 (1996).....191, 236, 266, 328
Oliver v. United States, 466 U.S. 170 (1984).....144
Oregon v. Elstad, 470 U.S. 298 (1984).....465
Orozco v. Texas, 394 U.S. 324 (1969).....503, 505
Outlaw v. People, 17 P.3d 150 (Colo. 2001).....44, 56
P.E.A., 754 P.2d 382 (Colo. 1988).....360
Paratt v. Taylor, 451 U.S. 527 (1981).....780
Payton v. New York, 445 U.S. 573 (1980).....109
Peltz v. People, 728 P.2d 1271 (Colo. 1986).....375
Pennsylvania v. Mimms, 434 U.S. 106 (1977).....82
People ex rel. Sandstrom v. District Court, 904 P.2d 874 (Colo. 1995).....618
People in the Interest of R.A., 937 P.2d 731 (Colo. 1997).....200
People v. A.W., 982 P.2d 842 (Colo. 1999).....340
People v. Aarness, 150 P.3d 1271 (Colo. 2006).....109, 150, 156, 158, 166
People v. Abeyta, 795 P.2d 1324 (Colo. 1990).....404
People v. Adkins, 113 P.3d 788 (Colo. 2005).....536
People v. Aguilar-Ramos, 86 P.3d 397 (Colo. 2004).....521, 530
People v. Alameno, 193 P.3d 830 (Colo. 2008).....187

People v. Alarid, 483 P.2d 1331 (Colo. 1971) 437
People v. Alexander, 724 P.2d 1304 (Colo. 1986). 628
People v. Alexander, 797 P.2d 1250 (Colo. 1990) 104, 385
People v. Allen, 199 P.3d 33 (Colo. App. 2007) 507, 513
People v. Allison, 86 P.3d 421 (Colo. 2004) 163
People v. Altman, 938 P.2d 142 (Colo. 1997) 92, 96, 226, 233, 242
People v. Altman, 960 P.2d 1164 (Colo. 1998). 366, 415, 416, 417, 659, 660
People v. Al-Yousif, 49 P.3d 1165 (Colo. 2002). 529
People v. Amato, 562 P.2d 422 (Colo. 1977) 161
People v. Amato, 631 P.2d 1172 (Colo. App. 1981). 553
People v. Ammons, 162 Cal. Rptr. 792 (Cal. App. 1980). 140
People v. Andersen, 837 P.2d 293 (Colo. App. 1992). 508
People v. Anderson, 536 P.2d 302 (Colo. 1975) 352, 353
People v. Anderson, 637 P.2d 354 (Colo. 1981) 630
People v. Anderson, 837 P.2d 293 (Colo. App. 1992). 652
People v. Apodaca, 561 P.2d 351 (Colo. App. 1976). 135, 259
People v. Aragon, 529 P.2d 644 (Colo. 1974). 423
People v. Archuleta, 616 P.2d 977 (Colo. 1980). 64
People v. Archuleta, 719 P.2d 1091 (Colo. 1986) 245, 518
People v. Archuleta, 980 P.2d 509 (Colo. 1999) 45, 58, 77, 78
People v. Arellano, 791 P.2d 1135 (Colo. 1990). 405
People v. Arias, 159 P.3d 134 (Colo. 2007) 105, 236
People v. Arno, 153 Cal. Rptr. 624 (Cal. App. 1979). 320
People v. Arnold, 509 P.2d 1248 (Colo. 1973) 420
People v. Arnold, 527 P.2d 806 (Colo. 1974). 424
People v. Arroya, 988 P.2d 1124 (Colo. 1999) 535, 542
People v. Atencio, 140 P.3d 73 (Colo. App. 2005) 604
People v. Atencio, 565 P.2d 921 (Colo. 1977) 648
People v. Atkins, 844 P.2d 1196 (Colo. App. 1992). 621
People v. Atley, 727 P.2d 376 (Colo. 1986) 375, 427
People v. Avery, 478 P.2d 310 (Colo. 1970) 437, 438
People v. Baca, 600 P.2d 770 (Colo. 1979) 153
People v. Bachofer, 85 P.3d 615 (Colo. App. 2003) 379
People v. Baenziger, 97 P.3d 271 (Colo. 2004) 603
People v. Baird, 628 P.2d 161 (Colo. App. 1981). 66
People v. Baker, 813 P.2d 331 (Colo. 1991) 100, 133, 166
People v. Ball, 639 P.2d 1078 (Colo. 1982) 400, 430
People v. Banks, 655 P.2d 1384 (Colo. App. 1982). 377
People v. Barndt, 604 P.2d 1173 (Colo. 1980) 157, 732
People v. Barrientos, 956 P.2d 634 (Colo. App. 1997). 258
People v. Barros, 835 P.2d 587 (Colo. App. 1992) 367, 385
People v. Barrow, 139 P.3d 636 (Colo. 2006) 551
People v. Barry, 888 P.2d 327 (Colo. App. 1994) 157
People v. Bartley, 817 P.2d 1029 (Colo. 1991) 663
People v. Bates, 546 P.2d 491 (Colo. 1976). 74
People v. Battle, 694 P.2d 359 (Colo. App. 1984). 549
People v. Bauer, 552 P.2d 512 (Colo. 1976) 402, 428
People v. Becker, 533 P.2d 494 (Colo. 1975). 144
People v. Beckstrom, 843 P.2d 34 (Colo. App. 1992). 357
People v. Beltran, 634 P.2d 1003 (Colo. App. 1981). 648
People v. Benson, 124 P.3d 851 (Colo. App. 2005) 192, 665
People v. Benson, 490 P.2d 1287 (Colo. 1971). 212
People v. Berow, 688 P.2d 1123 (Colo. 1984). 202
People v. Billington, 552 P2d 500 (Colo. 1976) 183
People v. Bischofberger, 724 P.2d 660 (Colo. 1986). 115, 117, 296
People v. Black, 698 P.2d 766 (Colo. 1985) 493

People v. Blackmon, 20 P.3d 1215 (Colo. 2000). 115
People v. Bland, 884 P.2d 312 (Colo. 1994). 115, 175
People v. Blankenship, 30 P.3d 698 (Colo. App. 2000) 486, 513
People v. Blehm, 623 P.2d 411 (Colo. App. 1980). 340
People v. Blessett, 155 P.3d 388 (Colo. App. 2006) 470, 499, 523, 527
People v. Bloyd, 292 N.W.2d 546 (Mich. App. 1980) 262
People v. Bolton, 859 P.2d 311 (Colo. App. 1993) 581, 625
People v. Bookman, 646 P.2d 924 (Colo. 1982) 70, 479
People v. Borelli, 624 P.2d 900 (Colo. App. 1980). 620
People v. Borghesi, 40 P.3d 15 (Colo. App. 2001) 581, 582
People v. Borrego, 668 P.2d 21 (Colo. App. 1983) 578, 595
People v. Bossert, 722 P.2d 998 (Colo. 1986). 375
People v. Bostic, 148 P.3d 250 (Colo. App. 2006) 184, 191
People v. Bowers, 801 P.2d 511 (Colo. 1990) 625
People v. Bowman, 812 P.2d 725 (Colo. App. 1991). 477
People v. Boylan, 854 P.2d 807 (Colo. 1993) 59, 342, 343
People v. Bozeman, 624 P.2d 916 (Colo. App. 1980) 644
People v. Bradshaw, 156 P.3d 452 (Colo. 2007) 463, 536
People v. Brake, 191 Colo. 390, 533 P.2d 763 (1976) 238
People v. Branch, 805 P.2d 1075 (Colo. 1991) 481
People v. Brandon, 140 P.3d 15 (Colo. App. 2005) 76, 81, 229
People v. Branin, 533 P.2d 1138 (Colo. 1975) 377
People v. Brazzel, 18 P.3d 1285 (Colo. 2001) 189
People v. Breidenbach, 875 P.2d 879 (Colo. 1994). 205, 490, 664
People v. Brethauer, 482 P.2d 369 (Colo. 1971) 419
People v. Brewer, 690 P.2d 860 (Colo. 1984). 209
People v. Brewer, 720 P.2d 583 (Colo. App. 1985) 480
People v. Bueno, 626 P.2d 1167 (Colo. 1981) 616, 667
People v. Bugarin, 507 P.2d 875 (Colo. 1973) 644
People v. Burns, 615 P.2d 686 (Colo. 1980) 108
People v. Bustam, 641 P.2d 968 (Colo. 1982) 165, 169, 186
People v. Butler, 929 P.2d 36 (Colo. App. 1996) 478
People v. Calvaresi, 600 P.2d 57 (Colo. 1979). 616
People v. Campbell, 785 P.2d 153 (Colo. App. 1989) 587
People v. Campbell, 94 P.3d 1186 (Colo. App. 2004) 187, 587
People v. Canton, 951 P.2d 907 (Colo. 1998). 62
People v. Cappelli, 927 P.2d 832 (Colo. 1996). 371
People v. Cardenas, 25 P.3d 1258 (Colo. App. 2000) 484, 532
People v. Carillo-Montes, 796 P.2d 970 (Colo. 1990) 58
People v. Carlson, 677 P.2d 310 (Colo. 1984) 228
People v. Carlson, 677 P.2d 390 (Colo. App. 1983) 615
People v. Carper, 876 P.2d 582 (Colo. 1994). 308
People v. Carrasco, 85 P.3d 580 (Colo. App. 2003) 581
People v. Cascio, 932 P.2d 1381 (Colo. 1997) 221
People v. Casias 59 P.3d 853 (Colo. 2002) 654
People v. Casias, 563 P.2d 926 (Colo. 1977). 94, 177
People v. Casper, 631 P.2d 1134 (Colo. App. 1981). 640
People v. Castaneda, 187 P.3d 107 (Colo. 2008) 81
People v. Castro, 159 P.3d 597 (Colo. 2007) 266
People v. Cerda, 819 P.2d 502 (Colo. 1991) 235
People v. Cervantes-Arredondo, 17 P.3d 141 (Colo. 2001). 63, 81, 229
People v. Chase, 675 P.2d 315 (Colo. 1984) 523
People v. Chastain, 733 P.2d 1206 (Colo. 1987) 553
People v. Chaves, 855 P.2d 852 (Colo. 1993). 307
People v. Chavez, 632 P.2d 574 (Colo. 1981) 535
People v. Cherry, 119 P.3d 1081 (Colo. 2005) 50

People v. Christian, 632 P.2d 1031 (Colo. 1981)..... 643
People v. Clay, 304 N.E.2d 280 (Ill. 1973)..... 392
People v. Cleburn, 782 P.2d 784 (Colo. 1989)..... 328
People v. Cleburn, 782 P.2d 784 (Colo. 1989)..... 197
People v. Clements, 661 P.2d 267 (Colo. 1983)..... 253
People v. Clements, 665 P.2d 624 (Colo. 1983)..... 245
People v. Close, 867 P.2d 82 (Colo. App. 1993)..... 475, 543
People v. Clouse, 849 P.2d 228 (Colo. App. 1992)..... 113
People v. Cobb, 690 P.2d 848 (Colo. 1984)..... 283, 304
People v. Cobbin, 692 P.2d 1069 (Colo. 1984)..... 68, 90, 589
People v. Coca, 829 P.2d 385 (Colo. 1992)..... 236, 359
People v. Coghlan, 537 P.2d 745 (Colo. 1975)..... 196
People v. Cole, 584 P.2d 71 (Colo. 1978)..... 455, 610
People v. Cole, 645 P.2d 830 (Colo. 1982)..... 619
People v. Conley, 804 P.2d 240 (Colo. App. 1990)..... 261
People v. Contreas, 780 P.2d 552 (Colo. 1989)..... 62
People v. Conwell, 649 P.2d 1099 (Colo. 1982)..... 408
People v. Cook, 22 P.3d 947 (Colo. App. 2000)..... 638
People v. Cooper, 731 P.2d 781 (Colo. App. 1986)..... 77, 480
People v. Copenhaver, 21 P.3d 413 (Colo. App. 2000)..... 160
People v. Corbett, 547 P.2d 1264 (Colo. 1976)..... 465
People v. Corbett, 656 P.2d 687 (Colo. 1983)..... 666
People v. Corley, 698 P.2d 1336 (Colo. 1985)..... 471
People v. Corpany, 859 P.2d 865 (Colo. 1993)..... 96, 243, 257, 289, 296
People v. Corr, 682 P.2d 20 (Colo. 1984)..... 351, 355
People v. Counterman, 556 P.2d 481 (Colo. 1976)..... 273, 279, 306
People v. Cousins, 181 P.3d 365 (Colo. App. 2007)..... 634
People v. Covington, 19 P.3d 15 (Colo. 2002)..... 608
People v. Crawford, 632 P.2d 626 (Colo. App. 1981)..... 204, 356
People v. Crawford, 891 P.2d 225 (Colo. 1995)..... 166
People v. Crespin, 631 P.2d 1144 (Colo. App. 1981)..... 638
People v. Cruse, 58 P.3d 1114 (Colo. App. 2002)..... 663
People v. Cullen, 695 P.2d 750 (Colo. App. 1984)..... 401, 429
People v. Cummings, 706 P.2d 766 (Colo. 1985)..... 182
People v. Czemerynski, 786 P.2d 1100 (Colo. 1990)..... 635
People v. D.F., 933 P.2d 9 (Colo. 1997)..... 62
People v. D.F.L., 931 P.2d 448 (Colo. 1997)..... 292, 450, 506
People v. Dailey, 639 P.2d 1068 (Colo. 1982)..... 395, 424, 433
People v. Daniels, 973 P.2d 641 (Colo. 1998)..... 581
People v. Dauphinee, 554 P.2d 1103 (Colo. 1976)..... 250
People v. Daverin, 967 P.2d 629 (Colo. 1998)..... 104
People v. Davis, 851 P.2d 239 (Colo. App. 1993)..... 583
People v. Davis, 187 P.3d 562 (Colo. 2008)..... 464
People v. Davis, 565 P.2d 1347 (Colo. App. 1977)..... 221
People v. Davis, 669 P.2d 130 (Colo. 1983)..... 85
People v. Davis, 903 P.2d 1 (Colo. 1995)..... 53, 376
People v. DeBoer, 829 P.2d 447 (Colo. App. 1991)..... 483, 500
People v. DeHerrera, 647 P.2d 241 (Colo. App. 1981)..... 617
People v. Delgado, 832 P.2d 971 (Colo. App. 1991)..... 103
People v. Dennison, 918 P.2d 1114 (Colo. 1996)..... 495
People v. Destro, 215 P.3d 1147 (Colo. App. 2008)..... 604
People v. Diaz, 793 P.2d 1181 (Colo. 1990)..... 107
People v. Dickinson, 928 P.2d 1309 (Colo. 1996)..... 42, 221, 345, 371
People v. Diefenderfer, 784 P.2d 741 (Colo. 1989)..... 625
People v. District Court, 776 P.2d 1083 (Colo. 1990)..... 625
People v. District Court, 647 P.2d 1206 (Colo. 1982)..... 601, 628

People v. Dixon, 21 P.3d 440 (Colo. App. 2000) 61, 247
People v. Doke, 171 P.3d 237 (Colo. 2007) 665
People v. Donahue, 750 P.2d 921 (Colo. 1988) 419
People v. Donald, 637 P.2d 392 (Colo. 1981) 139
People v. Donnelly, 691 P.2d 747 (Colo. 1987) 106, 397
People v. Dotson, 55 P.3d 175 (Colo. App. 2002) 580
People v. Dracon, 884 P.2d 712 (Colo. 1994) 491
People v. Drake, 748 P.2d 1237 (Colo. 1988) 603, 631
People v. Drake, 785 P.2d 1257 (Colo. 1990) 100, 153, 193
People v. Draper, 586 P.2d 231 (Colo. 1978) 165
People v. Duemig, 620 P.2d 240 (Colo. 1980) 119
People v. Dumas, 955 P.2d 60 (Colo. 1998) 182, 185
People v. Dunkin, 888 P.2d 305 (Colo. App. 1994) 357, 434
People v. Dunlap, 124 P.3d 780 (Colo. App. 2004) 463, 524, 544, 577
People v. Dunlap, 975 P.2d 723 (Colo. 1999) 630
People v. Eirish, 165 P.3d 848 (Colo. App. 2007) 375, 420, 428, 436
People v. Elagnaf, 829 P.2d 484 (Colo. App. 1991) 478, 522
People v. Elkhatib, 632 P.2d 275 (Colo. 1981) 173
People v. Elmarr, 181 P.3d 1157 (Colo. 2008) 491, 505
People v. Enriquez, 763 P.2d 1033 (Colo. 1988) 656
People v. Eppens, 979 P.2d 14 (Colo. 1999) 627
People v. Erickson, 883 P.2d 511 (Colo. App. 1994) 653
People v. Erthal, 570 P.2d 534 (Colo. 1976) 400, 429
People v. Escano, 843 P.2d 111 (Colo. App. 1992) 314
People v. Farrell, 34 P.3d 401 (Colo. 2001) 622
People v. Fell, 832 P.2d 1015 (Colo. App. 1991) 639
People v. Fierero, 606 P.2d 1291 (1980) 604
People v. Fincham, 799 P.2d 419 (Colo. 1990) 622
People v. Fines, 127 P.3d 79 (Colo. 2006) 47, 82
People v. Fish, 660 P.2d 505 (Colo. App. 1983) 534
People v. Flowers, 128 P.3d 285 (Colo. App. 2005) 102, 373
People v. Ford, 100 P.3d 540 (Colo. App. 2004) 666
People v. Fordyce, 612 P.2d 1131 (Colo. 1980) 483
People v. Forsyth, 653 P.2d 417 (Colo. App. 1982) 355
People v. Fortune, 930 P.2d 1341 (Colo. 1997) 436
People v. Foster, 788 P.2d 825 (Colo. 1990) 100
People v. Fournier, 793 P.2d 1176 (Colo. 1990) 445
People v. Fox, 691 P.2d 349 (Colo. App. 1984) 470, 476
People v. Fox, 862 P.2d 1000 (Colo. App. 1993) 208, 619
People v. Franklin, 640 P.2d 226 (Colo. 1982) 185, 187
People v. Freeman, 668 P.2d 1371 (Colo. 1983) 467, 472
People v. Frost, 5 P.3d 317 (Colo. App. 1999) 625
People v. Fury, 872 P.2d 1280 (Colo. App. 1993) 469
People v. Galimanis, 944 P.2d 626 (Colo. App. 1997) 604
People v. Gall, 30 P.3d 145 (Colo. 2001) 287, 288, 292, 365, 369, 412, 414, 420, 421, 438, 441
People v. Gallegos, 2009 WL 399766 (Colo. App. 2009) 642
People v. Gann, 724 P.2d 1318 (Colo. 1986) 654
People v. Garcia, 11 P.3d 449 (Colo. 2000) 70, 206, 331
People v. Garcia, 169 P.3d. 223 (Colo. App. 2007) 613
People v. Garcia, 752 P.2d 570 (Colo. 1988) 407, 618, 647, 667
People v. Garcia, 784 P.2d 823 (Colo. App. 1989) 605
People v. Garcia, 789 P.2d 190 (Colo. 1990) 235
People v. Garcia, 826 P.2d 1259 (Colo. 1992) 622
People v. Garner, 806 P.2d 366 (Colo. 1991) 638
People v. Garrison, 491 P.2d 971 (Colo. 1971) 497
People v. Gay, 24 P.3d 624 (Colo. App. 2000) 604

People v. Gee, 33 P.3d 1252 (Colo. App. 2001) 276, 277
People v. Gennings, 808 P.2d 839 (Colo. 1991) 473, 491
People v. Genrich, 928 P.2d 799 (Colo. App. 1996) 331, 434, 603
People v. George, 914 P.2d 367 (Colo. 1996) 235
People v. Gifford, 782 P.2d 795 (Colo. 1989) 214, 447
People v. Gillis, 883 P.2d 554 (Colo. App. 1994) ..... 157, 194, 492, 498, 501, 63[illegible]
People v. Glasener, 550 P.2d 851 (Colo. 1976) 390
People v. Glaubman, 485 P.2d 711 (Colo. 1971) 320, 422
People v. Glavey, 530 P.2d 491 (Colo. 1975) 421
People v. Godinas, 490 P.2d 945 (Colo. 1971) 181
People v. Goessl, 526 P.2d 664 (Colo. 1974) 232
People v. Gomez, 537 P.2d 197 (Colo. 1975) 630
People v. Gomez, 632 P.2d 586 (Colo. 1981) 139
People v. Gonzales, 987 P.2d 239 (Colo. App. 1999) 510
People v. Gonzalez, 525 P.2d 1139 (Colo. 1974) 613
People v. Gosselin, 205 P.3d 456 (Colo. App. 2008) 463
People v. Gothard, 185 P.3d 180 (Colo. 2008) 116, 169
People v. Gould, 354 P.2d 865 (Cal. 1960) 593
People v. Grady, 755 P.2d 124 (Colo. 1988) 401
People v. Grana, 527 P.2d 543 (Colo. 1974) 733
People v. Grant, 30 P.3d 667 (Colo. App. 2000) 473, 539
People v. Graybeal, 155 P.3d 614 (Colo. App. 2007) 605
People v. Grazier, 992 P.2d 1149 (Colo. 2000) 164, 378, 382, 383
People v. Greathouse, 742 P.2d 334 (Colo. 1987) 649, 652
People v. Green, 70 P.3d 1213 (Colo. 2003) 420
People v. Greer, 860 P.2d 528 (Colo. 1993) 56
People v. Grenier, 200 P.3d 1062 (Colo. App. 2008) 50, 277, 521, 539
People v. Griffin, 985 P.2d 15 (Colo. App. 1998) 581
People v. Guerin, 769 P.2d 1068 (Colo. 1989) 168
People v. Gurule, 593 P.2d 319 (Colo. 1978) 260
People v. Gutierrez, 596 P.2d 759 (1979) 239
People v. H.J., 931 P.2d 1177 (Colo. 1997) 46, 234
People v. Haggart, 533 P.2d 488 (Colo. 1975) 344
People v. Haley, 41 P.3d 666 (Colo. 2001) 232, 343
People v. Hamilton, 831 P.2d 1326 (Colo. 1992) 466, 490, 506
People v. Hammas, 141 P.3d 966 (Colo. App. 2006) 123, 298
People v. Hampton, 587 P.2d 275 (Colo. 1978) 433
People v. Hampton, 603 P.2d 133 (Colo. 1979) 283
People v. Hampton, 746 P.2d 947 (Colo. 1987) 603
People v. Hamrick, 624 P.2d 1333 (Colo. App. 1979) 644
People v. Hancock, *525 P.2d 435* (Colo. 1974) 194, 268
People v. Hankins, 201 P.3d 1215 (Colo. 2009) 492
People v. Hannaman, 507 P.2d 466 (Colo. 1973) 87
People v. Hardiway, 874 P.2d 425 (Colo. App. 1993) 585
People v. Hardrick, 60 P.3d 264 (Colo. 2002) 79, 93, 449
People v. Harfmann, 633 P.2d 500 (Colo. App. 1981) 280, 320
People v. Harper, 205 P.3d 452 (Colo. App. 2008) 501
People v. Harper, 902 P.2d 842 (Colo. 1995) 160, 185
People v. Harris, 703 P.2d 667 (Colo. App. 1985) 591
People v. Harris, 762 P.2d 651 (Colo. 1988) 86, 110
People v. Harrison, 58 P.3d 1103 (Colo. App. 2002) ..... 484, 521, 63[illegible]
People v. Hart, 718 P.2d 538 (Colo. 1986) ..... 44[illegible]
People v. Hart, 787 P.2d 186 (Colo. App. 1989) 126, 138, 341
People v. Hastings, 983 P.2d 78 (Colo. App. 1998) 134
People v. Hayhurst, 571 P.2d 721 (Colo. 1977) 51, 267
People v. Hazelhurst, 662 P.2d 1081 (Colo. 1981) 99

People v. Hearty, 644 P.2d 302 (Colo. 1982).....292, 450
People v. Hebert, 46 P.3d 473 (Colo. 2002).....159, 162, 365, 369, 411, 414
People v. Heilman, 52 P.3d 224 (Colo. 2002).....39, 48, 59
People v. Heimel, 812 P.2d 1177 (Colo. 1991).....316
People v. Helm, 633 P.2d 1071 (Colo. 1981).....332
People v. Henry, 631 P.2d 1122 (Colo. 1981).....284, 384, 391, 425
People v. Herrera, 935 P.2d 956 (Colo. 1997).....335
People v. Hicks, 590 P.2d 967 (Colo. 1979).....277
People v. Higbee, 802 P.2d 1085 (Colo. 1990).....159, 251
People v. Hill, 934 P.2d 821 (Colo. 1996).....40, 221
People v. Hillman, 834 P.2d 1271 (Colo. 1992).....210
People v. Hoffman, 780 P.2d 471 (Colo. 1989).....136, 168
People v. Hogan, 114 P.3d 42 (Colo. App. 2004).....577, 581
People v. Hogan, 649 P.2d 326 (Colo. 1982).....150
People v. Holmes, 981 P.2d 168 (Colo. 1999).....132
People v. Hopkins, 870 P.2d 478 (Colo. 1994).....301
People v. Horn, 790 P.2d 816 (Colo. 1990).....493
People v. Howard, 215 P.3d 1134 (Colo. App. 2008).....577
People v. Howard, 92 P.3d 445 (Colo. 2004).....492
People v. Hughes, 767 P.2d 1201 (Colo. 1989).....55, 94
People v. Hulsing, 825 P.2d 1027 (Colo. App. 1991).....623, 642
People v. Humes, 762 P.2d 664 (Colo. 1988).....651
People v. Humphrey, 132 P.3d 352 (Colo. 2006).....474, 486, 529
People v. Hutton, 831 P.2d 486 (Colo. 1992).....474
People v. Huynh, 98 P.3d 907 (Colo. App. 2004).....55, 234
People v. Ingram, 984 P.2d 597 (Colo. 1999).....550
People v. J.C., 844 P.2d 1185 (Colo. 1993).....495
People v. J.D., 989 P.2d 762 (Colo. 1999).....488, 495
People v. J.L.M., 8 P.3d 435 (Colo. 1999).....533
People v. Jackson, 627 P.2d 741 (Colo. 1981).....55, 636
People v. Jewell, 175 P.3d 103 (Colo. 2008).....532
People v. Jimenez, 217 P.3d 841 (Colo. App. 2008).....539, 547
People v. Johnson, 30 P.3d 718 (Colo. App. 2000).....513
People v. Johnson, 560 P.2d 465 (Colo. 1977).....143
People v. Johnson, 653 P.2d 737 (Colo. 1982).....586
People v. Johnson, 671 P.2d 958 (Colo. 1983).....493
People v. Johnson, 691 P.2d 751 (Colo. App. 1984).....53
People v. Johnson, 865 P.2d 836 (Colo. 1994).....41, 316
People v. Jones, 767 P.2d 236 (Colo. 1989).....112
People v. Jones, 828 P.2d 797 (Colo. 1992).....466
People v. Jordan, 891 P.2d 1010 (Colo. 1995).....526
People v. Joyce, 878 P.2d 48 (Colo. App. 1994).....479
People v. Juarez, 770 P.2d 1286 (Colo. 1989).....211, 440
People v. Kaiser, 32 P.3d 480 (Colo. 2001).....529
People v. Kazmierski, 25 P.3d 1207 (Colo. 2001).....379, 661
People v. Kellum, 907 P.2d 712 (Colo. App. 1995).....201
People v. Kerst, 181 P.3d 1167 (Colo. 2008).....436
People v. King, 121 P.3d 234 (Colo. App. 2005).....623
People v. King, 151 P.3d 594 (Colo. App. 2006).....531
People v. King, 16 P.2d 807 (Colo. 2001).....66, 99
People v. Klausner, 74 P.3d 421 (Colo. App. 2003).....481
People v. Kluhsman, 980 P.2d 529 (Colo. 1999).....122, 159, 184
People v. Koehn, 178 P.3d 536 (Colo. 2008).....182
People v. Kyle, 111 P.3d 491 (Colo. App. 2004).....637
People v. La Frankie, 858 P.2d 702 (Colo. 1993).....490, 503
People v. Lagrutta, 775 P.2d 576 (Colo. 1989).....249

People v. Larson, 97 P.3d 246 (Colo. App. 2004) 640
People v. Laurent, 194 P.3d 1053 (Colo. App. 2008) 211
People v. Lawrence, 55 P.3d 155 (Colo. App. 2001) 498
People v. Lazare, 542 P.2d 1290 (Colo. 1975) 643
People v. Leahy, 484 P.2d 778 (Colo. 1970) 422, 444
People v. Lee, 914 P.2d 441 (Colo. App. 1995) 44
People v. Leftwich, 869 P2d 1260 (Colo. 1994) 387
People v. Lehmkuhl, 117 P.3d 98 (Colo. App. 2004) 120
People v. LeMasters, 666 P.2d 573 (Colo. 1983) 607, 632, 647
People v. Lesslie, 939 P.2d 443 (Colo. App. 1996) 341
People v. Lewis, 659 P.2d 676 (Colo. 1983) 96
People v. Lewis, 975 P.2d 160 (Colo. 1999) 134, 152, 154, 176, 365, 367, 376
People v. Licea, 918 P.2d 1109 (Colo. 1996) 332
People v. Lindsey, 805 P.2d 1134 (Colo. App. 1990) 153
People v. Lingo, 806 P.2d 949 (Colo. 1991) 58, 129
People v. Lingren, 739 P.2d 895 (Colo. App. 1987) 75
People v. Litchfield, 918 P.2d 1099 (Colo. 1996) 234, 243, 278
People v. Little, 598 P.2d 140 (Colo. 1979) 208
People v. Loggins, 981 P.2d 630 (Colo. App. 1998) 122
People v. Lopez, 946 P.2d 478 (Colo. App. 1997) 481
People v. Lowe, 616 P.2d 118 (Colo. 1980) 507, 632
People v. Loyd, 751 P.2d 1015 (Colo. App. 1988) 515, 578, 617
People v. Lucero, 720 P.2d 604 (Colo. App. 1985) 199, 389
People v. Lujan, 484 P.2d 1238 (Colo. 1971) 216
People v. Mack, 638 P.2d 257 (Colo. 1981) 490
People v. Mack, 895 P.2d 530 (Colo. 1995) 506
People v. Madonna, 651 P.2d 378 (Colo. 1982) 587, 641
People v. Madson, 586 P.2d 1338 (Colo. 1978) 124
People v. Madson, 638 P.2d 18 (Colo. 1981) 8
People v. Madson, 689 P.2d 639 (Colo. App. 1984) 653
People v. Magallanes-Aragon, 948 P.2d 528 (Colo. 1997) 191, 265, 266, 326, 331
People v. Magoon, 645 P.2d 286 (Colo. App. 1982) 166
People v. Malczewski, 744 P.2d 62 (Colo. 1987) 161
People v. Malloy, 178 P.3d 1283 (Colo. App. 2008) 113, 256
People v. Mangum, 48 P.3d 568 (Colo. 2002) 516
People v. Manier, 197 P.3d 254 (Colo. App. 2008) 124
People v. Manning, 672 P.2d 499 (Colo. 1983) 475, 477
People v. Maraz, 961 P.2d 481 (Colo. 1998) 393
People v. Marcellus, 819 P.2d 555 (Colo. App. 1991) 543, 546
People v. Marez, 916 P.2d 543 (Colo. App. 1995) 155
People v. Marioneaux, 618 P.2d 678 (Colo. App. 1980) 68
People v. Martin, 30 P.3d 758 (Colo. App. 2000) 483, 532
People v. Martin, 791 P.2d 1159 (Colo. App. 1989) 587
People v. Martinez, 200 P.3d 1053 (Colo. 2009) 41, 93, 252, 397, 438, 449
People v. Martinez, 32 P.3d 520 (Colo. App. 2001) 252, 374, 580
People v. Martinez, 789 P.2d 420 (Colo. 1990) 545
People v. Martinez, 801 P.2d 542 (Colo. 1990) 93, 289, 449
People v. Martinez, 987 P.2d 884 (Colo. App. 1999) 639
People v. Marujo, 192 P.3d 1003 (Colo. 2008) 39, 40
People v. Mascarenas, 666 P.2d 101 (Colo. 1983) 584
People v. Mascarenas, 972 P.2d 717 (Colo. App. 1998) 91, 123, 160, 29
People v. Mason, 643 P.2d 745 (Colo. 1982) 64
People v. Mason, 989 P.2d 757 (Colo. 1999) 356
People v. Massey, 495 P.2d 1141 (1972) 434
People v. Masters, 33 P.3d 1191 (Colo. App. 2001), *aff'd* 58 P.3d 979 (2002) 400, 430
People v. Matheny, 46 P.3d 453 (Colo. 2002) 498

People v. Mathis, 542 P.2d 1296 (Colo. 1975) 399
People v. Mattas, 645 P.2d 254 (Colo. 1982) 87, 586
People v. May, 859 P.2d 879 (Colo. 1993) 528
People v. May, 886 P.2d 280 (Colo. 1994) 343
People v. McCall, 623 P.2d 397 (Colo. 1981) 189, 196, 329
People v. McClaugherty, 566 P.2d 361 (Colo. 1977) 145
People v. McCombs, 629 P.2d 1088 (Colo. App. 1981) 57, 631
People v. McCormick, 881 P.2d 423 (Colo. App. 1994) 478
People v. McCoy, 870 P.2d 1231 (Colo. 1994) 101
People v. McCoy, 944 P.2d 577 (Colo. App. 1996) 253
People v. McCullough, 6 P.3d 774 (Colo. 2000) 353
People v. McDaniel, 160 P.3d 247 (Colo. 2007) 97, 233
People v. McGahey, 500 P.2d 977 (Colo. 1972) 143
People v. McGlotten, 166 P.3d 182 (Colo. App. 2007) 499, 527
People v. McIntyre, 789 P.2d 1108 (Colo. 1990) 471, 486
People v. McKenna, 585 P.2d 275 (Colo. 1978) 601
People v. McKinstrey, 852 P.2d 467 (Colo. 1993) 205
People v. McKinstry, 843 P.2d 18 (Colo. 1993) 413, 447
People v. McMillon, 892 P.2d 879 (Colo. 1995) 257, 293, 296
People v. Medina, 25 P.3d 1216 (Colo. 2001) 468, 471
People v. Medina, 521 P.2d 1257 (Colo. 1974) 606
People v. Meinerz, 890 P.2d 130 (Colo. App. 1994) *cert granted and judgment vacated on other grounds* 339
People v. Mejia-Mendoza, 965 P.2d 777 (Colo. 1998) 521
People v. Melgosa, 753 P.2d 221 (Colo. 1988) 242, 262, 372
People v. Melton, 910 P.2d 672 (Colo. 1996) 40, 143
People v. Mendoza, 176 Cal. Rptr. 293 (Cal. 1981) 142
People v. Mendoza-Balderama, 981 P.2d 150 (Colo. 1999) 165, 170
People v. Meraz, 961 P.2d 481 (Colo. 1998) 425
People v. Meredith, 763 P.2d 562 (Colo. 1988) 114
People v. Metcalf, 926 P.2d 133 (Colo. App. 1996) 633
People v. Mickens, 734 P.2d 646 (Colo. App. 1986) 75, 80, 127, 199
People v. Milhollin, 751 P.2d 43 (Colo. 1988) 119
People v. Miller, 75 P.3d 1108 (Colo. 2003) 401, 418
People v. Miller, 773 P.2d 1053 (Colo. 1989) 155
People v. Miller, 829 P.2d 443 (Colo. App. 1991) 483, 533
People v. Miller, 94 P.3d 1197 (Colo. App. 2004) 155, 176, 191, 199, 214, 430, 533
People v. Milligan, 77 P.3d 771 (Colo. App. 2003) 276, 511, 664
People v. Milton, 826 P.2d 1282 (Colo. 1992) 133, 193
People v. Minjarez, 81 P.3d 348 (Colo. 2003) 493, 494, 512
People v. Mintz, 165 P.3d 829 (Colo. App. 2007) 603
People v. Miranda-Olivas, 41 P.3d 658 (Colo. 2001) 469
People v. Monroe, 925 P.2d 757 (Colo. 1996) 593
People v. Montanez, 944 P.2d 529 (Colo. App. 1997) 583
People v. Montoya, 828 P.2d 251 (Colo. 1992) 54
People v. Montoya, 914 P.2d 491 (Colo. App. 1995) 203
People v. Moore, 117 P.3d 1 (Colo. App. 2004) 623
People v. Moore, 860 P.2d 549 (Colo. App. 1993) *rev'd on other gnds* 877 P.2d 840 (Colo. 1994) 625
People v. Moore, 900 P.2d 66 (Colo. 1995) 249, 254, 271, 491
People v. Morales, 935 P.2d 936 (Colo. 1997) 44, 54, 94
People v. Moreno, 491 P.2d 575 (Colo. 1971) 394, 464
People v. Morley, 4 P.3d 1078 (Colo. 2000) 662
People v. Morrison, 583 P.2d 924 (Colo. 1978) 210
People v. Mossmann, 17 P.3d 165 (Colo.App. 2000) 626
People v. Muniz, 190 P.3d 774 (Colo. App. 2008) 539
People v. Muniz, 597 P.2d 580 (1979) 131

People v. Murphy, 919 P.2d 191 (Colo. 1996). 601
People v. Najjar, 984 P.2d 592 (Colo. 1999) 186, 188, 263, 302
People v. Nanes, 174 Colo. 294, 483 P.2d 958 (1971) 384
People v. Naranjo, 507 P.2d 1273 (Colo. 1973) 541, 542
People v. Naranjo, 686 P.2d 1343 (Colo. 1984) 249
People v. Newton, 966 P.2d 563 (Colo. 1998) 62
People v. Norman, 572 P.2d 1257 (Colo. 1977) 605
People v. Nunez, 698 P.2d 1376 (Colo. App. 1984). 653
People v. Nunez, 824 P.2d 54 (Colo. App. 1991). 534
People v. Nunez, 841 P.2d 261 (Colo. App. 1992). 613
People v. O'Hearn, 931 P.2d 1168 (Colo. 1997). 133, 502
People v. Oates, 698 P.2d 811 (Colo. 1985) 319, 346
People v. Olivas, 859 P.2d 211 (Colo. 1993). 265, 271
People v. Opson, 632 P.2d 602 (Colo. App. 1980) 639
People v. Ornelas, 937 P.2d 867 (Colo. App. 1996) 82
People v. Ortega, 34 P.3d 986 (Colo. 2001) 42, 290, 344, 380
People v. Ortega, 508 P.2d 784 (Colo. 1973). 592
People v. Owens, 969 P.2d 704 (Colo. 1999). 526
People v. Owens, 97 P.3d 227 (Colo. App. 2004) 581
People v. Oynes, 920 P.2d 880 (Colo. App. 1996) 144, 146, 374, 413, 414
People v. Pacheco, 175 P.3d 91 (Colo. 2006) 387, 418
People v. Pacheco, 182 P.3d 1180 (Colo. 2008) 54, 76
People v. Pacheco, 502 P.2d 70 (Colo. 1972). 587
People v. Padilla, 511 P.2d 480 (Colo. 1973). 445
People v. Page, 907 P.2d 624 (Colo. App. 1995). 374, 436, 526
People v. Pahl, 169 P.3d 169 (Colo. 2006) 604
People v. Palmer, 888 P.2d 348 (Colo. App. 1994). 341, 508
People v. Pancoast, 659 P.2d 1348 (Colo. 1983) 38, 80, 127
People v. Pannebaker, 714 P.2d 904 (Colo. 1986) 405, 43
People v. Papez, 652 P.2d 619 (Colo. App. 1982). 171, 443, 447
People v. Parada, 533 P.2d 1121 (Colo. 1975) 468, 474, 504
People v. Parsons, 15 P.3d 799 (Colo. App. 2000). 496
People v. Pate, 705 P.2d 519 (Colo. 1985). 106, 117
People v. Pate, 71 P.3d 1005 (Colo. 2003) 106, 117, 163
People v. Patnode, 126 P.3d 249 (Colo. App. 2005) 276
People v. Payne, 839 P.2d 468 (Colo. App. 1992). 198
People v. Paynter, 955 P.2d 68 (Colo. 1998) 43, 89
People v. Pearson, 546 P.2d 1259 (Colo. 1976) 511
People v. Pease, 934 P.2d 1374 (Colo. 1997) 526
People v. Perea, 126 P.3d 241 (Colo. App. 2005) 636
People v. Perez, 690 P.2d 853 (Colo. 1984). 57, 257
People v. Perryman, 859 P.2d 263 (Colo. App. 1993) 603, 655
People v. Perschong, 506 P.2d 1232 (Colo. 1973) 395, 424
People v. Phillips, 594 P.2d 1053 (Colo. 1979). 192, 206, 331
People v. Pierce, 562 P.2d 760 (1977) 83
People v. Pierson, 670 P.2d 770 (Colo. 1983). 545, 548
People v. Pilkington, 156 P.3d 477 (Colo. 2007) 213
People v. Pitts, 13 P.2d 1218 (Colo. 2000). 188
People v. Platt, 81 P.3d 1060 (Colo. 2004) 525, 532
People v. Plotner, 534 P.2d 791 (Colo. 1975). 635
People v. Polander, 41 P.3d 698 (Colo. 2001) 60, 99, 234, 517
People v. Pollock, 796 P.2d 63 (Colo. App. 1990). 14
People v. Pope, 724 P.2d 1323 (Colo. 1986) 652
People v. Portley, 857 P.2d 459 (Colo. App. 1992). 582
People v. Probasco, 795 P.2d 1330 (Colo. 1990) 497, 506
People v. Quezada, 731 P.2d 730 (Colo. 1986) 542

People v. Quinn, 794 P.2d 1066 (Colo. App. 1990) 469, 634
People v. Quintana, 996 P.2d 146 (Colo. App. 1998) 531
People v. Quintana, 665 P.2d 605 (Colo. 1983) 456
People v. Quintana, 785 P.2d 934 (Colo. 1990) 404
People v. Quintero, 657 P.2d 948 (Colo. 1983) 65, 73, 377
People v. Raglin, 21 P.3d 419 (Colo. App. 2000) 84
People v. Rahming, 795 P.2d 1338 (Colo. 1990) 56
People v. Raibon, 843 P.2d 46 (Colo. App. 1992) 460
People v. Ramirez, 1 P.3d 223 (Colo. App. 1999) 604
People v. Ramos, 13 P.3d 295 (Colo. 2000) 65, 227
People v. Randolph, 4 P.3d 477 (Colo. 2000) 367, 378, 417, 439, 661
People v. Ratcliff, 778 P.2d 1371 (Colo. 1989) 57, 95, 100, 289
People v. Ray, 626 P.2d 167 (Colo. 1981) 641
People v. Rayford, 725 P.2d 1142 (Colo. 1986) 372
People v. Raymer, 662 P.2d 1066 (Colo. 1983) 674
People v. Redderson, 992 P.2d 1176 (Colo. 2000) 83, 244
People v. Redgebol, 184 P.3d 86 (Colo. 2008) 521, 536
People v. Redinger, 906 P.2d 81 (Colo. 1995) 226
People v. Reed, 216 P.3d 55 (Colo. App. 2008) 577
People v. Requejo, 919 P.2d 874 (Colo. App. 1996) 511
People v. Rex, 636 P.2d 1282 (Colo. App. 1981) 583
People v. Reyes, 956 P.2d 1254 (Colo. 1998) 248
People v. Reynolds, 895 P.2d 1059 (Colo. 1995) 376
People v. Rhodes, 729 P.2d 982 (Colo. 1986) 485
People v. Ridenour, 878 P.2d 23 (Colo. App. 1994) 581
People v. Rincon, 140 P.3d 976 (Colo. App. 2005) 605
People v. Rios, 43 P.3d 726 (Colo. App. 2001) 114, 291, 296
People v. Rivas, 13 P.3d 315 (Colo. 2000) 510
People v. Rivera, 56 P.3d 1155 (Colo. App. 2002) 641
People v. Rivera, 792 P.2d 786 (Colo. 1990) 339
People v. Rivers, 727 P.2d 394 (Colo. App. 1986) 203
People v. Roark, 643 P.2d 756 (Colo. 1982) 164, 644
People v. Roberts, 553 P.2d 93 (Colo. App. 1976) 611
People v. Robinson, 713 P.2d 1333 (Colo. App. 1985) 631
People v. Robledo, 832 P.2d 249 (Colo. 1992) 494
People v. Roccaforte, 919 P.2d 799 (Colo. 1996) 413, 443
People v. Roddy, 532 P.2d 958 (Colo. 1975) 280
People v. Rodriguez, 645 P.2d 851 (Colo. App. 1982) 618
People v. Rodriguez, 945 P.2d 1351 (Colo. 1997) 50, 64, 67, 75, 226, 240, 268
People v. Romero, 745 P.2d 1003 (Colo. 1987) 629
People v. Rosa, 928 P.2d 1365 (Colo. App. 1996) 324
People v. Rosales, 911 P.2d 644 (Colo. App. 1995) 492, 540
People v. Ross, 821 P.2d 816 (Colo. 1992) 511, 546
People v. Rossman, 140 P.3d 172 (Colo. App. 2006) 354
People v. Roth, 85 P.3d 571 (Colo. App. 2003) 235, 250, 359
People v. Rowe, 837 P.2d 260 (Colo. App. 1992) *reversed on other gnds* 865 P.2d 486 (Colo. 1993) 148
People v. Roybal, 55 P.3d 144 (Colo. App. 2001) 481
People v. Roybal, 665 P.2d 410 (Colo. 1982) 120, 239, 481
People v. Rubanowitz, 673 P.2d 45 (Colo. 1983) 554
People v. Rudnick, 878 P.2d 16 (Colo.App. 1993) 635
People v. Rueda, 649 P.2d 1106 (Colo. 1982) 296, 305
People v. Rushdoony, 97 P.3d 338 (Colo. App. 2004) 54, 97, 125
People v. Russom, 107 P.3d 986 (Colo. App. 2004) 403, 431, 447
People v. Rutovic, 193 Colo. 397, 5676 P.2d 705 (1977) 274
People v. S.M.D., 864 P.2d 1103 (Colo. 1994) 551
People v. Saars, 584 P.2d 622 (Colo. 1978) 154, 382, 383

People v. Salazar, 648 P.2d 157 (Colo. App. 1981) 629
People v. Salazar, 964 P.2d 502 (Colo. 1998) 61
People v. Sanders, 358 N.E. 2d 375 (Ill. 1976) 336
People v. Sanders, 904 P.2d 1311 (Colo. 1995) 201
People v. Santisteven, 693 P.2d 1008 (Colo. App. 1984) 155
People v. Santisteven, 715 P.2d 792 (Colo. 1986) 347
People v. Sapp, 934 P.2d 1367 (Colo. 1997) 473
People v. Savage, 630 P.2d 1070 (Colo. 1981). 91
People v. Savedra, 907 P.2d 596 (Colo. 1995) 256
People v. Scarlett, 985 P.2d 36 (Colo.App. 1998) 650
People v. Schafer, 946 P.2d 938 (Colo. 1997) 134, 152, 155, 167, 211
People v. Schoondermark, 759 P.2d 715 (Colo. 1988) 662
People v. Schreck, 107 P.3d 1048 (Colo. App. 2004) 348
People v. Schrecongost, 796 P.2d 45 (Colo.App. 1990), *aff'd*, 810 P.2d 1068 (Colo. 1991). 656
People v. Schreyer, 640 P.2d 1147 (Colo. 1982) 65, 237
People v. Selph, 786 P.2d 1078 (Colo. 1989). 356
People v. Sexton, 555 P.2d 1151 (Colo. 1976). 631
People v. Shackelford, 546 P.2d 964 (Colo. App. 1976) 91, 513, 592
People v. Sharpless, 807 P.2d 590 (Colo. 1991). 510
People v. Shepherd, 906 P.2d 607 (Colo. 1995) 119, 371
People v. Sherman, 593 P.2d 971 (Colo. 1979) 90, 92
People v. Shetewi, 679 P.2d 1107 (Colo. App. 1983) 507
People v. Shorty, 731 P.2d 679 (Colo. 1987) 141
People v. Shreck, 22 P.3d 68 (Colo. 2001). 603, 629, 630
People v. Shriver, 528 P.2d 242 (Colo. 1974) 221
People v. Siegl, 914 P.2d 511 (Colo. App. 1996). 212, 427, 431, 619
People v. Simmons, 973 P.2d 627 (Colo. App. 1998) 244
People v. Singleton, 516 P.2d 428 (Colo. 1973) 440
People v. Sisneros, 55 P.3d 797 (Colo. 2002). 608
People v. Skufca, 141 P.3d 876 (Colo. App. 2005) 635
People v. Slusher, 844 P.2d 1222 (Colo. App. 1992). 353, 443
People v. Small, 631 P.2d 148 (Colo. 1981) 613
People v. Smith, 13 P.3d 300 (Colo. 2000) 70, 71, 241
People v. Smith, 716 P.2d 1115 (Colo. 1986) 486
People v. Smith, 870 P.2d 617 (Colo. App. 1994). 371
People v. Sosbe, 789 P.2d 1113 (Colo. 1990). 237
People v. Souva, 141 P.3d 845 (Colo. App. 2005) 161, 605
People v. Speer, 216 P.3d 18 (Colo. App. 2007) 481
People v. Sporleder, 666 P.2d 135 (Colo. 1983) 347, 351
People v. Spoto, 795 P.2d 1314 (Colo. 1990) 633, 643
People v. Stephenson, 159 P.3d 617 (Colo. 2007) 84, 245, 518
People v. Stephenson, 56 P.3d 1112 (Colo. App. 2001). 473
People v. Stevens, 642 P.2d 39 (Colo. App. 1981). 580
People v. Stoppel, 637 P.2d 384 (Colo. 1981). 408
People v. Stribel, 609 P.2d 113 (Colo. 1980). 624
People v. Sundermeyer, 769 P.2d 499 (Colo. 1990). 435
People v. Sutherland, 886 P.2d 681 (Colo. 1994) 93, 234
People v. Suttles, 685 P.2d 183 (Colo. 1984). 284
People v. Swearington, 649 P.2d 1102 (Colo. 1983) 355
People v. T.C., 908 P.2d 20 (Colo. 1995). 551
People v. T.H., 892 P.2d 301 (Colo. 1995) 45
People v. Tallent, 174 P.3d 310 (Colo. 2008) 282
People v. Tallwhiteman, 124 P.3d 827 (Colo. App. 2005) 605
People v. Tally, 7 P.3d 172 (Colo. App. 1999) 538
People v. Taube, 864 P.2d 123 (Colo. 1994) 134
People v. Taylor, 131 P.3d 1158 (Colo. App. 2005) 642

People v. Taylor, 41 P.3d 681 (Colo. 2002).....223, 246, 466, 518
People v. Taylor, 544 P.2d 392 (Colo. 1975).....92
People v. Taylor, 545 P.2d 703 (Colo. 1976).....611
People v. Terrazas-Urquidi, 172 P.3d 453 (Colo. 2007).....43, 141
People v. Thatcher, 638 P.2d 760 (Colo. 1981).....582
People v. Thiery, 780 P.2d 8 (Colo. App. 1989).....587
People v. Thiret, 685 P.2d 193 (Colo. 1984).....188, 207, 336, 503
People v. Thomas, 543 P.F2d 1249 (Colo. 1975).....395
People v. Thomas, 839 P.2d 1174 (Colo. 1992).....471
People v. Thomas, 916 P.2d 582 (Colo. App. 1995).....655
People v. Thompson, 770 P.2d 1282 (Colo. 1989).....161
People v. Thompson, 793 P.2d 1173 (Colo. 1990).....104, 384
People v. Thompson, 820 P.2d 1160 (Colo. App. 1991).....118, 121
People v. Thompson, 950 P.2d 608 (Colo. App. 1997).....638
People v. Thornton, 547 P.2d 1278 (Colo. 1976).....245, 516
People v. Thorpe, 641 P.2d 935 (Colo. 1982).....586
People v. Titus, 880 P.2d 148 (Colo. 1994).....406, 432
People v. Tooker, 601 P.2d 1388 (Colo. 1979).....71
People v. Topping, 764 P.2d 369 (Colo. App. 1988).....554
People v. Torand, 622 P.2d 562 (Colo. 1981).....337
People v. Torres, 141 P.3d 931 (Colo. App. 2006).....642
People v. Tottenhoff, 691 P.2d 340 (Colo. 1984).....296
People v. Triantos, 55 P.3d 131 (Colo. 2002).....114, 175
People v. Troudt, 5 P.3d 349 (Colo. App. 1999).....313
People v. Trujillo, 710 P.2d 1169 (Colo. App. 1985).....69, 509, 540
People v. Trujillo, 75 P.3d 1133 (Colo. App. 2003).....500, 585
People v. Trujillo, 784 P.2d 788 (Colo. 1990).....499
People v. Trusty, 516 P.2d 423 (Colo. 1973).....278
People v. Trusty, 53 P.3d 668 (Colo. App. 2002).....100, 183, 203, 371
People v. Tucci, 500 P.2d 815 (Colo. 1972).....451
People v. Tufts, 917 P.2d 45 (Colo. 1986).....372
People v. Turcotte-Scheffer, 843 P.2d 658 (Colo. 1993).....405
People v. Turner, 660 P.2d 1284 (Colo. 1983).....180, 423
People v. Turtura, 921 P.2d 40 (Colo. 1996).....72
People v. Tweedy, 126 P.3d 303 (Colo. App. 2005).....41
People v. Unruh, 713 P.2d 370 (Colo. 1986).....64, 290, 298, 343, 347
People v. Upshur, 923 P.2d 40 (Colo. App. 1996).....202
People v. Valdez, 969 P.2d 208 (Colo. 1998).....467, 472, 487
People v. Vasquez, 155 P.3d 588 (Colo. App. 2006).....540
People v. Velasquez, 641 P.2d 943 (Colo. 1982).....460
People v. Veloz, 996 P.2d 146 (Colo. App. 1997).....484
People v. Vialpando, 954 P.2d 617 (Colo. App. 1997).....643
People v. Villano, 181 P.3d 1225 (Colo. App. 2008).....102, 373
People v. Villarreal, 131 P.3d 1119 (Colo. App. 2005).....480
People v. Wallace, 724 P.2d 670 (Colo. 1986).....519
People v. Wallace, 97 P.3d 262 (Colo. App. 2004).....502, 630
People v. Wallen, 996 P.2d 182 (Colo. 1999).....167
People v. Wallin, 167 P.3d 183 (Colo. App. 2007).....603
People v. Walter, 890 P.2d 240 (Colo. App. 1995).....157, 198, 205
People v. Ware, 484 P.2d 103 (Colo. 1971).....124, 299, 378
People v. Washington, 865 P.2d 145 (Colo. 1994).....101
People v. Watson, 650 P.2d 1340 (Colo. App. 1982).....617
People v. Watson, 668 P.2d 965 (Colo. App. 1983).....419
People v. Webster, 987 P.2d 836 (Colo. App. 1998).....584, 586, 616
People v. Weeams, 665 P.2d 619 (Colo. 1983).....78, 516
People v. Weems, 676 P.2d 1222 (Colo. App. 1983).....602

People v. Weisenberger, 516 P.2d 1128 (Colo. 1973) 136, 439
People v. Welch, 58 P.3d 1065 (Colo. App. 2002) 664
People v. Wells, 592 P.2d 1321 (Colo. 1974) 602
People v. Wells, 691 P.2d 361 (Colo. App. 1984) 540
People v. Weston, 869 P.2d 1293 (Colo. 1994) 243, 297
People v. Whalin, 885 P.2d 293 (Colo. App. 1994) 348, 484
People v. Wheeler, 105 Cal. Rprtr. 56 (Cal. App. 1972) 345
People v. Whisler, 724 P.2d 648 (Colo. 1986) 209, 303
People v. White, 64 P.3d 864 (Colo. App. 2002) 141
People v. Whitman, 205 P.3d 371 (Colo. App. 2007) 629
People v. Wickham, 53 P.3d 691 (Colo. App. 2001) 400, 429, 475, 480
People v. Wieckert, 544 P.2d 688 (Colo. 1976) 335
People v. Wiedemer, 641 P.2d 289 (Colo. App. 1981) 640
People v. Wiley, 51 P.3d 361 (Colo. App. 2001) 270, 302, 528, 532
People v. Wilford, 111 P.3d 512 (Colo. App. 2004) 581
People v. Williams, 516 P.2d 114 (Colo. 1973) 585
People v. Williams, 525 P.2d 463 (Colo. 1974) 387
People v. Williams, 557 P.2d 399 (Colo. 1976) 119
People v. Williams, 628 P.2d 1011 (Colo. 1981) 676
People v. Wilson, 819 P.2d 510 (Colo. App. 1991) 433, 435
People v. Wilson, 841 P.2d 337 (Colo. App. 1992) 87
People v. Wimer, 799 P.2d 436 (Colo. App. 1990) 137
People v. Winpigler, 8 P.3d 439 (Colo. 1999) 142, 162, 167, 170, 367, 368, 374
People v. Wood, 135 P.3d 744 (Colo. 2006) 508
People v. Woods, 86 Cal. Rptr. 264 (Cal. App. 1970) 346
People v. Wright, 804 P.2d 866 (Colo. 1991) 294, 313
People v. Wyman, 788 P.2d 1278 (Colo. 1990) 650
People v. Yaklich, 833 P.2d 758 (Colo. App. 1991) 603
People v. York, 166 Cal. Rptr. 717 (Cal. App. 1980) 64, 588
People v. York, 537 P.2d 294 (Colo. 1975) 479
People v. Young, 785 P.2d 1306 (Colo. 1990) 434
People v. Young, 923 P.2d 145 (Colo. App. 1995) 515, 585
People v. Young, 987 P.2d 889 (Colo. App. 1999) 416, 660
People v. Zamora, 695 P.2d 292 (Colo. 1985) 88, 149, 281
People v. Zamora, 940 P.2d 939 (Colo. App. 1996) 183, 329, 544
Peterson v. City of Long Beach, 594 P.2d 477 (Cal. 1977) 774
Peterson v. People, 939 P.2d 824 (Colo. 1997) 135, 204
Rakas v. Illinois, 439 U.S. 128 (1978) 284
Reppin v. People, 34 P.2d 71 (Colo. 1934) 623
Rex v. Teeples, 753 F.2d 840 (10th Cir. 1984) 781
Rhode Island v. Innis, 446 U.S. 291 (1980) 506
Riverside County, California v. McLaughlin, 111 U.S. 1661 (1991) 368
Robbins v. California, 453 U.S. 420 (1981) 257
Robinson v. People, 927 P.2d 381 (Colo. 1996); 604
Rochin v. California, 342 U.S. 165 (1952) 120
Roybal v. People, 496 P.2d 1019 (Colo. 1972) 534
Sager v. City of Woodland Park, 543 F. Supp. 282 (D. Colo. 1985) 762
Salcedo v. People, 999 P.2d 833 (Colo. 2000) 604
Schneckloth v. Bustamonte, 412 U.S. 218 (1973) 330
See v. Seattle, 387 U.S. 541 (1968) 312
See Ybarra v. Illinois, 444 U.S. 85 (1979) 732
Shirley v. Bensalem Township, 501 F. Supp. 1138 (E.D.Pa. 1980); 779
Shuey v. Superior Court, 106 Cal. Rptr. 452 (Cal. App. 1973) 171
Simmons v. United States, 390 U.S. 377 (1968) 577
Smith v. Hill, 510 F. Supp. 767 (D. Utah 1981) 779
Smith v. Maryland, 442 U.S. 735 (1979) 351

Smith v. Wade, 461 U.S. 30 (1983) 785
South Dakota v. Opperman, 428 U.S. 364 (1976). 275
Specht v. Jensen, 832 F.2d 1516 (10th Cir. 1987). 781
Stapleton v. Superior Court, 447 P.2d 697 (Cal. 1968). 273
State v. Ahearn, 227 N.W.2d 164 (Iowa 1975). 329
State v. Appleton, 297 A.2d 363 (Me. 1972). 390
State v. Bainch, 505 P.2d 248 (Ariz. 1973). 346
State v. Blacker, 630 P.2d 413 (Or. 1981). 320
State v. Brewer, 549 P.2d 188 (1976). 500
State v. Clovis, 618 P.2d 245 (Ariz. App. 1980). 459
State v. Cozad, 556 P.2d 312 (Ariz. 1976) 512
State v. Crutchfield, 556 P.2d 312 (Ariz. 1976). 304
State v. Dugan, 555 P.2d 108 (Ariz. 1976). 265
State v. Ferguson, 579 P.2d 559 (Ariz. 1978). 476
State v. Goeller, 264 N.W.2d 472 (1978) 195
State v. Kelly, 636 P.2d 1533 (Ariz. 1981). 441
State v. Lopez, 563 P.2d 295 (Ariz. App.1977) 135
State v. McMahon, 568 P.2d 1027 (Ariz. 1977). 327
State v. Meichel, 290 So. 2d 878 (La. 1974). 263
State v. Mincey, 636 P.2d 637 (Ariz. 1981). 553, 658
State v. Monahan, 251 N.W.2d 421 (Wis. 1977). 207, 336
State v. Moreno, 556 P.2d 14 (Ariz. App.1976) 501
State v. Morse, 617 P.2d 1141 (Ariz. 1980). 460
State v. Peterson, 604 P.2d 267 (Ariz. 1979) 269
State v. Poland, 645 P.2d 784 (Ariz. 1982) 195
State v. Smith, 482 P.2d 863 (Ariz. 1971). 548
State v. Steelman, 585 P.2d 1218 (Ariz. 1978) 484
State v. Tom, 613 P.2d 842 (Ariz. 1980). 468
State v. Valenzuela, 589 P.2d 1306 (Ariz. 1979) 124
State v. Watkins, 592 P.2d 1278 (Ariz. 1979). 407
State v. White, 574 P2d 840 (Ariz. 1977) 272
States v. Dunn, 480 U.S. 294 (1987) 145
Steagald v. United States, 451 U.S. 254 (1981). 110, 150
Stone v. People, 485 P.2d 495 (Colo. 1971) 49, 63
Stoner v. California, 376 U.S. 483 (1964) 203
Terry v. Ohio, 392 U.S. 1 (1968) 38, 48, 90, 91
Tetro v. Stratford, 458 A.2d 5 (Conn. 1983). 769
Texas v. Brown, 460 U.S. 730 (1983). 231, 262
Thornton v. U.S., 541 U.S. 615 (2004) 34
Tomlinson v. Pierce, 2 Cal. Rptr. 700 (Cal. App. 1960). 770
Trammel v. United States, 445 U.S. 40 (1980). 666
Trinidad School District v. Lopez, 963 P.2d 1095 (Colo. 1998). 360
Trombetta v. California, 467 U.S. 479 (1984) 649, 651
Turbyne v. People, 151 P.3d 563 (Colo. 2007) 120
Turner v. Raynes, 611 F.2d 92 (5th Cir. 1979). 772
United States v Beasley, 485 F.2d 60 (10th Cir. 1973). 212
United States v. Albarado, 495 F.2d 799 (2nd Cir. 1974). 315
United States v. Antonelli Fireworks Company, 155 F.2d 799 (2nd Cir. 1946). 204
United States v. Ash, 413 U.S. 300 (1973) 592
United States v. Baldwin, 621 F.2d 251 (6th Cir. 1980). 195
United States v. Banks, 540 U.S. 31 (2003). 214
United States v. Biswell, 406 U.S. 311 (1972). 312
United States v. Borrelli, 621 F.2d 1092 (10th Cir. 1980). 604
United States v. Buie, 494 U.S. 325 (1990) 156
United States v. Chadwick, 433 U.S. 1 (1977). 112
United States v. Davis, 482 F.2d 893 (9th Cir. 1973) 316

United States v. Dionnisio, 410 U.S. 1 (1973) 592
United States v. Dunn, 480 U.S. 294 (1987). 145
United States v. Elrod, 441 F.2d 3533 (5th Cir. 1971) 332
United States v. Golden, 671 F.2d 369 (10th Cir. 1982). 784
United States v. Griffin, 537 F.2d 900 (7th Cir. 1976). 178
United States v. Grubbs, 547 U.S. 90 (2006) 403
United States v. Haley, 581 F.2d 723 (8th Cir. 1978) 252
United States v. Harris, 403 U.S. 573 (1971) 388, 390
United States v. Henry, 615 F.2d 1223 (9th Cir. 1980). 288
United States v. Jeffers, 342 U.S. 48 (1951) 369
United States v. Johnson, 333 U.S. 10 (1948) 165
United States v. Jones, 641 F.2d 425 (6th Cir. 1981) 194, 268
United States v. Karo, 468 U.S. 705 (1984). 318
United States v. Kim, 415 F. Supp. 122 (D. Haw. 1976) 146
United States v. Knotts, 460 U.S. 276 (1982). 318
United States v. Leon, 468 U.S. 897 (1984) 417, 660
United States v. Long, 439 F.2d 628 (D.C. Cir. 1971). 396
United States v. McCaleb, 552 F.2d 717 (6th Cir. 1977) 328
United States v. Ortiz, 422 U.S. 891 (1975) 427
United States v. Outland, 476 F.2d 581 (6th Cir. 1973). 403
United States v. Perlstein, 576 F.2d 531 (3rd Cir. 1978) 570
United States v. Place, 462 U.S. 696 (1983) 64, 308, 347, 380
United States v. Price, 599 F.2d 494 (2nd Cir. 1979) 193, 267
United States v. Riley, 554 F.2d 1282 (4th Cir. 1977). 350
United States v. Robinson, 414 U.S. 291 (1973) 114
United States v. Ross, 456 U.S. 798 (1982). 253, 293, 295
United States v. Van Leeuwan, 397 U.S. 249 (1970) 350
United States v. Ventresca, 380 U.S. 102 (1965) 368, 412, 413
United States v. Wasserteil, 641 F.2d 704 (9th Cir. 1981) 193, 267
United States v. Watson, 423 U.S. 411 (1976) 108, 194, 268
United States v. White, 401 U.S. 745 (1971) 460
Vale v. Louisiana, 399 U.S. 30 (1970). 151, 178
Vernonia School District v. Acton, 515 U.S. 646 (1995) 360
Virginia v. Moore, 553 U.S. 164 (2008) 228
Warden v. Hayden, 387 U.S. 294 (1967) 152
Washington v. Chrisman, 455 U.S. 1 (1982). 178
Wells v. People, 592 P.2d 1321 (Colo. 1974). 613
White v. People, 494 P.2d 585 (Colo. 1972) 636
Whiteley v. Warden, 401 U.S. 560 (1971). 396
Whren v. United States, 517 U.S. 806 (1996) 237
Wilson v. Arkansas, 514 U.S. 927 (1995) 216, 446
Winston v. Lee, 470 U.S. 753 (1985). 121
Wise v. Bravo, 666 F.2d 1328 (10th Cir. 1981). 781
Wooley v. People, 367 P.2d 903 (Colo. 1961). 637
Wyrick v. Fields, 459 U.S. 42 (1982). 631
Ybarra v. Illinois, 444 U.S. 85 (1979) 92, 449

SUBJECT MATTER INDEX

-A-

ABANDONMENT
Containers, 302, 303
Garbage – Trash, 209
Premises, 208
Vehicles, 282
ABUSE OF SPOUSES OR CHILDREN, 736
ABUSE OF PROCESS, 778
ACCIDENTS
Officers chasing suspects, 768
Officer liability for releasing drunken driver, 769
ACCOMPLICES
Information from accomplices to establish probable cause, 385, 422
Testimony of accomplice, 613
ACQUITTALS
How to avoid by taking statements, 453, 560 - 574
Affect upon civil liability, 775
ACTIVE VOICE – REPORT WRITING, 688
ADMINISTRATIVE SEARCHES AND SEIZURE
Airports, 314
Booking, 320
Businesses, 323
Inventories, 324
Prison and jail cells, 347
Warrant requirement, 314
ADMISSIONS – BY SUSPECTS
Voluntariness factor in consent, 190
Importance of, 453
ADVISEMENTS – TO SUSPECTS
Fifth Amendment warnings, 331, 488
Fourth Amendment warnings, 191, 266, 330
AERIAL VIEWS, 146
AFFIANTS
Definition, 410
Informants, 421
Officers, 410
AFFIDAVITS
Definition, 410
To obtain an arrest warrant, 394, 396
To obtain an order to detain, 85
To obtain a search warrant, 419, 437
AGENTS – PRIVATE CITIZENS AS AGENTS OF THE STATE, 213, 273, 305

AIRPORT SEARCHES AND SEIZURES, 314
ALCOHOL – DRUGS
As affecting voluntariness of consent, 196, 269, 315, 331
As affecting voluntariness of statements, 483
DUI, 271
ALIASES – ADMISSIBILITY OF, 617
ALIBI
Statements obtained to disprove alibi defense, 566
AMENDMENTS TO THE CONSTITUTION
Fourth Amendment, 37, 131, 217, 287, 311, 365, 409
Fifth Amendment, 488
Sixth Amendment, 552, 591
ANAL SEARCHES, 120
ANONYMOUS INFORMANTS
To create probable cause, 386, 406
To create reasonable suspicion, 60
ANTICIPATING DEFENSES, 561
APPROACHING PERSONS
Pedestrians, 40
Persons in vehicles, 220
ARGUMENTS
Closing arguments in trial, 613, 683
ARRAIGNMENTS, 677
ARREST – CUSTODY
Cite and release offenses, 115, 175, 257
Confession as a result of an illegal arrest, 79
Formal arrests, 71
Hearsay – arrests based upon hearsay, 102, 381
Indications of custody during detentions, 65, 217, 238
In a public place – warrant requirement, 108
In premises – warrant requirement
Suspect's residence, 111, 149
Third party's residence. 111, 150
Probable cause requirement, 98, 367
Searches incident to arrest, 111, 127, 174, 230, 233, 254, 295
Warrant requirement, 108
ASSAULT
By officers, 754, 775
By suspects, 788
ASSERTION OF CONSTITUTIONAL RIGHTS
Fifth Amendment rights, 331, 534
Relationship to consent searches, 330
Right to an attorney, 534
Right to remain silent, 541
Fourth Amendment rights, 129, 192, 279, 301, 330

ATTORNEYS – DEFENDANT'S RIGHT TO
After initial appearances, 547
During interrogations, 488
During physical lineups, 591
During photographic lineups, 592
During showups, 592
ATTORNEYS FEES – CIVIL CASES, 750, 781
AUTOMOBILES – See VEHICLES
AUTOMOBILE EXCEPTION
To the warrant requirement, 33, 250

-B-

BACK YARDS
Searches of, 136
Views into, 136
BAD ACTS
Admissibility of, 633
BARGAINING – PLEA BARGAINING, 679
BATONS
Civil liability for intentional use of, 776
BEEPERS, 318
BELIEVABILITY OF INFORMANTS – see RELIABILITY OF INFORMANTS
BINOCULARS, 146, 319
BLOOD SAMPLES, 118, 652, 655
BLOOD TESTS
BODY SEARCHES
Searches incident to arrest, 322
Searches incident to detention, 89
Surgical searches, 121
To draw blood, 118
To search body cavities, 121
BOOKING SEARCHES, 280, 320
BORDER SEARCHES, 358
BREATH SAMPLES, 272, 650
"BRUTON" RULE, 552
BURDENS OF PROOF
Civil cases, 758
Criminal trials, 670
Suppression hearings, 337, 575, 667, 670
With warrant, 412
BUSINESSES – SEARCHES OF, 323

-C-

CARPORTS – SEARCHES OF, 134

CARS – see VEHICLES
CAVITY SEARCHES, 120
CAUSES OF ACTION, 749
CHAIN OF CUSTODY, 647
CHASES OF SPEEDING VEHICLES, 768
CHILD ABUSE, 736
CHILD CUSTODY DISPUTES, 740
CHILDREN – see also SCHOOL SEARCHES
Authority to consent for parents, 198
CHOKING
Civil liability for, 776
CIRCUMSTANTIAL EVIDENCE, 600
CITIZEN INFORMANTS
Establishing probable cause, 382
CIVIL DISPUTES
Creditor repossessions, 744
Domestic disputes, 736
Landlord – tenant disputes, 741
CIVIL LIABILITY – see generally Civil Liability Chapter
CLEARING PAPER – PROMISES TO GET STATEMENTS, 475
CLOSED CONTAINERS – SEARCHES AND SEIZURES
Abandonment, 302
Consent searches, 299
Emergency searches, 240, 294
Frisk, 89, 288
In premises, 291
Incident to detention, 95, 230
Incident to arrest, 112, 177, 257, 295, 450
Inventory, 278, 306, 320
Probable cause, 174
Vehicle searches, 248, 249
Warrant requirement, 291, 441
COERCION
To obtain consent to search, 194, 264, 300, 327
To obtain statements from suspect, 467
COLOR OF LAW – OFFICER ACTING UNDER
Civil liability, 764
COMPETENCY – OF WITNESSES
Children, 628
Previously hypnotized persons, 629
Witnesses with unsound minds, 628
COMPLETE STORY DOCTRINE, 634
CONCLUSIONS
In affidavits, 393, 395
CONFESSIONS – see generally Statements Chapter

CONFIDENTIAL INFORMANTS
Protecting identity of, 427
Reliability of, 421
To establish probable cause for arrest warrants, 392
To establish probable cause for search warrants, 422
CONFRONTATION RIGHTS
Constitutional rights to confront one's accusers, 552
CONSENT SEARCHES AND SEIZURES
As condition of probation/parole, 352
Authority to consent, 198, 270, 301, 335
Detainees
Searches of, 94, 241
Seizure of
Exceeding time limitations, 74
Movement of, 66
Scope of search or seizure, 182, 206, 301, 335
To search containers, 299
To search persons, 126, 127
To search premises, 188
To search vehicles, 263
Voluntariness of consent,
Containers, 300
General rules, 326
Persons, 127
Premises, 190
Vehicles, 265
Withdrawal of consent, 129, 207, 271, 337
CONSPIRACY
Officers conspiracy to violate citizens' rights, 782
CONSTITUTIONS
Colorado, 30
United States, 30
CONTACTS – CONSENSUAL ENCOUNTERS
Pedestrians, 38
Persons in vehicles, 220
Versus seizures, 39, 65, 225
CONTEMPORANEOUS REQUIREMENT
To search incident to arrest, 112, 178, 266, 297
CONTROLLED BUYS
To make informants reliable, 389, 423
CONVERSATIONS
Between the suspect and citizens, 552-562
Bugging, 338
Eavesdropping, 340
Consent by participant to eavesdrop, 339
Electronic eavesdropping, 338

With suspects in custody, 487, 488
With suspects not in custody, 488-520
CONVICTIONS (Prior)
Admissibility at trial
Felonies, 633
Misdemeanors, 633
COOPERATIVE SEARCHES – WITH PRIVATE PERSONS, 213, 305
CORROBORATION
To establish probable cause to search or seize, 403, 431
COUNSEL – see ATTORNEYS
COURT ORDERS
Administrative warrants, 314
To detain persons, 84, 590
To evict, 742
To prevent domestic violence, 739
To repossess, 745
To search, Chapter 8
CREDIBILITY OF INFORMANTS – see RELIABILITY OF INFORMANTS
CREDITOR REPOSSESSIONS, 744
CRIME SCENES – PREMISES
Securing, 163, 172
Searching, 163, 172
CRIMINAL PROCEDURE, Chapter 12
CROSS EXAMINATION, 597, 609, 682
CURTILAGE, 144
CUSTODIAL ARREST REQUIREMENT
To search incident to arrest, 113, 174
CUSTODY
Arrest, 71
Affect upon consent, 194, 268, 300, 328
Miranda warnings requirement, 488
Versus detention, 38, 65, 237, 514

-D-

DAMAGES
General, 749, 753
Punitive, 750, 785
DECEIT BY OFFICERS
To enter premises, 195
To enter vehicles, 268
To get a suspect's statement, 480
To get a better search incident to arrest, 178
To get consent for a search, 328
DECLARATIONS AGAINST INTEREST
Supporting probable cause, 389, 425

DEFENSES
Accident, 564
Alibi, 566
Anticipating defenses, 561
Civil actions against officers
Constitutional torts, 778
False arrest and imprisonment, 771
Intentional torts, 774
Malicious prosecution, 778
Negligent torts, 765
Entrapment, 569
Insanity, 566
Intoxication, 564
Self defense, 562
Use of police reports to prepare defense, 686
DELAYS – see also TIME LIMITATIONS
Unnecessary delay before initial appearances, 674
DEMEANOR – OFFICERS
During contacts, 47
During detentions, 63
During the seeking of consent, 330
During taking of statement, 468, 506
During testimony, 705
DEMONSTRATIVE EVIDENCE, 607
DEPARTMENTAL RULES
Effect upon civil liability, 773
Effect upon power to search and seize
Booking searches, 320
Inventory searches, 273
Testimony relating to, 733
DEPOSITIONS, 756
DESCRIBING IN AFFIDAVITS AND SEARCH WARRANTS
Place to be searched, 437
Property to be seized, 442
DESTRUCTION OF EVIDENCE
By officers, 649
By suspects, 150, 248
DETENTIONS OF PERSONS
Avoiding appearance of arrest, 64 - 71
Consent during
Pedestrians, 79
Vehicles, 264
For identification, 64, 588
Miranda warnings during, 83, 244, 514
Officer's powers during, 63, 227, 238
Petitions to detain, 85, 589

Questioning during, 63, 181
Searches during, 89, 241
Vehicles – detaining occupants, 241, 246
Versus custody, 39, 65, 237
While executing search warrants, 82, 447
DICTATING REPORTS, 687
DIRECT EXAMINATION, 602
DISCLOSURE – DISCOVERY
Civil procedure, 755
Defense disclosures, 679
Officer's personnel file, 619, 679, 757
State disclosure, 678
DISMISSAL OF THE CASE
Civil cases, 758
DOCUMENTARY EVIDENCE, 607
DOCUMENTATION
Chain of custody, 647
Of evidence, 645
Report writing, Chapter 13
Statements of suspects, 462
DOGS (EXPLOSIVE AND NARCOTICS), 342
Sniffing not a search, 342
DOMESTIC DISPUTES, 736
DOORS – see KNOCK AND ANNOUNCE
DRIVER'S LICENSE CHECKS, 225
DRIVEWAYS – ENTRY OF BY OFFICERS, 143
DRIVING UNDER THE INFLUENCE
Consent, 271
Chemical testing, 272
Roadside sobriety tests, 271
DROPPING EVIDENCE – BY SUSPECT, 303
DRUNKEN DRIVERS
Officer's liability when release, 769
Consent, 271
DYING DECLARATIONS, 623

- E -

EAVESDROPPING
Electronic, 338
Recording, 339
Without aids, 340
EMERGENCIES – WARRANTLESS SEARCHES AND SEIZURES
Searches
Of containers, 294
Of persons, 118, 252
Of premises, 110, 149

Of vehicles, 252
Seizures
Of containers, 294
Of persons, 118, 261
Of premises, 111, 149
Of vehicles, 252
EMERGENCIES – STATEMENTS
Relating to voluntary statements, 482
Necessity to give *Miranda* warnings – rescue doctrine, 549
EMERGENCY PROTECTIVE ORDER, 740
EMPLOYER-EMPLOYEE – CONSENT TO SEARCH, 203
ENTRAPMENT
Statements to disprove, 569
ENTRY – OF PREMISES
Forcible, 213
Knock and announce requirements, 214
To secure while obtaining a search warrant, 165
ENTRY – OF VEHICLES
Legal theories for, 261
EVIDENCE
Admissibility of , 615
Bad acts, 633
Burdens of proof, 667
Chain of custody, 647
Circumstantial, 600
Defined, 599
Demonstrative, 607
Destruction of, 649
Direct, 600
Documentary, 607
Documents, 354
Exclusionary rule, 656
Foundation, 644
Hearsay, 620
Identifications, 593
Kinds of, 600
Lost, 649
Preservation of, 646
Relevance of, 615
Reliability, 619
Review of by officer, 645
Scientific, 629
Testimonial, 602
EXCESSIVE FORCE, 775
EXCITED UTTERANCES – SPONTANEOUS EXCLAMATIONS, 622

EXCLUSIONARY RULE
General rule, 462, 656
Good-faith exception, 414, 656
EXECUTION OF SEARCH WARRANTS
Detention of persons present, 81, 446
Knock and announce requirements, 214, 446
Where officers may search, 448
EXIGENCY (EXIGENT CIRCUMSTANCES)
Persons
To search, 76, 87, 118, 237, 254
To seize, 88, 237
Premises – searches of
Emergency entries, 150
Forcible entries, 213
Hot pursuit, 151
Imminent destruction or removal of evidence, 165
Knock and announce requirement, 213
Protective sweeps, 155
Vehicle – searches of
Emergencies, 252
The automobile exception, 253
Searches incident to arrest, 254
Searches incident to detention, 241
EXPECTATION OF PRIVACY see REASONABLE EXPECTATION OF PRIVACY
EXPERIENCE OF OFFICERS
In establishing probable cause or reasonable suspicion, 51
EXPERT OPINION, 603

-F-

FALSE ARREST, 771
FALSE IMPRISONMENT, 776
FALSE STATEMENTS
By officers
In affidavits, 433
In police reports, 597, 695
On witness stand, 727
By suspects, 453
By witnesses
Informants, 432
Friendly witnesses, 560
Hostile witnesses, 555
FEAR
Requirement for search incident to detention (frisk)
Pedestrians, 90

Persons in premises, 448
Persons in vehicles, 230, 241
FELLOW OFFICER RULE
To establish probable cause, 102, 384
FENCES – LOOKING OVER OR THROUGH, 140
FIFTH AMENDMENT RIGHTS – see also MIRANDA WARNINGS
Assertion as a factor in voluntariness
Of counsel, 191
Of statements, 481
Miranda warnings, 488
Right to attorney, 534
Right to remain silent, 541
FINGERPRINTS
Petitions to obtain, 85
FIRST-HAND INFORMATION – INFORMANTS
To establish probable cause, 106, 395, 426
FLASHLIGHTS
Hitting suspects with, 776
Use for plain view observations, 220, 344
FLIGHT
As factor creating reasonable suspicion, 58
As reason to enter premise without warrant, 110, 151
During detentions, 45
During stops, 58
Jury instruction, 614
Vehicle abandonment, 282
FORCE BY OFFICERS
Civil liability, 774
During detentions
Pedestrians, 63
Vehicles, 227
To enter premises, 213
To obtain consent, 268
To obtain statements, 469
FORESEEABILITY – NEGLIGENCE OF SUPERVISORS, 785
FOUNDATION
Requirement for admissibility of evidence, 645
"FOUR CORNERS" DOCTRINE, 419
FOURTH AMENDMENT – RECITATION OF
Application to containers, 287
Application to persons, 37
Application to premises, 131
Application to vehicles, 217
FRAUD
Rebutting defenses in fraud cases, 569

"FREEZING" – IMPOUNDMENT
Containers, 95
Persons, 48 - 87
Premises, 168
Vehicles, 231, 273
FRESH PURSUIT, 151
FRIENDLY WITNESSES – STATEMENTS FROM, 561
FRISKS – see also SEARCHES INCIDENT TO DETENTIONS
Justification for fear, 90, 230, 247, 448
Of closed containers, 95, 288
Of persons, 90, 448
Of vehicles, 232, 241
FRONT YARDS – ENTRY OF, 145
FURTIVE GESTURES
Establishment of reasonable suspicion, 59

-G-

GARAGES – ENTRY OF, 134, 259
GARBAGE, 214
GLOVE COMPARTMENTS – ENTRY BY OFFICERS
Inventory searches, 278
Probable cause, 253
Searches incident to arrest, 257
GOOD FAITH
As defense to civil suits, 763, 784
Exception to the exclusionary rule, 414, 657
GRAND JURY TESTIMONY, 676
GUILTY PLEA, 679

-H-

HAIR SAMPLES, 85, 118, 630
HANDCUFFS
Civil liability, 776
During detentions, 70, 77
HEARSAY
At grand jury, 676
At preliminary hearing, 676
Exceptions to hearsay rule, 620
Report writing, 620
Rule – hearsay not admissible, 620
To establish probable cause, 381
To arrest, 102, 381
To search, 250, 365, 381, 422
To establish reasonable suspicion, 379

HIGH CRIME AREA
Factor in establishing reasonable suspicion, 55
HOME – see PREMISES
HOST/GUEST CONSENT, 201
HOSTILE WITNESSES, 555
HOT PURSUIT – FRESH PURSUIT, 151
HOTEL ROOMS
Abandonment, 210
Consent to search by management, 203
Views into by officers, 138
HUNCH
Insufficient to stop, 233
HUSBAND/WIFE
Consent, 198
Conversations, 322
Disputes, 736
Privilege, 665
HYPNOTISM
Admissibility of testimony by hypnotized persons, 629

-I-

IDENTIFICATIONS – see generally Identifications Chapter
At hearings, 593
At trial, 593
Detentions of suspects for showups, 64, 588
Order to detain for physical lineup, 84, 589
Reliability of identification, 586, 597
Right to attorney
At photographic lineup, 592
At physical lineup, 591
At showup, 592
Suggestivity
Before identification, 577
During identification, 578
After identification, 585
IMMUNITY – FROM CIVIL LIABILITY, 749, 774
IMPEACHMENT – CROSS EXAMINATION, 610, 633, 665, 722
IMPOUND LOT
Probable cause – the warrant requirement, 252
IMPOUNDMENT
Of premises, 168
Of property – closed containers, 307, 320
Of vehicles, 273

IN-CUSTODY STATEMENTS
Miranda requirement, 83, 244, 488
INCONSISTENT STATEMENTS
By officers, 644, 676, 703
By suspects, 460, 514, 611
By witnesses, 558, 597
INCRIMINATING RESPONSES
Importance of , 453
Officers' statements eliciting, 505
INFERENCES, 613
INFORMANTS
Anonymous, 60, 386
Citizens, 382
Corroboration, 403
Disclosure of identity, 457, 617, 666
Personal knowledge of – first hand knowledge of, 395, 426
Protecting identity, 397, 427, 666
Reliability (believability, credibility) of, 382, 421
Types of informants, 381 - 385
INJURED OR ILL PERSONS – EMERGENCY DOCTRINE
Searches of containers, 252
Searches of persons, 252
Searches of premises, 158
Searches of vehicles, 252
INMATES – PRIVACY RIGHTS, 255
INSANITY DEFENSE, 566
INTENTIONAL TORTS, 774
INTERROGATION
Miranda warning requirement if custodial, 488
Re-initiation by officer
After assertion of right to attorney, 542
After assertion of right to silence, 542
Re-initiation by suspect, 542
INTERROGATORIES, 756
INTOXICATION
Affect on voluntariness
Of consent, 196, 269, 300, 331
Of statements, 483
Disproving defense of, 564
DUI's, 271
Liability of officers upon releasing intoxicated driver, 769
INVENTORY SEARCHES
Booking searches, 320
Containers, 306
Purposes of, 273
Vehicles, 273

INVOLUNTARINESS
Of consent – factors, 129, 194, 268, 300, 327
Of statements – factors, 467

-J-

JAIL SEARCHES, 347
JUDGES
Officer's credibility – importance of, 734
Warrants – judge's role, 409, 445
JUDICIAL NOTICE, 601
JURORS
Officer's relationship to, 706
Predisposition – affect of statements, 457
JURY INSTRUCTIONS, 612, 683
JURY SELECTION, 608, 680
JUVENILES
Fifth Amendment rights, 550

-K-

KEEPING THE PEACE, 737
KINDS OF EVIDENCE, 602
KNOCK AND ANNOUNCE
Compliance excused, 215
General rule, 213

-L-

LABELING EVIDENCE, 645
LANDLORD LIENS, 743
LANDLORD/TENANT
Consent to search, 202
Disputes, 741
LAWFUL PRESENCE
Requirement for plain view
Hearing, smell, 122, 179, 258, 297
LAY OPINION – ADMISSIBILITY, 638
LEADING QUESTIONS, 609
LEGAL THEORIES – OFFICER'S UNDERSTANDING, 34
LICENSE AND REGISTRATION
Roadblocks, 358
Stops, 225

LIES
By suspect
To establish probable cause, 514
To help convict, 453
LINEUPS
Photographic, 595
Physical, 594
Right to attorney, 591
Suggestiveness of, 577
LOCKOUT, TENANT, 742
LOST EVIDENCE, 649
LUGGAGE
Airport searches, 314
Reasonable expectation of privacy in, 288
Searches of, 291
Seizures of, 291

-M-

MAIL SEARCHES
General, 349
Prisoners, 348
MALICE – CIVIL LIABILITY, 777
MALICIOUS PROSECUTION, 778
MEMORIZING THE LAW, 27
***MIRANDA* WARNINGS**
Affect upon voluntariness of statements, 481
Condition of the suspect, 525
Custody – factors, 488
During detentions, 83, 244
Emergency – rescue doctrine, 549
Interrogation, 499
Non-interrogative questions, 506
Non-testimonial statements, 509
Questioning after charges filed, 547
Taped statements, 460
Traffic offenders, 245
The warnings, 520
Volunteered statements, 509
MISSTATEMENTS
By informants, 432
By officers
At trial, 723, 727
In affidavits, 433
MISTRIALS, 731
MOBILITY OF VEHICLES – EXIGENT CIRCUMSTANCES, 252

MODUS OPERANDI, 637
MOTEL ROOMS – see HOTEL ROOMS
MOTIONS TO SUPPRESS
Burdens of proof, 337, 575, 667, 670
MOTIVE
Bad acts, 616, 634
Testimony, 611, 616
MOVEMENT OF DETAINEES
General rule, 66, 84
Exceptions to rule, 79, 85, 229, 238
MUG SHOTS
Admissibility, 643
Photographic lineups, 595
Testimony about, 731
MURDER
Bad acts, 637 - 642
Homicide scene, 163

-N-

NARCOTICS – PRESERVATION OF, 647 - 648
NEGATIVE EVIDENCE, 616
NEGLIGENCE – CIVIL LIABILITY
Constitutional torts, 779
General, 765
NEIGHBORING PREMISES
Officers view from, 145
Witnesses knowledge about crime, 554
NO KNOCK, 213
NOSE – USE OF SENSE OF SMELL
Dogs, 342
Informants, 496
NOTES – PRESERVATION OF, 653

-O-

OATH
Informants, 392, 425
Officers, 445, 706
OBSERVATIONS, PLAIN-OPEN VIEW
Persons, 122
Premises, 177
Vehicles, 257
Versus peeking, 138
ON-THE-SCENE QUESTIONING, 519
OPEN FIELDS, 144

OPEN VIEW
Premises, 131-143
Vehicles, 220, 231-233, 263
OPINIONS
Expert testimony, 603
Lay testimony, 604
Report writing, 696
OVERBROAD DESCRIPTION
In warrant of things to be seized, 443

-P-

PAPER BAG – REASONABLE EXPECTATION OF PRIVACY, 288
PAPERS – FOURTH AMENDMENT PROTECTION, 354
PARENT/CHILDREN
Authority to consent, 198
Disputes – child custody, 741
PARKED VEHICLES
Contacts, 220
Exigent circumstances, 253
Inventory of, 273
PARTICULARITY – SEARCH WARRANTS
Description of place to be searched, 420
Description of things to be seized, 421
PASSENGER COMPARTMENT
Looking into, 231, 258
Entry of, 261
Searches of incident to arrest, 252
PASSENGERS – VEHICLES
Airline, 314
Ordering out of a vehicle, 246
Searches of, 246, 252
Standing, 284
PATROL CAR – SEIZURES OF DETAINEES
Putting detainees in patrol car, 69, 227
PAT DOWNS – see FRISKS
PEDESTRIANS – SEARCHES AND SEIZURES, Chapter 2
Approaching a pedestrian, 40
Arrest of, 98
Chart – searches and seizures, 37
Frisks of, 90
Stops of, 48
Searches incident to arrest, 110
PEEKING – A SEARCH, 139
PEN REGISTER, 351

PERSONAL KNOWLEDGE – INFORMANTS
Documentation in affidavit, 426
Requirement to arrest, 108, 395, 426
Requirement to search, 395, 426
'ERSONS – FOURTH AMENDMENT PROTECTIONS
Searches of, 90, 110
Seizures of, 48, 98
PHOTOGRAPHIC LINEUPS
General procedure, 595
Right to attorney, 591
Suggestivity, 577
PHOTOGRAPHS
Admissibility, 643, 718
PHYSICAL CHARACTERISTICS – SEIZURE OF
Fifth Amendment inapplicability, 483
Fourth Amendment inapplicability, 589
Seizures to obtain, 85
During detentions, 85
After arrests, 591
PLAIN FEEL
Containers, 297
Persons, 124
PLAIN HEARING, 125
'LAIN SMELL
Containers, 297
Persons, 124
Premises, 185
Vehicles, 261
PLAIN VIEW SEIZURES
Apparently crime-related requirement, 181, 261
Lawful presence requirement, 179, 258
Persons, 24
Premises, 179
Vehicles, 258
PLEA AGREEMENTS, 679
POLYGRAPH TESTS – ADMISSIBILITY OF, 630
POWER TO CONSENT – see CONSENT
PREJUDICE
In delay taking suspect to a magistrate, 674
Officers' testimony showing prejudice, 610 - 611
Undue prejudice of evidence – inadmissibility, 632
PRELIMINARY HEARING, 675
'REMISES
Abandonment, 209
Consent searches, 189
Entries under exigent circumstances, 151

Forcible entries, 213
Hot pursuit, 151
Protective sweeps, 155
Searches incident to arrest, 174
Searches with warrant, 149
Seizures or impoundment, 168
Warrant requirement, 149
PREPARATION
How defense attorneys prepare for trial, 455, 686
For hearing – officers, 732
For trials – officers, 702
PRESENTING WARRANT AND AFFIDAVIT TO MAGISTRATE, 445
PRESERVATION OF EVIDENCE, 646
PRESUMPTIONS
Evidence – generally, 601
Negligence per se, 773
Search warrants – presumption of validity, 412
PRIOR CONVICTIONS – ADMISSIBILITY, 633
PRIOR INCONSISTENT STATEMENTS, 610
PRIOR LAWFUL INTRUSIONS – PLAIN VIEW
Premises, 179
Vehicles, 261
PRISON SEARCHES, 347
"PRIVATE" PERSONS SEARCHES
Agency relationships, 212, 305
Containers, 304
Cooperative searches, 213, 273, 305
Premises, 212
Vehicles, 271
PRIVILEGES
Communications, 666
Spousal, 666
PROBABLE CAUSE
Exceptions to the warrant requirement
Containers, 291
Premises, 149
Vehicles, 248
Hearsay to establish (informant), 381
To arrest, 98, 367
To search, 367, 373
Persons, 98
Premises, 149
Vehicles, 248
Warrant requirements
Containers, 288
Persons, 108

Premises, 131
Vehicles, 248
PROBATIONER SEARCHES AND SEIZURES, 347
PROTECTION
Officers duty to protect citizens, 770
PROTECTIVE ORDERS – FOR SPOUSES, 739
PROTECTIVE SWEEPS, 155
PUBLIC PLACES
Arrests in, 108
Statements – custody in *Miranda*, 499
PUNITIVE DAMAGES
Against officers for intentional torts, 750, 754, 774

-R-

REAL EVIDENCE, 606
REASONABLE EXPECTATION OF PRIVACY
Binocular viewings, 146, 319
Businesses, 323
Containers, 288
Conversations, 338
Flashlight viewings, 344
Mail, 349
Pen registers, 351
Paper, 354
Premises, 131
Probationers and parolees, 352
Prisoners, 348
Records, 354
Students, 359
Tents, 133
Trash, 210
Vehicles, 219
REASONABLE PERSON TEST
Contacts, 39
REASONABLE SUSPICION
Definition, 51
Factors establishing, 51
To stop pedestrians, 52
To stop vehicles, 233
To take a closer look, 188
Verses probable cause, 237
RECORDS – FOURTH AMENDMENT PROTECTION, 354
REFRESHING MEMORY DURING TESTIMONY, 715

RELEASE OF ARRESTEE
Civil liability for failure to release, 777
RELEVANCY OF EVIDENCE, 615
RELIABILITY
Of identifications, 586, 597
Of informants, 382
REPORT WRITING, Chapter 13
REPOSSESSION OF PROPERTY BY CREDITORS, 744
RESIDENCES see PREMISES
RESTRAINING DETAINEES, 49, 227, 238
RESTRAINING ORDER – SPOUSES, 740
ROADBLOCKS, 358
ROAD HAZARDS, 769
ROOMMATES
Authority to consent to search of premises, 200

-S-

SCHOOLS – SEARCHES OF STUDENTS' PROPERTY, 359
SCOPE OF SEARCHES
During detentions, 94, 230
During emergencies, exigencies
Premises, 150
During inventories
Vehicles, 277
Incident to arrests
Containers, 295
Persons, 113
Premises, 174
Vehicles, 257
With consent, 129, 206, 270, 301, 335
With search warrant, 449
SCOPE OF EMPLOYMENT – CIVIL LIABILITY, 763
SEARCHES INCIDENT TO ARRESTS
Searches of containers, 295
Searches of persons, 111
Searches of premises, 174
Searches of vehicles, 254
SEARCHES INCIDENT TO DETENTIONS – see also FRISKS
Searches of containers, 74, 241, 288
Searches of persons (frisks), 90
Searches of vehicles, 241
SEARCH WARRANTS
Affidavits supporting, 419
Bodily intrusions, 120
Burden of proof, 411

Definitions, 410
Description
Of person or place to be searched, 437
Of property to be seized, 442
Detention of persons during execution of, 81, 448
Searches of persons during, 448
Warrant requirement
To search containers, 291
To search premises, 149
To search vehicles, 248
SECURITY GUARDS, 362
SEIZURES
Of containers
On probable cause, 308
On reasonable suspicion, 308
Of persons – Chapter 2
On probable cause, 98
On reasonable suspicion, 48
Of premises
Destruction or removal of evidence, 168
Of vehicles
Inventories, 273
On probable cause, 248
On reasonable suspicion, 233
On plain view
In containers, 297
In premises, 179
In vehicles, 258
On persons, 122
SELF DEFENSE
Statements from suspect to disprove, 562
SELF HELP, 744
SELF INCRIMINATION
Civil cases, 759
SETTLEMENTS
Civil cases, 758
Criminal cases, 679
SHOWUPS
Defined, 584
Procedures, 596
Search and seizure, 588
Suggestivity, 577
SIDEWALKS
Views from, 144

SIGNIFICANT RESTRAINT BY OFFICER
Difference between detention and arrest, 65, 488
Miranda requirement, 488
SILENCE
Assertion of right to, 541
SMELL
Plain smell, 124
Reasonable expectation of privacy, 290
SPONTANEOUS EXCLAMATIONS OR DECLARATIONS
By suspects, 509
By witnesses or victims, 622
SPOUSES
Abuse, 736
Authority to consent, 198
Disputes, 736
STALENESS – PROBABLE CAUSE TO SEARCH, 251, 399, 428
STANDING
Abandonment, 209, 282, 302
Containers, 304
Premises, 208
Vehicles, 282
STATUTES
Basis for search warrants, 410
Basis for stops, 50
STOMACH PUMPS
To retrieve evidence, 120
STOPS
Definition of, 48, 224
Officer's powers, 63
Pedestrians, 48
Reasonable suspicion, 51, 233
Vehicle occupants, 238
Versus arrest, 65
STRIP SEARCHES, 118, 322, 348
STRUCTURES ON PREMISES, 134
STUDENTS – SCHOOL SEARCHES, 359
SUGGESTIVITY – LINEUPS AND SHOWUPS, 577
SUPERVISORY LIABILITY, 786
SUPREMACY CLAUSE, 30
SURGICAL INTRUSION, 121
SURVEILLANCE, 362

-T-

TELEPHONES
Listening to conversations, 338

TENANT/LANDLORD
Consent, 202
Disputes, 741
Lockouts, 742
TESTIMONY
Officers, 711, 723
During suppression hearings, 733
During trials, 711
THIRD PARTY PREMISES
Searches for suspects, 109
THREATS
Factor in establishing reliability of informant, 392
Factor in voluntariness
Of consent, 194
Of statements, 468
By suspects to witnesses or victims, 554
TIME LIMITATIONS
After informant obtains information, 399
After knocking and announcing, 215
After officer obtains information, 402
Delay in taking arrestee to a magistrate, 674
Detention of persons during execution of a search warrant, 467
Detention of persons while obtaining a search warrant, 171
Detention on reasonable suspicion, 74, 239
To execute and return a search warrant, 446
To get a search warrant, 428
To find the suspect to obtain physical characteristics, 85
TORTS
Constitutional, 755
Intentional, 754
Negligence, 751
TOTALITY OF CIRCUMSTANCES TEST
To determine probable cause, 403
To determine voluntariness of consent, 326
To determine voluntariness of statements, 467
TRAFFIC STOPS – SEARCH AND SEIZURE
Officer's powers, 227
Time limitations, 229
TRASH – SEARCHES AND SEIZURE OF, 210
TRESPASS
By officers as search, 132
TRUNKS – VEHICLES SEARCHES
Consent, 270
Inventory searches, 273
Probable cause searches, 253
Searches incident to arrest, 257

-U-

UNRELIABLE INFORMANTS, 102, 385
UNDUE PREJUDICE
Inadmissibility of , 668

-V-

VEHICLES
Abandonment, 282
Automobile exception, 252
Charts, 218 - 219
Closed containers in, 253
Consent to search, 264
Contacts, 220
Detention of occupants, 227, 238
Officers powers, 227
Examining exterior, 258
Impoundment of, 273
Inventory of, 273
Miranda warnings, 244
Mobility of – exigency (automobile exception), 252
Ordering occupants out of, 246
Plain view seizures, 258
Probable cause, 248
Reasonable suspicion to stop, 233
Roadblocks, 358
Searches
By private persons, 272
Frisk, 241
Incident to arrest, 254
Incident to detention, 241
Inventory, 273
On probable cause, 248
Warrant requirement, 249
Seizures
For traffic offense, 225
Of the driver, 225
Of the passenger, 246
Of vehicles, 281
Impoundment of, 273
Stops of, 224
On reasonable suspicion, 233
Traffic stops, 225

Where officers may search
Incident to arrest, 257
Incident to detention, 241
Inventory, 273
Probable cause, 253
VICTIMS
As reliable informants, 383
Taking statements from, 560, 597
VIEW – see PLAIN AND OPEN VIEW
VOICE, ACTIVE TENSE, 688
VOLUNTARINESS
Of consent, 190, 265, 300, 326
Of statements, 467
VOLUNTEERED STATEMENTS, 509

-W-

WAIT/REFUSAL
Before entering premises, 213
WAIVER
Fifth Amendment rights, 525
WALLS – LOOKING OVER, 140
WARNINGS
Fifth Amendment, 488, 520
WARRANTLESS SEARCHES
Abandonment, 209, 282, 302
Containers, 302
Premises, 209
Vehicles, 282
Airports, 314
Closed containers
Booking, 320
Consent, 299
Emergencies – exigencies, 294
Inventory, 273, 303
Searches incident to arrest, 295
Consent
Containers, 299
General, 324
Persons, 126
Premises, 189
Vehicles, 264
Emergencies
Containers, 291
Premises, 151

Exigencies
Containers, 294
Persons, 92, 110
Premises, 149
Inventory searches
Containers, 306
Vehicles, 273
Premises
Emergencies, 151
Imminent destruction of evidence, 165
Searches incident to arrest, 174
Searches incident to arrest
Containers, 294
Persons, 110
Premises, 174
Vehicles, 254
Vehicles
Consent, 264
Inventories, 273
Searches incident to arrest, 254
Searches incident to detention, 241
WARRANTLESS SEIZURES
On probable cause
Containers, 308
Persons, 108
Premises, 165
On reasonable suspicion
Containers, 308
Persons, 48
Plain-open view seizures
Containers, 297
Persons, 122
Premises, 179
Vehicles, 258
WEAPONS
Civil liability for use of by officer, 770, 775
Frisk, 89, 232
Use by officer to stop suspect, 66
WIFE/HUSBAND
Consent, 198
Disputes, 736
Spousal abuse, 736
WINDOWS – OFFICER LOOKING THROUGH
Premises, 137
Vehicles, 258
WITHDRAWAL – FROM NARCOTICS, 484

WITHDRAWAL OF CONSENT, 337
WITNESSES
Conduct during identification, 593
Cooperative/hostile – statements, 554
Defense, 555
Fifth Amendment rights, 560
Friendly, 560
Hostile, 555
Officers as, Chapter 14

-X-

X-RAYS
Of containers as a search, 288