Drug Agents' Guide to Search and Seizure

U.S. Department of Justice
Drug Enforcement Administration

DRUG AGENTS GUIDE

TO

SEARCH & SEIZURE

Written by

Harry L. Myers, Esquire
Office of Chief Counsel
Drug Enforcement Administration
U.S. Department of Justice

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BY

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WARNING

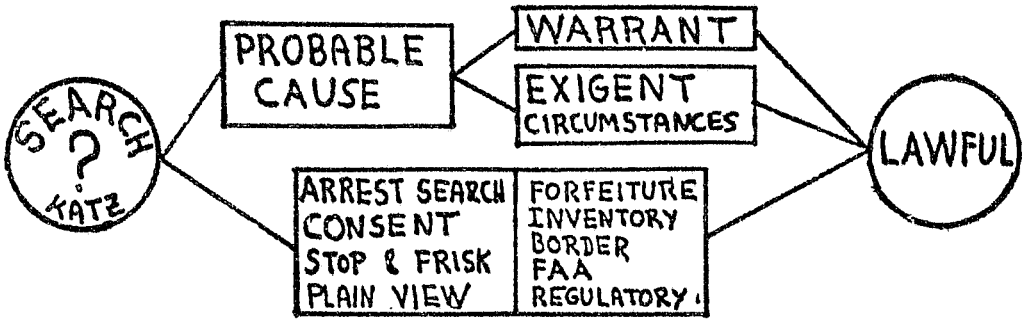
The rules contained in this Guide are based upon the Fourth Amendment to the United States Constitution, as interpreted by the Supreme Court and by a majority of lower federal courts. A few of the rules have been interpreted or applied differently by a number of lower courts, both state and federal. Moreover, many states impose tougher restrictions on police conduct than the federal Constitution does. It is imperative, therefore, that you

CONSULT YOUR PROSECUTOR OR LEGAL ADVISOR BEFORE APPLYING THE RULES CONTAINED IN THIS GUIDE!

SEARCH & SEIZURE

NUTSHELL

SEARCH & SEIZURE "LOGIC"



BERNER'S SERIES

1. IS THERE A "SEARCH" ?
   - IF NOT, THEN THERE IS NO 4th AMENDMENT VIOLATION
   - IF SO, GO TO 2.

2. IS THERE PROBABLE CAUSE TO SEARCH ?
   - IF SO, GO TO 3.
   - IF NOT, GO TO 5.

3. IS THE SEARCH TO BE CONDUCTED UNDER A VALID WARRANT ?
   - IF SO, THE SEARCH IS LAWFUL
   - IF NOT, GO TO 4.

4. ARE THERE EXIGENT CIRCUMSTANCES ?
   - IF SO, THE SEARCH IS LAWFUL
   - IF NOT, GO TO 5.

5. IS THERE AN EXCEPTION TO THE PROBABLE CAUSE AND WARRANT REQUIRMENTS ?

   POSSIBILITIES:

ARREST SEARCH	FORFEITURE
CONSENT SEARCH	INVENTORY
STOP & FRISK	BORDER
PLAIN VIEW	FAA
	REGULATORY

   - IF SO, THE SEARCH IS LAWFUL
   - IF NOT, THE SEARCH IS UNLAWFUL

DRUG AGENTS GUIDE TO SEARCH & SEIZURE

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I. INTRODUCTION

It is extremely difficult today to obtain a good working knowledge of search and seizure law. First, the sheer number of cases being decided on the subject makes it impractical to stay current with every small change or interpretation handed down by the courts. The volume of cases decided, almost on a daily basis, is overwhelming. Second, many of the reported decisions conflict with one another. Trying to extract rules from these decisions, which can be confidently applied in future investigations, is always frustrating and frequently impossible. Third, there are countless factual situations involving Fourth Amendment protections which have never been resolved by the courts. How can an agent be expected to cope with so many unknowns? Finally, assuming the conflicting decisions could be resolved and a rule could be found for every case, how could a law enforcement officer learn such a large body of law?

In spite of these hurdles, drug enforcement officers must develop a practical knowledge of search and seizure law. Without it, they run the risk of violating constitutional rights, they jeopardize the successful prosecution of their cases, and they expose themselves to civil lawsuits for damages.

The solution to this dilemma -- the absolute need to learn the law, on the one hand, and the many hurdles to learning, on the other -- lies in a two step approach:

(i) LEARNING THE CLEAR-CUT RULES, and

(ii) DEVELOPING A LOGICAL SYSTEM TO APPLY THE RULES TO ANY PROBLEM.

A knowledge of the basic rules is essential. These core principles are applicable to every case, they remain unchanged for long periods of time, and they are recognized and accepted by virtually every court. Learning these clear-cut rules is the first step to learning the law.

Developing a thorough, systematic approach for applying these rules to most factual situations is equally essential. Analyzing a problem, identifying the legal questions, and selecting the correct legal rules, should not be a "hit or miss" proposition. A logical approach is needed: one that insures a more thorough analysis, prevents jumping to "gut" conclusions, and makes complex situations easier to solve by breaking them down into smaller, simpler, problems. Cromberg, et al., On Solving Legal Problems, 27 Journal of Legal Education 165 (1975).

These two steps offer the best way to develop a working knowledge of search and seizure law in the least amount of time. An officer cannot memorize the rule of law for every possible case he will encounter. Learning the basic rules and knowing how to apply them offers a way to cope with the endless variations that must be faced.

Learning the Clear-Cut Rules

This outline contains a summary of the basic search and seizure rules. Unfortunately, simply reading and understanding the rules is not enough. A working knowledge of the law requires you to have the basics stored in your mind, ready for use when needed. More often than not, you will be required to apply the search and seizure rules without a prior opportunity to consult with a book or an attorney. Therefore,

MEMORIZATION IS ESSENTIAL.

You cannot, and need not memorize everything, but you must memorize the "guts", the "bare bones", the key principles which you need to make decisions.

This outline identifies these key rules by printing them in capital letters. In addition, the most important rules are grouped in the very beginning of the sections and are referred to as "elements" of the law. You must know these rules.

The outline also contains examples showing how these key principles apply to most common drug cases. Putting the rules into the context of drug enforcement should make them understandable, and more memorable.

Finally, the table of contents of the outline has been expanded into a nutshell of the key principles. It is the "tip of the iceberg" of what is in the summary. Most people are not gifted at memorizing, nor do they have exotic methods, such as special drugs or hypnotism, to help them. For most of us, memorizing information requires frequent reviews of the material. The Nutshell is designed to let you review all the memorable rules in the shortest possible time.

Developing a Logical Method

There is no magic to developing a logical approach to solving legal problems. In a single subject area, such as search and seizure, being logical is rather simple. The first step is to understand the interrelationships of the legal rules -- how do the basic rules relate to each other? The second step is to outline an efficient, orderly way to scan all the basic rules and determine whether, and how, they apply to your problem. The final step is to adhere to step 2, religiously, to solve every problem, until the approach becomes habit or second-nature to you.

The "Logic Chart" following the Nutshell explains graphically how the basic search and seizure rules relate to one another. You can see at a glance, that if a search (the circle on the left) is supported by both probable cause and a warrant, it is presumed lawful (the circle on the right). And, a search

supported by probable cause and exigent circumstances is lawful, even without a search warrant. Finally, searches incident to arrests, consent searches, and so forth, are lawful without probable cause, warrants or exigent circumstances. You should learn this chart.

Imagine, for a moment, that you must search the rooms of your home for a lost hammer. Where would you look first -- the bathroom, the kitchen? Would you search every room in a row? Would you search different rooms at random?

Most of us would devise a search "strategy." We would begin with the room most likely to house the hammer, perhaps a workroom. If we did not find it, we would go on to search the next most likely location, perhaps the garage. We would continue searching this way until we either found the hammer, or we completed a search of the entire house. This logical approach to searching is designed to locate the hammer in the least amount of time and to be very thorough when necessary.

Scanning the search and seizure rules for those that apply to a case should not be any different. A logical approach is needed; one that is thorough, and designed to resolve the problem as quickly as possible. Analyzing Search and Seizure Problems, 68 Am.Jur.2d at 660; Berner, Search & Seizure: Status and Methodology, 8 Valp. U.L. Rev. 471 (1974); Cromberg, On Solving Legal Problems, cited above.

Most search and seizure experts agree that the first place to look, or question to ask, in attacking a problem is: Is the investigative conduct a search or seizure under the Fourth Amendment? If not, the problem is immediately solved in favor of the government. If the conduct is a search and seizure, which rules do you apply next?

The experts disagree. They have developed different methods for scanning the remaining rules. Every method involves a series of questions to be answered or avoided depending upon the answers to prior questions, but the order or sequence of questions varies from expert to expert.

The series of questions below the Logic Chart is the method recommended and used by the author of this outline. It was devised by Bruce G. Berner in his article for the Valpariso University Law Review, cited above, and is the most efficient method available. In addition to learning the Logic Chart, you should learn and use Berner's method for solving all search and seizure problems.

Organization Is Critical

Organization of information is directly related to the brain's ability to store it in long-term memory and retrieve it for future use. Material which is not logically organized is difficult to learn. For example, how long would it take you to memorize the following series of letters?

fb id ea
in sc ia

It might take a while, since the material is unorganized and makes no sense in this form. How long would it take you to memorize this next series of letters?

ɐɪɔ sɯɪ
ɒəɐ ɟbɪ

A simple change in organization makes the same letters much easier to remember.

This outline organizes the many search and seizure rules into logical clusters. Each cluster centers around a basic legal principle, such as consent, or plain view. It is these core concepts that judges use to reach their decisions. Courts do not recognize artificial doctrines such as "Search of the Person" or "Search of a Vehicle." You should learn the rules in their logical, legal groupings.

Berner's series is used to present the legal clusters in a logical order. Learning the rules in the same logical order that you use to analyze a problem, should enhance both your memory and your ability to analyze problems quickly.

In summary, the organization of this material is critical to understanding, to memory, and to problem solving. Please cover it in the order in which it is presented.

4TH 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."

II Summary of the Law

A. WHAT IS A SEARCH?

The 4th Amendment is intended to protect individuals from unreasonable searches and seizures conducted by government agents. It is not intended to control government conduct which is not a search or seizure. Nor is it intended to control the activities of private parties.

IF YOUR CONDUCT IS NOT A SEARCH OR SEIZURE, THE 4TH AMENDMENT RESTRICTIONS DO NOT APPLY.

But, what is a "search"?

1. The 4th Amendment and The Right to Privacy

By its terms, the 4th Amendment protects "persons, houses, papers and effects" from unreasonable government intrusion. In 1967, in the case of Katz v. U.S., 88 S.Ct. 507, the Supreme Court of the United States interpreted these four words as a shorthand expression for "privacy." In the eyes of the Court, the 4th Amendment is intended to protect a person's privacy, not just his person, houses, papers and effects.

Federal agents had bugged Katz' telephone conversation by placing a device on the outside of a public telephone booth which he regularly used to convey gambling information. Katz was convicted on the evidence obtained by the bug.

On appeal, Katz argued that his privacy had been invaded by the police; that since he believed his conversations would be private, the police needed a warrant before they could bug them.

The government argued that a public phone booth was not a constitutionally protected area. It was not a home, nor was it "papers or effects", nor was it a "person" protected by the 4th Amendment. Therefore, the government reasoned, the bug could be placed on the booth without a warrant.

Katz won. In reversing his conviction, the Supreme Court said:

> "The Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection * * * * . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."

Since Katz reasonably expected his conversations to be private, they were protected from unreasonable government intrusion. Therefore, the agents needed probable cause and a warrant before bugging the calls.

The Katz case is a landmark decision, because the Katz Test, also referred to as "The Reasonable Expectation of Privacy Test", now determines what is, and what is not, a 4th Amendment "search."

A SEARCH OCCURS ONLY WHEN THE GOVERNMENT INVADES AN INDIVIDUAL'S "REASONABLE EXPECTATIONS OF PRIVACY."

A REASONABLE EXPECTATION OF PRIVACY EXISTS ONLY IF:

(i) AN INDIVIDUAL ACTUALLY EXPECTS PRIVACY,

AND

(ii) HIS EXPECTATION IS REASONABLE.

Note, that the first prong of the Katz Test will be presumed in virtually every case, unless there is evidence to the contrary.

Among the factors to consider in applying this test to any situation are:

(i) The place, area, or context into which the government intrudes (for example, a patio, a yard, a bedroom, a public toilet, etc.), and

(ii) The nature of the intrusion (for example, physical entry, observation, use of a "bug", use of sensing aids, etc.)

2. Open View

Things that a government agent can sense (see, smell, hear, etc.) without invading a reasonable expectation of privacy are said to be "in open view." Things in open view have been exposed to the public and are not protected by the 4th Amendment.

Moylan, The Plain View Doctrine Etc., 26 Mercer L. Rev. 1047, 1070-71 (1975).

SENSING THINGS IN OPEN VIEW IS NOT A "SEARCH."

Example. You get a tip from a local townhouse owner that his neighbor has marihuana growing on his back sundeck. You go to the tipster's house, he takes you out to his rear yard, you step on a milkbox and look over the six foot high privacy fence. You can easily see marihuana plants on the neighbor's sundeck. Is your conduct a "search" within the meaning of the 4th Amendment?

No. A search occurs only when the government invades an individual's reasonable expectations of privacy. Moreover, a reasonable expectation of privacy requires (i) that the individual actually expect privacy and (ii) that his expectation be reasonable. Here, the neighbor probably expected privacy as to the plants on his deck. He certainly expected that no one would climb over his privacy fence into his yard, and he probably expected the plants would not be seen. His expectation that no one would enter is reasonable, therefore, if you enter his yard, it's a search. But, his expectation that no one would see the plants is not reasonable. Most persons would not expect to be free from observation while in a yard surrounded only by a six foot high fence. Since the neighbor does not have a reasonable expectation of privacy that the plants will not be seen, your conduct in observing the plants is not a 4th Amendment "search." The plants are in "open view." (See U.S. v. McMillon, 350 F.Supp. 593 (1972); George v. State, 509 S.W. 2d 347 (Tex. 1974); People v. Claypoole, 366 N.Y.S. 2d 481 (NY. App. 1975)).

Example: Suppose in the last example that the neighbor has constructed a 10 foot high, see-proof, privacy fence so that other neighbors and the public cannot see anything he has in his yard. And suppose you call your office and they send a helicopter which hovers 25 feet over the yard and photographs the marihuana plants. Is your conduct a 4th Amendment search?

Yes. By constructing a 10 foot high, see-proof fence around his yard, the neighbor has sought to preserve the area as private, from both entry and observation. Moreover, his expectation of privacy in his yard is reasonable. Most persons who take special steps to prevent neighbors and the public from being able to observe their activity would expect privacy. Since the helicopter invaded the neighbor's reasonable expectation of privacy, the conduct is a search under the 4th Amendment. And, since this "search" is not supported by a warrant, it is unlawful. (See People v. Sneed, 108 Cal. Rptr. 146, Cal.App. 1973)

3. Common Factual Patterns

The endless possible factual changes and the differing reactions of the courts to the Katz Test makes it difficult to articulate clear rules of law in this area. The following factual patterns, however, are very common.

a. Curtillage and Open Fields

"Curtillage" has been defined as "the enclosed space of grounds and buildings immediately surrounding a dwellinghouse." Areas of private property which are outside the curtillage of a dwelling are referred to as "open fields." As early as 1924, the Supreme Court of the United States recognized that the "curtillage" of a dwelling was an area protected by the 4th Amendment against government entry; whereas, the "open fields" of private property were not protected by the Constitution. Hester v. U.S., 44 S.Ct. 445. To determine if an area was curtillage, the courts looked to:

(i) its nearness or connection to the dwelling,

(ii) whether it is enclosed, for example, by a fence or a porch, and

(iii) how it is used by the occupants. Care v. U.S., 231 F.2d 22 (10 Cir. 1956).

The question now being asked is whether the Katz decision has changed the Curtillage and Open Fields rules. After all, Katz tells us that "The Fourth Amendment protects people, not places." Although the courts have not agreed upon the answer, the logical conclusion is that the Katz Test has replaced the Curtillage and Open Fields rules for determining what is a "search." Davis v. U.S., 413 F.2d 1226 (5 Cir. 1969); Wattenburg v. U.S., 388 F.2d 853 (9 Cir. 1968); Gedko v. Heer, 406 F.Supp. 609 (Wis. 1975); State v. Fearn, 345 So.2d 468 (La. 1977); Bies v. State, 251 N.W. 2d 461 (Wis. 1977); State v. Wert, 550 S.W. 2d 1 (Tenn. App. 1977); State v. Lopez, 563 P.2d 295 (Ariz. App. 1976).

Note, even though the Katz Test has technically replaced the Curtillage and Open Fields rules, as a practical matter, they remain good guides as to what is a "search" of private property. The factors used under the old Curtillage rule, namely, the type of area, its distance from the house, whether it is enclosed, the use made of the area by the occupants, and so forth, are precisely the same factors you must consider in deciding if the occupants have a reasonable expectation of privacy in that area. Moreover because of its proximity to the dwelling, it seems logical to conclude that privacy will normally be expected in the Curtillage. Conversely, "open fields" are not areas in which the owner of property has traditionally expected privacy.

The important point to remember is that the Katz Test is now controlling. Thus, there might be areas once characterized as "open fields" in which the owner retains a reasonable expectation of privacy. Since Katz controls, an intrusion into such areas will be a "search." Conversely, there might be areas which once were recognized as "curtillage", but in which the owner does not actually expect privacy. Invasion of these areas will not be a "search." The best way to clarify these statements is with examples.

Example: You get an anonymous tip that F has a large stockpile of marihuana in his barn. F owns a very large farm, none of which is fenced. You drive to the rear property line of the farm and walk unnoticed to within 50 yards of the barn. The doors are open and you see F packaging green vegetable material in butcher paper. F is putting the wrapped material in trash bags and loading them into his truck. Is your conduct in trespassing onto his farm and observing his activity a 4th Amendment "search?"

No. The Katz Test determines if your conduct is a search. Katz requires that (1) F actually expects privacy as to his activity, and (2) that his expectation be reasonable, before it is protected by the 4th Amendment. Here, F probably expected that he would not be observed, but that expectation is not reasonable. His farm is large, it is not fenced, anyone could wander or trespass onto it. F made no effort to hide his activities. He left the barn door open, thereby exposing his actions to anyone who might be on the farm. Since you have not invaded a reasonable expectation of privacy, your trespass and observations are not a "search." F's activities are in "open view."

Note, that the older "open fields" rule gives the same result. Although trespassing, your position is 50 yards from the house and barn. You are in "open fields." Observations made from open fields were never considered to be a search. (See Fullbright v. U.S. 392 F.2d 432, 10 Cir. 1968; U.S. v. Freie, 545 F.2d 1217, 9 Cir. 1976).

Example. Suppose, in the last example, that the farm was completely enclosed by a six foot high fence and that "No Trespassing" signs were posted every 25 feet. In addition, suppose the house and barn were in the center of the farm and surrounded by woods so as not to be visible to the public. If you climbed the fence, walked through the woods and stopped 50 yards from the barn, would your conduct be a "search"?

Yes. Under these circumstances it is clear that the owner expects privacy, from both entry and observation. And, his expectations seem reasonable. He has fenced and posted his property, and his home is not in public view. Your entry and resulting observations are an invasion of his reasonable expectations of privacy. Therefore, your conduct is a "search" governed by the 4th Amendment. You need probable cause and a warrant under such circumstances. Note, under the old rules you are standing on open fields, not on the curtillage. This is an example where the old rules provide the wrong answer. Katz controls! (See Gedko v. Heer, 406 F.Supp. 609, DC Wis. 1975; State v. Wert, 550 S.W.2d 1, Tenn. 1977).

Example. You get an anonymous tip that J is cutting heroin in his basement. You drive to his home and walk up the sidewalk to his front door. You see that the house is dark except for a light in the basement. The basement window is large, is open, has no curtain and is well-lit. You step a few feet off the sidewalk and immediately get a clear view of someone in the basement. He is standing next to a table covered with powder, foil, balloons scales, and other drug paraphernalia. Is your conduct a "search?"

No. The Katz Test is controlling. Katz requires that the occupant expect privacy and that his expectation be reasonable. Here, any privacy that the occupant expected is clearly unreasonable. Anyone who came up his walk would have seen what he was doing in the basement. He took no precautions to insure that he would not be seen by visitors, delivery-men, or others who might walk up to the door. Since you did not invade a reasonable expectation of privacy, your trespass and observations are not a "search." J's activities are in "open view." Moreover, you now have probable cause to search and, arguably, exigent circumstances exist which allow you to enter without a warrant. Note that you entered upon "curtillage" when you observed J in the basement. Under the old rule your conduct would be a search, but Katz is now the test. (See U.S. v. Johnson, 561 F. 2d 832, DC Cir. 1977).

b. Abandoned Property

Before the Katz decision, the Supreme Court had ruled that a person has no right to challenge the search or seizure of an area or thing that he has voluntarily abandoned. Abel v. U.S., 80 S.Ct. 683 (1960); Hester v. U.S., 44 S.Ct. 445 (1924). Since, in most cases, a person who voluntarily abandons property is also abandoning his expectation of privacy in the property, the old abandonment rule seems consistent with the newer Katz Test. In the rare case where the old abandonment rule conflicts with the Katz Test, the Katz Test is controlling. Magda v. Benson, 536 F.2d 111 (6 Cir. 1976), U.S. v. Mustone, 469 F.2d 970 (1 Cir. 1972), U.S. v. Jackson, 448 F.2d 963 (9 Cir. 1971), U.S. v. Kahan, 350 F.Supp. 784 (SDNY, 1972); City of St. Paul v. Vaughn, 237 NW 2d. 365 (Minn. 1975).

Example. You get a tip from a merchant in a ghetto area that F is pushing heroin to local children. The merchant tells you that F keeps his "stash" in an abandoned truck. He describes the truck's location. You go to the area and locate the truck. It is on blocks on an empty lot. It has no wheels, has several broken windows, has been stripped of its accessories, is unlocked, and has no license plates. You look in the truck and find several balloons of heroin. You place the truck under surveillance and arrest F when he enters it to find his stash. Is your search of the truck controlled by the 4th Amendment?

No. For purposes of the 4th Amendment, a search occurs only when the government invades an individual's reasonable expectations of privacy. Any privacy that F might have expected as to this truck, is clearly unreasonable. Most people would never expect any privacy in a vehicle which has been abandoned in this manner.

Your conduct in finding heroin in the truck is not a 4th Amendment "search." The truck and the heroin are in "open view." (See U.S. v. Calhoun, 510 F.2d 861, 7 Cir. 1975).

Example. Humpty Dumpty asks for a package at a local airfreight office. An employee finds the package and asks Humpty to open it at the counter. Humpty gets very nervous and asks "Why?" The employee points to a "Damaged When Received" sticker which has been placed on the package, and explains that he must inspect the contents to prevent a false damage claim. Humpty says "Look, it's OK, it's only glue. I'll take it just as it is." Humpty grabs the package and turns to leave. The employee grabs his arm and yells for the airport police. Humpty panics, runs away, and throws the package in a trash can. Airport police open it and find $4,000 worth of heroin. Is this a 4th Amendment search?

No. A 4th Amendment search occurs only when the government invades a reasonable expectation of privacy. When Humpty abandoned the package, he also abandoned his expectations of privacy as to the package, therefore, opening it was not a search. The package and its contents were in "open view." (See U.S. v. Humphrey, 549 F.2d 650, 9 Cir. 1977).

Example. You have developed a reasonable suspicion that the occupants of a car are engaged in a major drug violation. As you try to stop them for questioning, they throw a package from the car. One of your fellow officers retrieves it, opens it, and finds marihuana. Is his conduct a 4th Amendment search?

No. When the occupants abandoned the package, they also abandoned any reasonable expectations of privacy they might have had regarding its contents. Since opening the package does not

invade anyone's reasonable expectations of privacy, it is not a search. The package is in "open view." (See U.S. v. McLaughlin, 525 F.2d 517, 9 Cir. 1975).

Example. You believe that A is involved in a conspiracy to distribute drugs. A works for a public agency in the same building in which you have your offices. You decide to interview A. Not wishing to embarass A in front of his fellow employees, you wait until the end of the work day before going to his agency. A's work area consists of a large open area with numerous desks and partitioned offices around the outer perimeter. The door to this area is open and the lights are on, but everyone, including A, has left for the day. A janitor says it is OK for you to enter. On a coatrack in the common area you see a jacket which you recognize as belonging to A. You look in the jacket pocket and find several squares of aluminum foil with cocaine traces on them. Is your conduct a search?

No. A abandoned his reasonable expectations of privacy in the jacket by placing it on a coatrack in a general working area of a large office, and by leaving it there overnight. Anyone in the building could have looked at or taken A's jacket. It is unreasonable to expect it to remain private. Therefore, looking in the jacket is not a 4th Amendment "search." The jacket is in "open view." (See U.S. v. Alewelt, 532 F.2d 1165, 7 Cir. 1976). Note, it seems clear that A did not abandon his property interest in the jacket. He was not giving or throwing it away when he placed it on the rack. Thus, he did not actually abandon the coat. But abandoning a property interest is not the test. Under Katz, the question is whether A abandoned his reasonable expectations of privacy in the property. (See also, U.S. v. Kahan, above)

There is one limitation on the abandonment rule: ABANDONMENT MUST NOT BE CAUSED BY UNLAWFUL GOVERNMENT CONDUCT. Fletcher v. Wainwright, 399 F.2d 62 (5 Cir. 1968); Comm. v. Jeffries, 311 A2d 914 (Pa. 1973); Bowles v. State, 267 N.E. 2d 56 (Ind. 1971)

Example. You are assigned to a drug investigation unit at a local airport. You see X depart from a plane which has just arrived from Los Angeles. Although you lack probable cause to search or arrest X, you do have enough facts to establish a reasonable suspicion that X is a drug courier, therefore, you stop him before he leaves the terminal. X is very polite, he identifies himself and satisfactorily answers most of your questions. After a few minutes, X says "Look, I've got to get going or I'll miss the bus to my hotel. Why don't you call me there." You refuse to let X go and ORDER him to accompany you to a private room for further questioning. X panics, runs away and throws a small package in a trash can. You catch X and return to get the package out of the trash. You open it and find heroin. Is opening the package a search?

Yes. Although a person generally has no reasonable expectations of privacy in property that he has abandoned, abandonment must not be caused by unlawful government conduct. Here, although you had grounds to stop X and ask a few questions, you did not have the right to engage in an extended interrogation and demand that he accompany you to a private room. Since X abandoned the package in response to your unlawful demands, the inspection of the package is a 4th Amendment search. (See U.S. v. Chamblis, 425 F.Supp. 1330, ED Mich. 1977)

C. Trash Searches

Whether a trash can is protected by the 4th Amendment is also governed by the Katz Test.

Thus, trash cans located immediately next to the kitchen door or under a porch on private property would be protected, because the owner has a reasonable expectation of privacy that no one will search through those cans. Work v. U.S., 243 F.2d 660 (D.C. Cir. 1957); Ball v. State, 205 N.W. 2d 353 (Wis. 1973).

On the other hand, trash put out for collection is generally not protected. Every federal appellate court to consider the issue has ruled that an owner does not have a reasonable expectation of privacy in trash which he has put out for collection. Magda v. Benson, 536 F.2d 111 (6 Cir. 1976); U.S. v. Mustone, 469 F.2d 970 (1 Cir. 1972); U.S. v. Jackson, 448 F.2d 963 (9 Cir. 1971); U.S. v. Shelby, 431 F.Supp. 398 (ED Wis. 1977).

In Shelby, Judge Warren of the U.S. District Court for the Eastern District of Wisconsin explained why it is unreasonable to expect privacy in trash put out for collection:

> "It is well known that children often take delight and that vagrants often find it necessary to rummage through the abandoned articles in others' garbage. It is not beyond reason that sanitation workers might from time to time look through garbage themselves, whether for their own benefit or as a favor for another . . . . (W)ith such common instances of trash rummaging, defendant's asserted expectation of privacy is questionable. It is not apparent that we, as a society, share such an expectation as an element of the privacy the fourth amendment is designed to protect."

California is the Exception

Under California law, an individual is considered as having an expectation of privacy in his garbage until it has "lost its identity and meaning by becoming part of a large conglomeration of trash elsewhere." People v. Edwards, 458 P.2d 713 (Cal. 1969); People v. Krivda, 486 P.2d 1262 (Cal. 1971). The practical effect of this state court ruling is to require officers who bring cases in California State courts to get a warrant whenever they want to examine a suspect's garbage.

d. Eavesdropping

Eavesdropping on a conversation will be considered a "search" if the parties to the conversation reasonably expected their talk to be private. On the other hand, it will not be a "search" if the parties should have expected they could be overheard.

As a general rule, if the eavesdropping is accomplished with the "naked ear" (i.e. no special listening devices are used) from a location easily and lawfully accessible to the listener, it will not be a 4th Amendment "search." Under such circumstances, it is unreasonable for the parties to the conversation to expect privacy.

Example. A motel manager calls you to report that he is suspicious of one of his guests, Mr. D. He tells you that D is receiving and placing a very excessive number of calls through the motel switchboard; that there has been a parade of poorly dressed and bearded young people going to and from D's room; and that D's room service bill for food and drinks has skyrocketed. He begs you to come over and investigate, and he offers to let you use a room next to D's. You agree to investigate. You enter the room next to D's, which the motel has made available to you, and you listen to the wall. You hear only muffled sounds. You lie down on the floor with your ear near the crack of a locked door

which connects your room with D's. From this position you hear this conversation: "This is the quality of the marihuana before we process it, and this is the condition of it after we remove the stems and seeds and clean it up." Is your eavesdropping a 4th Amendment "search?"

No. You eavesdropped using your naked ear from an easily accessible and lawful location. Under the circumstances, D has no right to expect that his normal conversations will not be overheard by listeners in the next room. Since he has no reasonable expectation of privacy that he will not be overheard, your conduct is not a search. (See State v. Day, 362 N.E.2d 1253, Ohio. App. 1976; U.S. v. Martin, 509 F.2d 1211, 9 Cir. 1975; U.S. v. Fisch, 474 F.2d 1071, 9 Cir. 1973; U.S. v. Fuller, 441 F.2d 755, 4 Cir. 1971; Ponce v. Craven, 409 F.2d 621, 9 Cir. 1969; U.S. v. LLanes, 398 F.2d 880, 2 Cir. 1968).

Note: The result would be different if the suspects whispered and you were forced to use a listening device to hear them.

e. Visual Sensing Aids

The Katz decision is not limited to protecting privacy from physical entry, electronic bugging and eavesdropping. Katz also protects reasonable expectations of privacy from unreasonable visual intrusions. U.S. v. Kim, 415 F.Supp. 1252 (Hawaii, 1976); People v. Sneed, 32 Cal. App. 3d 535 (1973); Kroehler v. Scott, 391 F.Supp. 1114 (ED Pa 1975).

Cases involving unreasonable visual surveillance are rare. The courts have consistently held that the use of common sensing aids, such as flash-lights, binoculars, and telescopes will not turn an otherwise lawful surveillance into a 4th Amendment search. U.S. v. Thomas, 551 F.2d

347 (DC Cir. 1976); U.S. v. Park, 531 F.2d 754 (5 Cir. 1976); U.S. v. Wickizer, 465 F.2d 1154 (8 Cir. 1972); Bies v. State, 251 N.W.2d 461 (Wis. 1977); State v. Manly, 530 P.2d 306 (Wash. 1975).

But, if the sensing aids become highly sophisticated and if the vantage point is very remote or unusual, the visual surveillance could invade the suspect's reasonable expectation of privacy. For example, the use of a government helicopter to hover over private property to photograph marihuana which otherwise was hidden from public view, has been ruled to be a search (See People v. Sneed, above). Similarly, the use of a super-telescope to peer into a highrise apartment, and monitor every activity of the occupant, including his reading habits, from over a quarter mile away, has been held to be a search. (See U.S. v. Kim, above). And, if the government ever used the super-telescopes contained in so-called "Spy Satellites" to observe and photograph activity on private property, it would arguably be a 4th Amendment search.

f. Katz & Dogs

The courts have held that the use of a drug-trained dog to detect contraband is not a "search" under the Katz Test. U.S. v. Solis, 536 F.2d 880 (9 Cir. 1976); U.S. v. Race, 529 F.2d 12 (1 Cir. 1976) U.S. v. Bronstein, 521 F.2d 459 (2 Cir. 1975); U.S. v. Fulero, 498 F.2d 748 (DC Cir. 1974).

Of course, the dog must be lawfully present when he sniffs the suspected container.

4. Comment

Before Katz, government agents were prohibited from conducting unreasonable searches of persons, of personal property and of constitutionally protected areas. The rules as to what were protected areas, were mechanical and fairly clear-cut. Katz replaced these

rules. Now, the protection of the 4th Amendment is focused on reasonable expectations of privacy, not mechanically defined areas.

This change places a greater burden on law enforcement officers. It requires them to evaluate, in hundreds of different situations, whether a defendant has a recognizable privacy interest in his activities. Fortunately, today's officers are well-educated and sophisticated enough to make these professional judgments. Unfortunately, because the Katz Test includes the element of "reasonableness", officers must often second-guess the courts on what is a "search."

The safest course, therefore, is to:

OBTAIN A SEARCH WARRANT WHENEVER YOU BELIEVE YOUR CONDUCT MIGHT BE A "SEARCH" UNDER THE 4TH AMENDMENT.

5. Private Searches

As already noted, the 4th Amendment is a limitation on government conduct only. It is not intended to control the activities of private parties. The courts, therefore, will not exclude evidence unlawfully obtained by a private person acting purely on his own initiative. Burdeau v. McDowell, 41 S.Ct. 574 (1921); U.S. v. Lamar, 545 F.2d 488 (5 Cir. 1977); U.S. v. Newton, 510 F.2d 1149 (7 Cir. 1975); U.S. v. Pryba, 502 F.2d 391 (DC Cir. 1974); State v. Phillips, 366 A.2d 1203 (Del. Super. 1976); Ward v. State, 351 A.2d 452 (Md. App. 1976); State v. Bookout, 281 So.2d 215 (Fla. App. 1973); Wolf v. State, 281 So.2d 445 (Miss. Super. 1973); 68 Am.Jur. 2d at 670.

A SEARCH OR SEIZURE IS "PRIVATE" IF AND ONLY IF:

(i) IT IS CONDUCTED BY A PRIVATE CITIZEN,

(ii) ON HIS OWN INITIATIVE,

(iii) WITHOUT GOVERNMENT PARTICIPATION.

Example. A freight agent suspects a trunk contains marihuana because it is very heavy, smells of mothballs and is leaking talcum powder. In addition, the owner of the trunk appeared nervous when he consigned it for shipment. The freight agent opens the trunk and finds 100 pounds of marihuana. He calls you to show you what he's found. You inspect the

package and the marihuana. Is your conduct a 4th Amendment search?

No. The freight agent is responsible for opening the trunk, not you. All you did was to look at an already opened container. As for the freight agent, he is a private citizen who opened the trunk on his own initiative without government participation. Therefore, the opening of the trunk was a private search which is not controlled by the 4th Amendment. (See U.S. v. Pryba, above).

Example. You suspect Mr. N, a frequent air-traveler, of being a drug courier. You ask an airline manager for permission to inspect the outside surfaces of N's luggage before it is loaded on the plane. The manager approves and escorts you to the baggage loading area. Seeing nothing unusual about the bags' appearance you say to the manager: "Do you know that under Civil Aeronautics Board Regulations Number 142, you have the absolute right and sole discretion as an airline employee to open and inspect any luggage consigned to you? Moreover, as a common carrier you have a right under the common law to open any property consigned to you for shipment." The manager opens the suitcase and finds 10 pounds of heroin. Is this a "private" search?

No. A search is private if and only if it is conducted by a private citizen, on his own initiative, without government participation. Here, the carrier is a private corporation and the manager is not a law enforcement officer. And, you did not participate in conducting the search. But, the manager did not conduct the search on his own initiative. But for the fact that you asked to see the luggage, and "prompted" him to open it by citing him the CAB regulations, the bag would never have been inspected. This is not a private search. It is a government search controlled by the 4th Amendment. Since you initiated it without a warrant, it is unlawful.

Example. A passenger service supervisor for a major airline phones your office and reports that she is suspicious of a certain passenger and believes the passenger has drugs in a bag he has consigned to the airline for shipment. She asks that a drug agent be sent to her office to investigate. You are assigned the task and you assemble several field testing kits and go to the airport. The supervisor is waiting for you. With you standing by, the supervisor opens the luggage, takes out a brown paper bag, and hands it to you. You open the paper bag which contains a brown powdery substance. You test the powder with Marquis Reagent. The test proves positive for heroin. You hand her the bag and tell her to replace it in the luggage and to allow the owner to claim the bag. Is this a "private" search?

No. A search is private only if it is conducted by a private citizen, on his own initiative, without government participation. Here, the supervisor is a private citizen and conducted the search on her own initiative. But, she conducted the search with government participation. She called for your help and waited for you to arrive before opening the bag. She had you stand by while she opened the bag. She handed you the contents relying upon your special training and equipment to identify drugs. Your participation is significant enough to convert this to a government, not a private, search. (See U.S. v. Newton, above).

Example. You are at an airport waiting to pick up a friend. You unexpectedly see L, a reputed drug courier, getting off a flight from San Diego. Having time to spare, you decide to follow L. He goes to the baggage claims area and locates his bag, but he doesn't claim it. Instead, L takes a tour of the entire terminal and disappears in the parking lot. You go back to the baggage area, but L's bag is gone. You then go to the airline counter and ask if there was any luggage left unclaimed from the last flight. The airline employee tells you there was one unclaimed bag, and it's not labeled. He says it has been taken into the office where it will be opened and searched for the owner's name, address, and phone number. The employee tells you he'd be happy to give you the

owner's name and address as soon as they find it. He then asks you if you'd like to wait in the office while they open the bag. You accept his offer and sit in a corner of the office while the employees conduct the inspection. As soon as they open the luggage you see it contains large glassine bags of white and brown powder. From where you are sitting you recognize it as probably heroin. Is this a private search?

Yes. First, it was conducted by airline employees, not law enforcement officers. Second, the employees opened the bag on their own initiative. Travelers are required by FAA regulations to attach their name and address on their luggage. When L failed to label his luggage and left it unclaimed, airline rules required that the bag be opened for identification. The employees had plans to open the luggage before you approached them. Finally, you did not participate in any way in the search. You merely sat off in the corner while the luggage was opened. Merely being present is not the same as assisting or participating. Since this is a private search, it is not controlled by the 4th Amendment. And, since your observations of the bags plus your knowledge of L's reputation and behavior give you probable cause to believe the bags contain heroin, you can arrest L when he picks it up. (See U.S. v. Lamar, above).

Comment

Accepting referrals of drug-related evidence from parties who have engaged in private searches is a legitimate method of beginning an investigation. Every drug agent, particularly those who are assigned to airport operations, welcomes these referrals. Drug agents often take the trouble to introduce themselves to private parties who have occasion to conduct searches, such as FAA security searchers, air-freight personnel, airline service personnel, and other employees of common carriers. There is nothing wrong with introducing yourself to one of these parties and asking him to notify you if he ever discovers anything illegal.

Unfortunately, the temptation is often present to befriend these private parties by taking them to coffee or treating them to lunch. During these meetings, the conversation might turn to the important need to detect drug-traffickers. It might touch on the common methods used by traffickers to conceal drugs. It might hit on some of the characteristics common to drug couriers. The conversation might even touch on the rewards available to a citizen for assisting law enforcement officers in effecting an arrest or seizure. You must be aware, that if you befriend private parties in this manner, you run the very real risk that a court will hold them to be "in league with" the government. In these circumstances, they will be considered agents of the government, and evidence they uncover could be suppressed. Moreover, if these parties are ever required to testify in a judicial proceedings, they run a substantial risk of being impeached as witnesses because you have befriended them. The safest legal course to follow, therefore, is to:

BE COURTEOUS, BUT NEUTRAL TOWARD PRIVATE PARTIES WHO CONDUCT "PRIVATE" SEARCHES.

B. IS THERE PROBABLE CAUSE TO SEARCH

If government conduct is a search, it must be reasonable under the 4th Amendment. The courts have held that a search is presumed to be reasonable, if it is supported by both probable cause to search and a search warrant. Therefore, in analyzing any search and seizure problem, once you have decided that your conduct is a "search", you must ask: is there probable cause to search?

1. What is Probable Cause?

a. Definition

The most quoted definition of "probable cause" is found in Carroll v. United States, 45 S.Ct. 280, (1924):

> ". . . facts and circumstances within . . . (the agents) . . . knowledge and of which they had reasonably trustworthy information . . . sufficient in themselves to warrant a man of reasonable caution in the belief that . . . (seizable property would be found in a particular place or on a particular person)."

Probable cause to search has two elements: first, there must be probable cause to believe certain property is crime connected and, therefore, that it is seizable. Second, there must be probable cause to believe this property can be found in a particular place.

b. Facts and Circumstances

Probable cause cannot be based upon mere suspicions or upon an agent's educated guess. Naked conclusions cannot be used to establish probable cause.

PROBABLE CAUSE MUST BE BASED UPON SPECIFIC, ARTICULABLE, FACTS AND CIRCUMSTANCES.

Example. Does the following paragraph establish probable cause to search?

> "Agent has received reliable information from a credible person and believes that narcotics are being kept at 320 Jones Street, Apt. 5, for the purpose of sale . . ."

No. This paragraph is a naked conclusion. Where are the facts and circumstances to support the conclusion that the information is trustworthy? Where are the facts and circumstances to support the conclusion that drugs are at this location? The paragraph does not contain them. Without specific, articulable facts and circumstances, this information cannot establish probable cause. (See Aguillar v. Texas, 84 S.Ct.1509 1964)

Comment. Which of the following statements are "facts"? Which are "conclusions"?

(1)
John sold drugs

(2)
A DEA Agent saw John sell drugs

(3)
DEA Agent Myers saw John sell packages containing heroin to Phil

(4)
On January 1, 1978, DEA Agent Myers saw John sell packages of suspected heroin to Phil at a street corner which is a center for drug traffickers.

(5)
At 2 am on January 1, 1978, DEA Agent Myers saw John and Phil standing on a street corner long known to state and federal officers as a center for drug trafficking. John and Phil were nervous and were continually looking about for others who might be watching. John suddenly handed Phil several glassine bags containing a brown powdery substance, and Phil quickly handed John some folded currency.

Which statement is a "fact"? Which is a "conclusion"?

The answer is relative. As a practical matter, the only logical distinction between a "fact" and a "conclusion" is that a fact contains more details. Thus, statement (4) is a conclusion when compared to statement (5). But, statement (4) is a fact when compared to statement (3). Therefore, if you want to avoid having a judge characterize your information as "naked conclusion":

INCLUDE AS MUCH DETAIL AS PRACTICABLE WHEN YOU ARTICULATE YOUR PROBABLE CAUSE.

Any facts and circumstances which are logically relevent can be used to establish probable cause. The exception

is information which is the "fruit" of prior illegal government activity. Wong Son vs. U.S. 83 S.Ct. 407 (1963).

c. Logical Inferences

The probable cause determination is based upon everyday logic and common sense. The facts and circumstances must logically make it "probable" that seizable property is located in a particular place. Absolute certainty is not required. Proof beyond a reasonable doubt is not required. "PROBABILITY" IS ENOUGH. Spinelli v. U.S., 89 S.Ct. 584 (1969); U.S. v. Chester, 537 F. 2d 173 (5 Cir. 1976)

It goes without saying that the logical inferences which can be drawn from the facts and circumstances by a man of reasonable caution are included in the probable cause determination.

Example. You negotiate with A to buy two ounces of cocaine for $2000. A asks you to meet him in front of a local bank. After the transaction takes place, but before your fellow agents arrive to assist in A's arrest, A "ducks" into the bank. When he comes out, you arrest him, but he doesn't have the $2,000 on him. An officer of the bank tells you that A has a safety deposit box there. Is there probable cause to search A's box for the buy money?

Yes. The logical inference that a reasonable man would draw from these facts is that A hid the money in his safety deposit box when he disappeared into the bank. This logical inference is included with the facts in the probable cause determination, and it makes it likely, or probable, that the money is in A's box. Note that the possibility exists that A gave the money to an accomplice or to a friend or lover in the bank. A might even have hidden the money somewhere on bank property. But, while these possibilities exist, they are unlikely. The average man would conclude from the facts that A probably put the money in his safety deposit box. Therefore, there is probable cause to search the box.

Time Affects Probability

The passage of time affects the decision of whether there is probable cause to search. If you saw drugs in X's home less than one hour ago, it is very likely the drugs are still there. If you saw drugs in X's home over a month ago, what likelihood is there that the drugs are there now? Very little. State v. Rockhold, 243 N.W. 2d 846 (Iowa 1976); State v. O'Brien, 528 P. 2d 176 (Ariz. App. 1974).

Since the existence of probable cause to search is logically affected by the passage of time, YOU MUST INCLUDE THE TIMES OF OCCURRENCE OF THE FACTS AND CIRCUMSTANCES YOU RELY UPON. The preferred method of stating the facts and circumstances is in chronological order.

d. Professional Inferences: The Reasonable Agent Standard

Logical inferences drawn by an agent based upon his special expertise, schooling, or experience can be used to establish probable cause. Bell v. U.S. 254 F. 2d 82 (DC Cir. 1958); State v. Poe, 445 P. 2d 196 (Wash. 1968); People V. Gregg, 73 Cal. Rptr. 362 (1968).

For example, an experienced drug agent knows that mothballs and talcum power are often used by drug couriers to mask the odor of marihuana. Thus, while the average person would think nothing unusual about a heavy trunk smelling of talcum powder, a drug agent would be very suspicious. From the same set of facts, the drug agent draws logical inferences that a layman would not draw. Drug agents frequently rely upon so-called "professional inferences."

The rule on professional inferences was stated concisely by the court in Bell v. U.S., above:

> "Probable cause is not a philosophical concept existing in a vacuum; it is a practical and factual matter. A fact which spells reasonable cause to a doctor may make no impression on a carpenter, and vice versa . . . An officer experienced in the narcotics traffic may find probable cause in the smell of drugs and the appearance of paraphernalia which to the lay eye is without significance. His action is not measured by what might be probable cause to an untrained civilian passerby . . . . The question is what constituted probable cause in the eyes of a reasonable, cautious and prudent . . . (drug agent) . . . under the circumstances of the moment."

There is one very important limitation on the use of professional inferences to establish probable cause:

YOU MUST BE ABLE TO ARTICULATE THE EXPERTISE, TRAINING AND EXPERIENCE WHICH CAUSED YOU TO DRAW PROFESSIONAL INFERENCES.

Remember, you will be required to set forth your probable cause, either in an affidavit in support of a warrant or

in a suppression hearing, and a judicial officer will review it. He will not have the benefit of your special training, therefore, he will draw only the logical inferences from the facts, just as an average citizen would do. If he is to also draw professional inferences from the facts, you will have to advise him of the special experiences and training that lie behind your professional judgements.

Example. You suspect that a van is involved in marihuana smuggling in the Florida Keys. At 11 o'clock at night you follow the van to a fish restaurant near the docks. The van enters the rear parking area near the fish house docks. The fish house is dark because it is after business hours. In a short while, you see two men loitering around the dock. At 4 am you hear two large boats coming down the channel. One boat is lower in the water, and both boats have all their lights off. The boats dock behind the fish house, where the two men who were loitering help the crew to quickly offload. The cargo is boxes shaped somewhat like lobster traps. Do these facts, and the logical inferences that can be drawn from them, give you probable cause to believe marihuana is being smuggled in these boxes?

Arguably not. Since fishing is frequently done at night, the boats could simply be unloading their catch in preparation for the day's business at the restaurant. The boxes do look like lobster traps. The men loitering around the dock were probably there to help them offload. As for the running lights being off, they might have simply malfunctioned. In short, to the average person these facts are consistent with innocent behavior. It is not "probable" that these people are smuggling.

Suppose, using this same set of facts, you add the following professional inferences: (1) As a drug agent you have been trained that it is a violation of federal law for such boats to operate without lights. 33 U.S.C. 178; (2) Based upon your professional associations with Coast Guard and Customs officers, you know that running lights- green or one side and red on the other- are universally required of all world vessels; they are mandatory safety equipment which would never be ignored by a seaman, unless he wanted to travel undetected; (3) Based upon several years service as a drug agent in the Florida Keys, it has been your experience that 80% of smuggling in the Keys is accomplished by boats landing at night without lights; (3) Again, based upon your experience in the Keys, docks such as the one behind the fish house are preferred by would-be smugglers, because: the dock is out

of view of most land areas and public roads; because docks behind commercial premises draw less attention when used; because the dock can accomodate even large vessels and has facilities for fast offloading; and because the area around the dock is specially made for vehicles, making it easy for vans to get next to the boat and easy for the van to speed away. Do these professional inferences, combined with the facts, make it "probable" that these boats are smuggling?

Yes. These professional inferences, not available to the average citizen or magistrate, make it much more likely that these boats are transporting marihuana. There is probable cause to search. (See U.S. v. Bass, 551 F.2d 962, 5Cir. 1977).

e. The Probable Cause Mixture

Remember, probable cause is based upon all the facts and circumstances available to an agent, upon all the logical inferences that can be drawn from these facts, and upon any professional inferences drawn by the agent-provided he can articulate his basis for drawing them.

Probable cause does not hinge on any individual fact. Chief Justice Burger expressed this neatly in Smith v. U.S.:

> "Probable cause is the sum total of layers of information and the synthesis of what the police have heard, what they know, and what they observe as trained officers. We weight not individual layers but the laminated total." 358 F.2d 833 (DCCir. 1966).

2. Establishing Probable Cause

Probable cause can be established either through the personal knowledge of the officer or through reports to the officer by a third party, usually an informant.

a. Hearsay

Facts and circumstances related to an officer, which are not within the officer's personal knowledge are hearsay. PROBABLE CAUSE CAN BE BASED UPON HEARSAY, PROVIDED THE HEARSAY IS TRUSTWORTHY. Brinegar v. U.S., 69 S.Ct. 1302 (1949).

This rule is easier to state than it is to apply. Our society frowns on "tattletales". We are suspicious of rumors, and we condemn gossip and slander. When, then, is the tattletale to be trusted? When must he be ignored?

b. The AGUILAR-SPINELLI TEST

In Aguilar v. Texas, 84 S. Ct. 1509 (1964), and Spinelli v. U.S., 89 S. Ct. 584 (1969), the Supreme Court answered these questions by developing a two-pronged test for determining when hearsay is trustworthy.

HEARSAY IS TRUSTWORTHY IF AN AGENT CAN SHOW THE DECLARANT'S:

(i) BASIS-OF-BELIEF
AND
(ii) CREDIBILITY

Both prongs of this test must be satisfied before hearsay, standing alone, can be relied upon to establish probable cause.

1) Basis-of-Belief

This prong of the Aguilar-Spinelli test is designed to measure the reliability of the information provided by the declarant. How did he obtain it? Did he get it first-hand? Did a third-party give it to him? If so, who is the third-party, and how did the third party get it? Is the information merely casual rumor? If the information contains "conclusions", exactly what "facts" did the declarant rely upon to reach those conclusions? In summary, what is the declarant's basis of belief?

INFORMATION MEETS THE BASIS-OF-BELIEF PRONG IF:

(i) THE DECLARANT TELLS HOW HE OBTAINED IT, either by personal observation or in some other dependable way,

OR

(ii) IT IS EXTREMELY DETAILED, so that the average person would conclude that the declarant has first hand knowledge of the facts and is not relying on rumors.

EXAMPLE. A credible informant (he has previously supplied you with vital information which resulted in eleven arrests-two of which resulted in convictions while the other nine are pending) phones you and says that within the past 24 hours he has been inside J's home and has seen a large quantity of marijuana in cardboard boxes and duffle bags. He says he overheard J discussing a

sale of marijuana which will take place in less than two hours from now. Does this tip meet the Aguilar-Spinelli test?

Certainly. Hearsay is trustworthy under the Aguilar-Spinelli test if you can show the informant's: (1) Basis-of-Belief; and (2) his Credibility. Here, the informant is clearly credible. Moreover, his information meets the basis-of-belief requirement because he told you how he obtained it, namely, by personal observation. (See Jarrell v. State, 373 A. 2d 975, Md.App. 1977; State v. Daniels, 200 N. W. 2d 403, Minn. 1972).

Example. You receive a phone call from a credible informant that a large truck is being loaded at this very moment near the intersection of routes 1 and 3 at Fronton, Texas. The informant describes the truck as red and white, with high sideboards and expensive crome trumpet air horns mounted on the roof. He tells you that P and L have just hauled 3,065 pounds of marihuana from the interior of Mexico, and they are loading it on this truck, which they will drive across the Rio Grande River near Fronton. He says the truck will drive up route 1 to a certain warehouse in south Texas. He describes the details of the truck's intended route and gives you directions to the warehouse. Does this tip meet the Basis-of-Belief requirement of the Aguilar-Spinelli test?

Yes. Information meets the Basis-of-Belief prong if the informant tells how he obtained it, or if it is extremely detailed. Here, we don't know how the informant got his information, but it is so detailed that it's reasonable to conclude that he has firsthand knowledge and is not relying upon rumors. Therefore, the Basis-of-Belief test is met. And, since the informant is also credible, both prongs of the Aguilar-Spinelli test are satisfied. (See U.S. v. Almendarez, 534 F. 2d 648, 5Cir. 1976; U.S. v. Toral, 536 F. 2d 893, 9Cir. 1976).

Example. You receive a phone call from a credible informant who says he "just found out" that A and B, whom he just had a drink with at a local bar, have heroin on them. Does this tip meet the Basis-of-Belief prong?

No. The informant has not told you how he obtained this information. Nor is the tip so extremely

detailed that you know he isn't relying on rumors. The very real possibility exists that the informant simply overheard this information at the bar. In short, the Basis-of-Belief requirement is not satisfied. (See Comm. v. Smith, 309 A. 2d 413, 1974).

2) Credibility

Unlike the Basis-of-Belief prong, which focuses on the nature and the source of the information, the Credibility prong focuses on the truthfulness of the declarant as a person. Is the declarant believable? Is he telling the truth?

To satisfy this prong of the Aguilar-Spinelli test, an agent must articulate facts tending to show that the declarant is inherently credible (eg. he is a member of the clergy) or that he is being truthful on this particular occasion. CREDIBILITY CAN BE SHOWN BY:

a) PAST RELIABILITY

The "track record" of a previously reliable informant is the most frequently used method to demonstrate his credibility. If he has been truthful and accurate in the past, he is likely to be truthful now. McCray v. Illinois, 87 S.Ct. 1056 (1967).

Note. Past Reliability is one way of demonstrating Credibility, but it is not the only way. The terms Reliability and Credibility are not synonymous. Don't confuse them.

b) STATEMENTS AGAINST PENAL INTEREST

If the informant has participated in a crime and, as part of the information he discloses, he makes statements against his penal interest, he will generally be considered credible. U.S. v. Harris, 91 S.Ct. 2075 (1971); U.S.v. Rueda, 549 F.2d 865 (2Cir. 1977); U.S. v. Golay, 502 F.2d 182 (8Cir. 1974); State v. Johnson, 561 P. 2d 701 (Wash. App. 1977).

Chief Justice Burger explained in Harris why statements against penal interests tend to show the informant is being truthful:

"Common sense in the important daily affairs of life would induce a prudent

and disinterested observer to credit these statements. People do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions. Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility-sufficient at least to support a finding of probable cause to search." 403 U.S. at 583, 91 S.Ct. at 2082.

c) COUNSEL IS PRESENT

If the informant has provided the statements in the presence of counsel, he will generally be considered credible. State v. Jackson, 294 A. 2d 517 (Conn.1972).

d) GOOD-CITIZEN-INFORMANT

So-called "good-citizen" informants, or "ordinary-citizen" informants, who have nothing to gain by providing information to law enforcement officers, other than to assist the Government in the enforcement of the law, will be presummed credible by most courts. Edmondson v. FBI, 402 F. 2d 809 (10Cir. 1968); State v. Gerber, 241 N.W. 2d 720 (S.D. 1976); Guzewicz v. Comm., 187 S.E. 2d 144 (VA. 1972); People v. Hester, 237 N.E. 2d 466 (ILL. 1968).

e) LAW ENFORCEMENT OFFICIAL

Statements of fellow law enforcement officials are presummed to be credible. Rugendorf v. U.S,, 84 S.Ct. 825 (1964); Whiteley v. Warden 91 S.Ct. 1031 (1971); U.S. v. Ventresca, 85 S. Ct. 741 (1965); U.S. v. Black, 476 F. 2d 267 (5 Cir. 1973).

f) VICTIM OF CRIME

Statements given by a victim in reporting a crime will generally be presumed credible. U.S. v. Mahler, 442 F. 2d 1172 (9 Cir. 1971); Wolf v. State, 281 So. 2d 445 (Miss. 1973); State v. Paxzek, 184 N.W. 2d 836 (Wis. 1971).

g) EYEWITNESS TO CRIME

Statements made by an eyewitness in reporting a crime will generally be presumed credible. U.S. v. Bell, 457 F. 2d 1231 (5Cir. 1972); U.S. v. Brooks, 350 F. Supp. 1152 (Wis. 1972).

Comment. These common methods of demonstrating credibility are not inclusive. Officers should try to articulate"any circumstances which suggest the probable absence of any motivation to falsify" by the declarant-informant. See U.S. v. Harris, above (Justice Harlan, dissenting). Moreover, where no single fact, standing alone, establishes the informants' credibility, several factors taken together might be sufficient. U.S. v. Canestri, 518 F. 2d 269 (2 Cir. 1975).

Remember: YOU MUST ARTICULATE FACTS TO SUPPORT YOUR CONCLUSION THAT AN INFORMANT IS CREDIBLE.

Naked conclusions, such as, "information was received from reliable informant", or "information was received from a good-citizen informant," are not sufficient. You must articulate some of the underlying facts from which you concluded that the informant is reliable, or that he is a good-citizen, and so forth.

Example. Is the following hearsay trustworthy? "I, John Jones, an investigator with this city's integrated narcotics task force, was told today by a certain individual that Sonnie D. grows, uses, and distributes marihuana at his home at 13 Unlucky Way, Ourtown. According to this individual: He is a neighbor of D's; has seen marihuana plants growing behind D's home; he constantly sees large numbers of young people visiting D's home for very short periods of time; today he observed D and his friends through a window rolling their own cigarettes from green vegetable material which D keeps in a large clear plastic bag in his living room; and today he watched D deliver these cigarettes together with several dozen red capsules to a young boy in his back yard. This officer personally knows that this individual is a registered voter, is employed at a well-paying, respectable job, has a good

reputation in this community, has on prior occasions expressed to me his concern for young people using drugs, and has never previously provided confidential information to law enforcement authorities."

Yes. This hearsay is trustworthy. First, it meets the Basis-of-Belief test. The informant has told you he personally observed these activities and he describes when and how he observed them. Second, the informant is credible. The hearsay contains facts tending to show that the informant is a "good-citizen" informant. Therefore, he is presumed to be credible. Since both requirements of the Aguilar-Spinelli test are met, this hearsay is trustworthy (See Brown v. Commonwealth, 187 S.E. 2d 160, Va. 1972).

Example. B, a Columbian citizen, tries to enter Puerto Rico from Columbia with 8 pounds of cocaine in a false bottom of her suitcase. She is detected by Customs and you arrest her. B agrees to cooperate. She explains to you that the suitcase and false passport were given to her by her lover, R. Pursuant to R's instructions, she has traveled from Bolivia to Columbia and them to Puerto Rico. From here she is supposed to fly to New York to deliver the suitcase to R at the "M" Hotel. Then she is supposed to go to Philadelphia. She tells you that she went through a "dry-run" of this trip with R's right-hand man. She gives you their complete descriptions and all the details. Does this hearsay meet the Aguilar-Spinelli test?

Yes. First, the Basis-of-Belief prong is met. B is a participant in the enterprise and the lover of R. She has personal knowledge of all the facts and she details how she acquired them. Her information is not rumor. Second, B's statements are against her penal interests. They are admissions by a participant in the crime. Therefore, B is presumed to be credible. Since this hearsay is trustworthy under the Aguilar-Spinelli test, it can provide probable cause to arrest R when he arrives at the "M" Hotel. (See U.S. v. Rueda, 549 F.2d 865, 2Cir. 1977).

c. Corroboration

Remember, hearsay which fails either part of the Aguilar-Spinelli test cannot be relied upon by itself to establish probable cause. It simply is not trustworthy enough. Defective hearsay can be used to establish probable cause only when it is supported by independent corroboration which makes the hearsay more trustworthy.

A DEFECTIVE TIP PLUS CORROBORATION CAN PROVIDE PROBABLE CAUSE. Draper v. U.S., 79 S.Ct. 329 (1959);

CORROBORATION HAS THREE FORMS:

(i) AGENTS VERIFY THE FACTS given by the informant, through surveillance, further investigation, etc.;

(ii) ANOTHER SOURCE VERIFIES THE FACTS, usually a second informant; or

(iii) THE TIP "SQUARES" WITH THE AGENT'S KNOWLEDGE. U.S. v. Spach, 518 F.2d 866 (7Cir. 1975).

These forms of corroboration can be used to cure a tip which fails either, or both, prongs of the test. (See LaFave, Probable Cause from Informants, Law Forum, Vol 1, 1977)

THE MORE DEFECTIVE THE TIP, THE MORE CORROBORATION THAT IS REQUIRED.

ONLY THE STRONGEST CORROBORATION OF SUSPICIOUS CONDUCT CAN CURE A TIP WHICH FAILS BOTH PRONGS OF THE TEST.

Example. A very reliable informant, who has given you information leading to the seizure of large amounts of narcotics eight times within the last eight months, and who has never given you a bad tip, tells you that A, B and C are in town to buy marihuana which they intend to transport to Fort Wayne, Indiana. Although the informant does not explain how he got his information, he does say that he has seen these three in town on a previous occasion when they bought marihuana and that they are using the same mode of operation now that they used before. According to the

informant, they always rent two cars, one to be used locally and the other to make the trip to Fort Wayne. You initiate an investigation and locate A, B and C. You also confirm that A has rented a car for a trip to Fort Wayne and that B has rented a car for local use. While you are surveilling their hotel A,B and C load the cars with luggage and large cardboard boxes and leave. A heads toward Fort Wayne, while B and C head for the airport. Do you have probable cause to search A's car for marihuana?

Yes. Probable cause can be based upon hearsay, provided the hearsay is trustworthy. Hearsay is trustworthy if you can show the informant's Basis-of-Belief and Credibility. Here, the informant is clearly credible, as shown by his excellent "track record" of past reliability. Unfortunately, you do not know his Basis-of-Belief. He has not told you how he got his information,nor is it so extremely detailed that you can be confident he isn't just repeating a rumor. So, this tip fails one part of the Aguilar-Spinelli test and cannot be used by itself to establish probable cause. But, you have more than just the tip. You have personally verified the fact that A, B and C are in town, and that they have rented two cars, just as the tip described, and that one of the cars is on its way back to Fort Wayne with a load of large boxes. This corroboration of the facts of the tip makes the hearsay more trustworthy. A defective tip, plus corroboration, can provide probable cause. (See U.S. v. Anderson. 500 F. 2d 1311, 5Cir. 1974).

Example. A previously unknown informant tells you that M is involved in distributing heroin and cocaine, and that M has three prior federal convictions for narcotics violations. He gives you M's address, the make and license number of M's car and the address of A, M's girlfriend. He says that M is conducting his drug network out of A's apartment. You are very interested in this information because you have already heard that M is considered to be a major violator. You begin an investigation and confirm every detail the informant has given you, except the actual drug activities

of M. Within a few weeks the informant calls you again. He says that M has narcotics on him and that he is taking them to A's to prepare them for distribution. You tell the informant to go to A's and to call you if M arrives with the drugs. You drive to A's where you see M's car already parked in front. You call your office and are told that your informant just phoned you again, and that he has actually just seen drugs in A's apartment. Do you have probable cause to search?

Yes. Probable cause can be based upon hearsay, if the hearsay is trustworthy. Hearsay is trustworthy if you can show the informant's Basis-of-Belief and Credibility. Here, the informant's last phone call tells you that he is in A's apartment and has seen the drugs. Therefore, the Basis-of-Belief requirement is met. Unfortunately, you cannot show the informant is Credible. He has no track record of past reliability. His information is not against his penal interests. He is not a good citizen informant, since he appears to be involved in some way with M and A and so forth. So, the tip, standing alone, is not enough. Fortunately, you have corroborated the tip. The tip "squares" with the facts that you have already heard that M is a major violator. You have personally verified all of the facts of the tip concerning M's conviction, his address, car, girlfriend, and so forth. And, you have verified that M is now at A's, just as the informant said he would be. This corroboration cures the defective tip, and together they add up to probable cause to search. (See U.S. v. Manning, 448 F.2d 992, 2Cir. 1971).

Example. An anonymous caller tells you that a 1972 black on blue GMC "blazer-type" vehicle, with an identified license plate, is traveling from El Centro to Los Angeles, California, and is carrying heroin and marijuana. You set up a surveillance of the major route and spot a vehicle matching this description. Do you have probable cause to search the car?

No. The tip fails both prongs of the Aguilar-Spinelli test. You cannot show that the informant is credible; you don't even know

his identity. Nor do you know his Basis-of-Belief. You don't know how he got the information, and it is not extremely detailed. There's a good possibility that it's simply a rumor. Hearsay which fails both prongs of the test can be cured by corroboration, but the corroboration must be very strong and must include corroboration of suspicious activities, not just innocent conduct. Here, you have corroborated the innocent details of the tip. There is no suspicious activity. Therefore, neither the tip nor the corroboration establishes probable cause. (See U.S. v. Larkin, 510 F.2d 13, 9Cir. 1974).

Example. You receive an anonymous call that a black man named W has drugs and guns in his car and is selling drugs at a lowcost housing project. The tipster says W is wearing a wide-brimmed hat and is driving a green Pontiac. Is this information trustworthy hearsay?

No. To be considered trustworthy, hearsay must satisfy both prongs of the Aguilar-Spinelli test. In this case, you cannot show the informants' credibility, since he is anonymous. And, you cannot show his Basis-of-belief, since he has not told you how he acquired the information and it is not so extremely detailed that you can be sure he isn't just repeating a rumor. This hearsay fails both prongs of the test.

Suppose you drive to the housing project and spot several black males standing next to a green Pontiac. And suppose one of the men has a wide-brimmed hat on. Now is this hearsay trustworthy?

No. Personally verifying some of the facts of a tip is a form of corroboration. And, corroboration can be used to cure a tip which fails one or both prongs of the Aguilar-Spinelli test. But, if a tip fails both prongs, such as this tip does, then only the strongest corroboration of suspicious conduct can cure the tip and provide probable cause.

Suppose you see two transactions conducted by the suspect in the hat. In the first transaction, he reaches into his car and takes something out which he hands to a

person on the street. That same person hands something back to him and leaves. The second transaction occurs within minutes and is almost identical to the first, except that the "buyer" drives up in a car. And, suppose that the suspect "spots" you and immediately takes something wrapped in a cloth out of his car and locks it in his trunk? Now is the tip likely to be trustworthy?

Yes. This corroboration of highly suspicious conduct tends to confirm the tip that the suspect, W, is dealing out of his car. Strong corroboration of suspicious conduct can cure a tip which fails both prongs of the Aguilar-Spinelli test. In this case, the tip plus your corroboration, provides probable cause to arrest W and probable cause to search his car. (See U.S. v. Edmond, 548 F.2d 1256, 6 Cir. 1976).

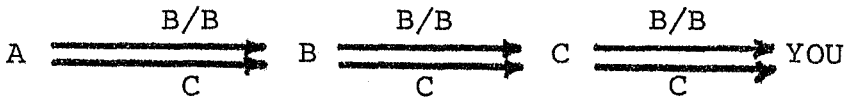
d. Hearsay-on-Hearsay

If an informant supplies you with information which he says he obtained from a third-party, you have a hearsay-on-hearsay problem. And, if the third party got the information form a fourth party, you have a hearsay-on-hearsay-on-hearsay problem. The ultimate source of information,the person who actually has first-hand knowledge of the facts, is at the other end of this "chain" or "bucket brigade" of informants. The trustworthiness of information coming through such a chain depends upon the trustworthiness of every "link".
U.S. v. Regan, 525 F.2d 1151 (8 Cir. 1975);
U.S. v. DiNovo 523 F.2d 197 (7 Cir. 1975);
U.S. v. Spach, 518 F.2d 866 (7 Cir. 1975);
U.S. v. Carmicheal, 489 F.2d 983 (7 Cir. 1973)
U.S. v. Romano, 482 F.2d 1183 (5 Cir. 1973);
State v. Yaw, 572 P.2d 856 (Hawaii, 1977).

TO BE TRUSTWORTHY, EVERY LINK IN A HEARSAY CHAIN MUST MEET BOTH PRONGS OF THE AGUILAR-SPINELLI TEST.

Comment. Because hearsay chains can be complex, you might find it helpful to sketch the chain before you analyze it. For example, where A gives a tip to B, and B gives it to C, and C

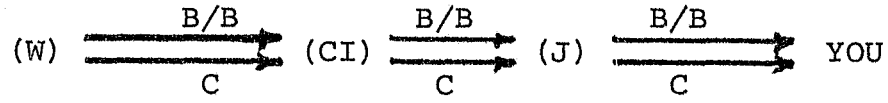
tells you, a sketch of this chain would look like:



Remember, you must show that the Basis-of-Belief test and the Credibility test are satisfied everytime the information changes hands.

Example. You receive a phone call from a local police officer named Jones. He tells you that one of his confidential informants visited him today. The informant told Jones that he was at Wild Waynes home today and bought a small amount of heroin from Wayne. During the buy, Wayne told the informant that he was a runner for "Mr. D" and that D would be receiving 30 pounds of heroin within the week so there would be no shortage of supply in your city. Is this trustworthy?

Yes. This hearsay has come to you through a hearsay chain. It can be represented by the following sketch:



To be trustworthy, every link in this chain must meet both prongs of the Aguilar-Spinelli test. Officer Jones meets both prongs of the test. His Basis-of-Belief is that he obtained the information from his CI. And, his credibility is presummed because he is a law enforcement officer. The CI meets both prongs of the test. His Basis-of-Belief is that he was in W's home and was told the information by W. The CI's credibility is established by the fact that he admits to getting this information while buying heroin from W. This information is against the CI's penal interests. Finally, W meets both prongs of the test. His Basis-of-beleif is that he is a runner and distributor of drugs for Mr. D, so he has personal knowledge of D's drug operation, including when deliveries can be expected. And, like the CI, W's

credibility is established because his statements are against his penal interests. He's admitted to being a participant in a conspiracy. Since every link in this chain satisfies the Aguilar-Spinelli test, this hearsay is trustworthy and can be used to establish probable cause. (See U.S. v. DiNovo, 523 F.2d 197, 7 Cir. 1975).

C. WARRANTS

Assuming there is probable cause to search, IS THE SEARCH TO BE CONDUCTED UNDER A VALID WARRANT?

1. Introduction

Subject to a few, very narrowly-defined exceptions, every search and seizure must be conducted under the authority of a valid search warrant. The 4th Amendment expressly requires that "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."

A search conducted under a warrant is presumed by the courts to be lawful; the defendant has the burden of proving it was illegal. 68 Am. Jur. 2d 712. Therefore, WHEN TIME PERMITS, YOU SHOULD OBTAIN A WARRANT BEFORE SEARCHING.

2. Warrant Requirements

a. Neutral and Detached Judicial Officers

Warrants can be issued only by neutral and detached judicial officers sitting in the district where the property is located. Law enforcement officers, prosecutors, and others who are involved in "the competitive enterprise of ferreting out crime" cannot issue warrants. Johnson v. United States, 68 S.Ct. 367, (1948).

Federal search warrants can be issued by federal judges, federal magistrates, or judges of state courts of record within

the district where the property sought is located. FRCP, Rule 41(a).

Since only a judicial officer can issue a search warrant, only he can change it or correct it. 68 Am Jr 2d 727.

b. Particularly Describing
THE WARRANT MUST PARTICULARLY DESCRIBE

i) THE PLACE TO BE SEARCHED, AND

ii) THE PERSONS OR THINGS TO BE SEIZED

1) Purposes of Description

Describing in detail the area to be searched and things to be seized insures that the search will be as limited in scope as possible. So-called "general warrants" which once allowed the King's officer to go on "fishing expeditions" are forbidden by the 4th Amendment. (Coolidge v. New Hampshire, 91 S Ct 2022, 1971).

By forcing government agents to particularly describe in the warrant the area to be searched, the 4th Amendment prevents officers from conducting overly broad searches. By forcing the agents to identify the objects to be seized, the Amendment prevents them from "rummaging" in a person's belongings in the hopes of finding something incriminating.

Example. A warrant to search "Joe's Bar at 123 Popular Street, Newark, New Jersey, and all persons on said premises for dilaudid, cocaine, barbiturates, and all other controlled substances possessed in violation of the law" is overly broad. It is a general and,

therefore, invalid warrant. (See Wilson v. State, 221 S.E. 2d 62, (Ga. App. 1975).

2) The Place to be Searched

A description of the place to be searched is sufficient "if the officer . . . can, with reasonable effort, ascertain and identify the place intended." People v. Martens, 170 N.E. 275, 276 (Ill. 1930).

As a practical matter, agents must identify the place in as much detail as possible, so that the searching agents are able to easily locate the property, and there is little chance of confusion or mistake.

Minor errors in description will not affect the validity of the warrant, as long as the description, read as a whole, enables the officers to identify the site intended. United States v. Ventresca, 85 S.Ct. 741 (1965).

Example. You are handed a warrant to search an apartment for heroin. The warrant describes the apartment house in great detail and goes on to describe the apartment as "located on the second floor, third door on the north side from the stairway, the door of which is painted pink with the number "11" affixed, said apartment being under the custody and control of one Benjamin Singer." You go to the apartment house, up the second floor, count three doors down from the stairs on north side and find a pink door with the number "10" on it. No other doors are painted pink. You knock on a neighbor's

door and ask who lives in apartment "10" with the pink door. She says "Ben Singer". Is the description of Ben's apartment sufficient, even with the wrong number?

Yes. There is enough detail in the description to enable you to locate the property with reasonable effort, and there is little chance that there is a mistake in location. The incorrect number is a minor error. See State v. Gallo, 279 So. 2d. 71 (Fla. App. 1973).

3) The Persons or Things to be Seized

The standard of "practical accuracy" applied to describing places, also applies to describing persons and things.

a) Persons

Persons should be identified by name, physical description and location, whenever possible. But none of these "identifiers" is indispensable.

Example. You are given a warrant to search "John Doe, a white male with black wavy hair and stocky build seen using the telephone in Apt. 4-C, 1806 Pat Lane, Pittsburg, Pennsylvania". You go to this address, knock on the door and identify the individual who comes to the door as the one in the warrant. Is the description in the warrant sufficient even though you don't know his name?

Yes. The description is sufficiently detailed so that you can identify the intended person with reasonable certainty. It meets the "practical accuracy" standard (See U.S. v. Ferrone, 438 F.2d 381 (3 Cir. 1971).

b) Things

Some things lend themselves to detailed description. A car, for example, can be described by make, model, year, color, options, license number, vehicle identification number, owner, and so forth. Other things can be very difficult to describe in detail, such as milk sugar.

As a general rule, the more an object lends itself to a detailed description, the more it must be described in detail in the warrant. (8 Valp. L. Rev. 511, Sp. 1974)

(1) Contraband

It is often said that contraband objects, such as heroin or marihuana, do not have to be described in detail (Steele v. U.S., 45 S.Ct.414,,1925). This rule recognizes the fact that agents often have not seen the particular contraband shipment they are searching for, so how can they describe it in detail? And, most contraband doesn't lend itself to detailed description. But, if agents have seen the contraband to be seized, such as when the agents have supervised a controlled delivery of the contraband, they should describe it if possible.

(2) Drug Paraphernalia

Drug or narcotic "paraphernalia" generally refers to objects which are used in cutting, packaging, distributing and taking of drugs, such as

scales, cellophane, condoms, tin foil squares, razor blades, roach clips, and so forth. In recent years, the term has become a standard vocabulary word in the drug enforcement community and has been recognized as such by the courts. Therefore, the use of the term "drug paraphernalia" in a warrant is detailed enough to describe these objects. (U.S. v. Johnson, 541 F2d 1311, 8 Cir. 1976).

(3) Evidence of Constructive Possession

When drug agents execute a search warrant for drugs they also seize items of identification which connect the suspects to the drugs and to the searched premises. It is advisable to describe these items in the warrant. General descriptions such as "items of identification to show constructive possession of the above contraband such as rent receipts, utility bills, personal letters and other personal I.D." are particular enough and will be upheld by the courts. (See State v. Wiley, 205 N.W. 2d 667, Minn. 1973).

c. Supported by Sworn Affidavit

The 4th Amendment requires that the facts and circumstances relied upon to establish probable cause, together with the other necessary elements of a warrant, be presented to a judicial officer in "sworn" form. In most cases, it will be a written affidavit, but some states, and a recent amendment to the Fed. Rules of Criminal Procedure, allow for sworn oral testimony communicated by telephone or other appropriate means, provided it is recorded. (FRCP, Rule 41, amend. Oct. 1, 1977).

1) Probable Cause to Search

The information communicated to the magistrate must contain sufficient facts and circumstances that would lead a reasonable agent to conclude that the particular items sought are crime-connected and are to found in a particular place.

a) Probable Cause "On Its Face"

An agent is not required to tell the magistrate every fact he has learned about the case. He need only give the magistrate enough information so that the magistrate can make an independent finding of probable cause. On the other hand, THE FACTS COMMUNICATED TO THE MAGISTRATE MUST ESTABLISH PROBABLE CAUSE "ON THEIR FACE". In other words, only the information given to the magistrate will be considered in determining if probable cause exists. Facts known to an agent, but not communicated to the magistrate cannot be used to establish probable cause for the issuance of a warrant. (Whitely v. Warden, 91 S.Ct. 1031, 1971)

b) Timeliness

PROBABLE CAUSE TO SEARCH MUST EXIST AT THE TIME THE WARRANT IS ISSUED AND AT THE TIME THE SEARCH IS CONDUCTED. Therefore, the facts contained in an affidavit must be referenced by the time(s) they occurred. It is bad practice to use terms such as "recently" or "lately" in an affidavit. (Sgro v. U.S., 53 S.Ct.138 , 1932; State v. O'Brien, 528 P.2d 176, Ariz. App. 1974).

c) "Anticipatory" Warrants

In rare instances, a valid warrant can be issued to search property, even though at the time it is issued the agents and the magistrate know there are no seizable items located there, but that there will be evidence there within a very short time.

Example. Customs agents advise you that a package shipped from Bolivia and now at the International Mail Facility in New York has been found to contain cocaine. The agents ask you to assist in arranging a controlled delivery of the package to the addressee. Although you have no reason to believe the addressee now has cocaine at his premises, and you know he will not have it there until a Customs agent posing as a mailman delivers it, you may apply for a warrant to search that address in anticipation of the delivery. Of course, you cannot execute the warrant unless you have probable cause at the time of the search that the cocaine is there. This type of "Anticipatory Warrant" has been upheld by both state and federal courts (U.S. ex rel. Beal v. Skaff, 418 F.2d 430, 7 Cir. 1969 ; U.S. v. Feldman, 366 F. Supp. 356, D. Hawaii, 1973; State v. Mier, 370 A.2d 515, N.J. 1977; People v. Glen, 282 N.E. 2d 614, N.Y., 1972).

2) Misstatement of Facts

Agents must be careful not to misstate facts in an affidavit or testimony. Many courts will invalidate warrants which were issued based upon misstatements or other falsehoods. Although the courts have not agreed on a rule to apply in these cases, you can be confident that a misstatement in an application will not invalidate the warrant, unless:

a) the misstatement was knowingly made with the intent to deceive the court,

or

b) the misstatement is material, i.e., without it, there would be no probable cause. (See U.S. v. Belculfine, 508 F.2d 58, 1 Cir. 1974; U.S. v. Dunnings, 425 F.2d 836, 2 Cir. 1969; U.S. v. Astroff, 556 F.2d 1369, 5 Cir. 1977; U.S. v. Luna, 525 F.2d 4, 7 Cir. 1975; U.S. v. Marihart, 492 F.2d 897, 8 Cir. 1974; U.S. v. Hole, 564 F.2d 298, 9 Cir. 1977; State v. Boyd, 224 N.W. 2d 609, Iowa 1974; State v. Goodlow, 523 P.2d 1204, Wash. 1974).

Example. A security agent for a railroad phones you to say that two passengers have a bag which he believes contains almost 150 pounds of marihuana. The railroad agent tells you that the telephone number given by the passengers to a ticket agent turned out to be fictitious and that two of his inspectors smelled marihuana coming from the bag. You obtain a search warrant for the bag using the following key paragraphs in your affidavit for the warrant:

(i) The telephone number given by the individuals purchasing the tickets turned out to be a fictitious number and the ticket agent became suspicious of the two travelers.

(ii) Inspection of the suitcase by the two investigators revealed a substance which appeared to be about one hundred and fifty pounds of marihuana.

Most readers would interpret the words "Inspection . . . revealed" as an opening and visual inspection of the bag. Using these words misleads the magistrate into thinking the bag was opened. Will this misrepresentation invalidate the warrant?

Yes. Although you did not intentionally mislead the magistrate, the misrepresentation is material. Without it, the affidavit does not contain probable cause. Moreover, you did not insertin the affidavit the fact that the inspectors smelled marihuana in the bag, therefore, that fact cannot be considered. (See U.S. v. Astroff, above).

3. Execution of the Warrant

a. Officers Present

The 4th Amendment does not require that a warrant name a specific officer to execute it. But, federal and state statutes generally specify classes of officers who are authorized to execute warrants and require that a warrant be directed to one of these classes or to a specific officer within these classes. (FRCP, Rule 41(c)).

1) Who must be there

Most states require one of the officers to whom the warrant is directed to be present to execute it (68 AmJur 2d 762).

Any federal agent authorized by statute to execute drug warrants can execute a federal drug warrant, even if he or his organization are not named in the warrant. (18 U.S.C. 3105; U.S. v. Gannon, 201 F. Supp. 68, D. Mass. 1961)

2) Unauthorized Persons

As a general rule, persons not authorized to execute warrants can be present and can assist in the search provided:

a) an authorized officer has asked them to assist,
and
b) an authorized officer is present and supervises the search (18 U.S.C. 3105)

Example. A DEA agent is handed a federal warrant to search for heroin. The warrant is directed to the ". . .U.S. Marshal or

other authorized officer." The agent asks two local officers who are experienced in narcotics cases to help him. Is the execution of the warrant by the DEA agent and the local officers illegal?

No. A DEA agent can execute any federal drug warrant even if he or DEA is not named in it, and the local officers participated at the DEA agent's request and under his supervision (See U.S. v. Cox, 462 F.2d 1293, 8 Cir. 1972).

3) The Byars Doctrine

Warning! Unauthorized officers may not be asked to assist in executing a search warrant if their participation would effectively extend the search beyond the scope of the warrant. (Byars v. U.S., 47 S. Ct. 248, 1927; U.S. v. Sanchez, 509 F.2d 886, 6 Cir. 1975; U.S. v. Lee, 427 F. Supp. 318, E.D. Ken. 1977; U.S. v. Wright, 405 F. Supp. 1236, E.D. Tex. 1975)

Example. You are asked by a local officer who has a valid warrant to search a home for explosives, to assist in its execution. The officer has a tip that the owner is also involved in drugs and he wants the benefit of your experience as a drug agent when he conducts the search. Before the explosives are found, you locate a substantial quantity of high quality, white heroin in a large flour container in the kitchen. Will the heroin be admissible in court?

No. The warrant authorized the local officer to enter and search only for explosives, not drugs. Under the guise of asking your help to search for explosives, the officer was using his hunch and your expertise to look for drugs, thereby going beyond the authority of the warrant (See Sanchez, above).

b. Time of Day

Most state search warrants, and non-drug federal warrants, direct that they shall be served only in the daytime, unless the issuing authority finds reasonable cause for searching at night and inserts permission to search at night in the warrant (FRCP, Rule 41(c)).

In contrast, federal drug warrants can authorize a nighttime search without any special showing that a nighttime search is necessary (21 U.S.C. 879(a); Gooding v. U.S., 94 S.Ct. 1780, 1974).

"Daytime" is defined by federal law as the hours between 6 a.m. and 10 p.m. local time (FRCP, Rule 41(c)).

c. Life of a Warrant

Once issued, an otherwise valid search warrant "dies" and cannot be executed, when:

(i) PROBABLE CAUSE VANISHES, or
(ii) PERIOD FIXED BY STATUTE EXPIRES, or
(iii) PERIOD FIXED BY WARRANT EXPIRES, or
(iv) THERE IS UNREASONABLE DELAY

As soon as any one of the above occurs, the warrant is dead. And, obviously, once a warrant has been executed it is dead: a second search cannot be based upon the same warrant.

1) Original Probable Cause Vanishes

As was noted earlier, probable cause to search must exist at the time the warrant is issued AND at the time the search is conducted. If the probable cause upon which the warrant was based "vanishes" before the warrant can be executed, the warrant is no longer valid (See U.S. v. Bedford, 519 F.2d 650, 3 Cir. 1975).

a) "Staleness"
Probable cause to search can vanish simply with the passage of time. When this happens, the probable cause and the facts which gave rise to the probable cause are said to be "stale". In some cases, staleness can occur very quickly.

Example. A reliable informant tells you that his brother has joined a local drug ring and that he will receive his first shipment of heroin at his home within one hour and will have it all on the streets within three hours. By means of a telephonic warrant procedure you obtain a warrant to search the brother's home for heroin. Unfortunately, because of a crisis in your office, six hours go by before you find time to execute the warrant. Is the warrant still valid?

No. The passage of six hours makes it very unlikely that the heroin is still on the premises. The tip itself indicates the drugs would all be distributed within three hours. Therefore, there is no longer probable cause to search.

There is no rule of thumb for determining when probable cause has become stale. It is a logical test of probability which depends on all the facts of the case, including the nature of the offense. (See Bedford, above).

b) Counterindication
Sometimes the probable cause which supported the warrant vanishes, not

because of the passage of time, but because new facts have come to the attention of the officers which counter the probability that the evidence described in the warrant is at the search site. When this happens, the warrant is no longer valid.

Example. You receive trustworthy information from a previously reliable informant that he has just been in the home of "Angel Dust" Danny and saw 30 hits of PCP and a small amount of marihuana which Danny has for sale. You immediately obtain a valid warrant to search Danny's home for PCP and marihuana. You go to Danny's and see someone leaving by the back door. Before executing the warrant you decide to send your partner in to try to make a buy. He goes in and meets Danny. Danny tells him he just sold everything he had to the last buyer, but that he'll have a new shipment at the end of the week. Your partner leaves the house convinced that Danny told him the truth. Is the search warrant still valid?

No. Probable cause to search must exist when the warrant is issued and when it is executed. Your partner has determined that Danny probably doesn't have drugs in the house and this counters the original finding of probable cause. The warrant is dead. (See Delaney v. State, 218 S.E. 2d 318, Ga. App. 1975)

Could you hold on to the warrant and wait a week until Danny gets his new shipment, and then execute it?

No. Once dead, the warrant cannot be executed. On the other hand, you can return to the magistrate and seek a warrant for the new shipment.

2) Statutory Period Expires
The maximum lifetime of a search warrant is controlled by federal and state statutes. Federal law fixes the maximum life of a federal search warrant as 10 days (FRCP, Rule 41 (c)). Once the 10 days has run the warrant is dead and cannot be executed.

3) Period Fixed by Warrant Expires
The same statutes which fix the maximum lifetime of a warrant also give the issuing authority the discretion to specify a shorter time in which the search must be conducted. Therefore, if the judge or magistrate specifies that the search must be conducted within one day, the warrant is dead if not executed within the one day period.

4) Unreasonable Delay
The 4th Amendment prohibits unreasonable searches and seizures. Many courts rely upon this to invalidate a warrant which has been executed after unreasonable delay. Unfortunately, these courts have not been able to agree on what constitutes "unreasonable" delay and their decisions go in too many directions for us to formulate an accurate rule.

However, assuming the period fixed by the magistrate (or the statute) has not run and probable cause for the search continues to exist, you may usually delay the search if:

a) you can articulate a valid reason for the delay, and

b) you are not delaying in bad faith in an attempt to prejudice the suspects.

(See U.S. v. Dunnings, 425 F.2d 836, 2 Cir. 1969, cert. den., 90 S.Ct. 1149, 1970).

Example. You use an informant to make a controlled buy of heroin from one of the city's biggest dealers. On the same day you obtain a search warrant for the dealer's apartment. You know that the dealer has a reputation for violence and that because of his position, he has direct contact with only a few high-level buyers. You conclude that if you execute the warrant immediately, the dealer will connect the search to the informant and may kill or injure him. So, you delay the search for six days. Is the warrant still valid?

Yes, assuming the magistrate has not fixed a shorter period and the statutory period has not run. The dealer is engaging in a continuous criminal activity at his residence and it's logical to believe drugs are still there. You have no new facts to counter this conclusion, therefore, probable cause to conduct the search continues to exist. And, the delay is not unreasonable. Protecting the life of the informant is a good reason for delay. You are not acting in bad faith. Therefore, the search can be conducted on the sixth day. (See U.S. v. Wilson, 491 F.2d 724, 6 Cir. 1974).

d. Manner of Entry

1) Need Not Exhibit Warrant
The 4th Amendment does not require officers to exhibit, read, or provide anyone with a copy of a search warrant before executing it. State statutes may require it, but federal law does not (Katz v. U.S., 88 S.Ct. 507, 1967; Rule 41(d), FRCP.)

2) Site Need Not Be Occupied
Neither the 4th Amendment nor federal law requires that the property be occupied at the time it is searched.

3) Announcement is Required

BEFORE USING FORCE TO ENTER PREMISES, AGENTS MUST:

(i) ANNOUNCE THEIR IDENTITY (e.g. "Federal Agents"), AND

(ii) ANNOUNCE THEIR PURPOSE (e.g. "We have a search warrant"), AND

(iii) BE REFUSED ENTRY.

Every state has this requirement, either by statute or court decision (70 ALR 3d 217). Federal law requires it by statute (18 U.S.C. 3109). It applies to both searches and arrests. (See Miller v. U.S., 78 S.Ct. 1190, 1958; Sabbath v. U.S., 88 S.Ct. 1755, 1968).

4) Purposes
The purposes behind this "knock-and-announce" requirement are said to be 1) protection of the owner's privacy; 2) prevention of unnecessary violence; and 3) preservation of property (Accarino v. U.S., 179 F.2d 456, D.C. Cir. 1949).

5) Refusal
A refusal by the occupant to permit the agents to enter can be express or implied. (21 ALR Fed 820). A REFUSAL OCCURS WHEN:

(i) OCCUPANT EXPRESSLY REFUSES, or

(ii) OCCUPANT'S CONDUCT SIGNALS A REFUSAL (e.g. he peeks out and then runs from the door), or

(iii) REASONABLE TIME TO GET TO DOOR HAS PASSED.

Example. You are among three teams of agents executing a nighttime search warrant for a home. Each team positions itself at one of the doors to the home. The house is completely dark. Each team simultaneously knocks and makes a proper announcement.

Hearing nothing, you knock again and repeat the announcement. Thirty seconds have passed. Another thirty seconds goes by in silence. Have you been refused entry?

Yes. There was no express refusal, nor was there any conduct by the occupant that indicated a refusal. But, a reasonable amount of time passed to allow the occupant to get to one of the doors. His failure to answer within a reasonable time constitutes an implied refusal (See U.S. v. Noreikis, 481 F.2d 1177, 7 Cir. 1973).

CAUTION: What constitutes a reasonable time to answer the door varies with the facts of each case. It can be affected by the size of the premises, the time of day, the number, age and health of the occupant, and so forth. The burden is upon you to show the time interval was unreasonable.

6) Use of Force

You may legally use force to enter once you have complied with the "knock-and-announce" rule (18 U.S.C. 3109), but you may not use excessive or otherwise unreasonable force, even though your entry is lawful.

Federal law provides "Whoever, in executing a search warrant, willfully exceeds his authority or exercises it with unnecessary severity, shall be fined not more than $1,000 or imprisoned not more than one year." (18 U.S.C. 2234).

7) Team Entries

Officers are not required to announce at every place of entry. One proper announcement is enough. But no one can enter until a proper announcement has been made (U.S. v. Bustamante-Gamez, 488 F.2d 4, 9 Cir. 1973).

8) Exceptions

Several exceptions to the "knock-and-announce" rule have been created by the courts (Ker v. California, 83 S.Ct. 1623, 1963).

AGENTS NEED NOT KNOCK AND ANNOUNCE IF:

(i) THEY ARE VIRTUALLY CERTAIN IT IS A USELESS GESTURE,

or

(ii) EXIGENT CIRCUMSTANCES REQUIRE QUICK ENTRY.

a) Useless Gestures

Obviously, it would be a useless gesture to knock and announce when AGENTS ARE VIRTUALLY CERTAIN THE PREMISES ARE UNOCCUPIED. You need not announce in such circumstances (Payne v. U.S., 508 F.2d 1391, 5 Cir. 1975).

It is also a useless gesture to knock and announce when AGENTS ARE VIRTUALLY CERTAIN THE OCCUPANTS ALREADY KNOW OF THEIR AUTHORITY AND PURPOSE (Miller v. U.S., 78 S.Ct. 1190, 1958).

Example. You approach a home with a valid warrant to search for heroin. As you walk up the steps to the porch of the home, you see one of your previously used informants peeking out a window. From the surprised look on his face you are certain he has recognized you. He runs from the window. Must you knock, announce your authority and purpose, and wait a reasonable time until someone comes to the door?

No. You are virtually certain that you have been identified as a drug agent by the occupants, and it is reasonable to conclude they know you are there to search or arrest. Knocking and announcing would be a useless gesture. (See U.S.v. Singleton, 439 F.2d 381, 3 Cir. 1971).

Note: To rely upon the useless gesture exceptions, you must be able to articulate facts which make you VIRTUALLY CERTAIN that an announcement would be useless. (Miller v. U.S., above).

b) EXIGENT CIRCUMSTANCES

For the purpose of the knock-and-announce rule, EXIGENT CIRCUMSTANCES EXIST IF AN AGENT HAS A REASONABLE BELIEF THAT ANNOUNCEMENT WOULD RESULT IN:

(i) BODILY HARM (either to the agent or persons inside), or

(ii) DESTRUCTION OF EVIDENCE, or

(iii) ESCAPE.

Example. Before executing a search warrant for a home, you look through a window and see a suspect asleep on the couch with an automatic revolver just inches away from his hand. Must you knock and announce before entering?

No. In view of the drawn weapon near the suspect, a prior announcement might result in a fire-fight and injury or death to you and the suspect. (See U.S. v. Garcia Mendez, 437 F.2d 85, 5 Cir. 1971).

Note: In this example the agents were certain the occupant was armed and likely to use the weapon. In most cases you need not be certain that an occupant is armed. Exigent circumstances exist

as long as you have a reasonable belief that bodily harm could result. Belief that the occupants are dangerous can be based upon their history, a tip from an informant, and so forth (U.S. v. Artieri, 491 F.2d 440, 2 Cir. 1974); 21 ALR Fed 820).

Example. You have a warrant to search an apartment for heroin. You knock on the door and identify yourself as a federal agent. You immediately hear sounds of running and scuffling. Based upon your experience as a drug agent, you reasonably conclude the suspects are going to destroy the evidence. You kick in the door, seize evidence and make arrests. Is this entry lawful?

Yes. Although you knocked and announced your identity, you did not announce your purpose as required by statute. But an exception to the statute applies to this case, since you reasonably believed that evidence would be destroyed if there were any further delay (See U.S. v. Manning, 448 F.2d 992, 2 Cir. 1971).

Example. You develop probable cause to believe that a 25 year old, single, female accountant has accepted delivery of a crate containing over 50 pounds of hashish. She picked up the crate from a late night airfreight service and immediately returned with the crate to her apartment. Armed with a night-time warrant you knock on her door, announce your authority and purpose, wait 10 seconds and break in.

Have you complied with the knock-and-announce rule?

No. Although you made a proper announcement, you are not justified in concluding you were refused entry. She did not expressly refuse you entry, nor did you hear or see her act in any way that would imply a refusal. Moreover, 10 seconds does not amount to a reasonable time to get to the door: she is a female, a professional, it is night, she is likely to be undressed, etc. Your failure to comply cannot be excused because there was no reason to expect violence, she could not escape, and she could not dismantle the crate and destroy 50 pounds of hashish in 10 seconds.

9) Forceless Entry

The knock-and-announce requirement applies to entries accomplished by force, however minimal. Thus, opening a closed but unlocked door is considered an entry by force (Sabbath v. U.S., above). And, the use of a passkey to enter, even when peaceful, is considered a forced entry (See 21 ALR Fed 820 at 831).

On the other hand, the knock-and-announce rule does not apply to entries made without any force, such as:

a) Entering fully opened doors, or
b) Entering by invitation, or
c) Entering by ruse or trick.

Example. You are in a motel room next to that of several suspected drug violators. The suspects are talking loudly enough for you to overhear their conversation. One of the suspects says "The stuff looks good. Let's weigh it and get out of here." You hear the sound of scales banging. Having probable cause to both arrest and search and not having time to obtain a search warrant, you position yourself just outside the suspects' motel door. When they fully open it, you enter without first knocking and announcing, and you place them under arrest and search the room. Have you violated the knock-and-announce rule?

No. You entered a fully opened door without the use of any force. The knock-and-announce rule applies only to forceful entries (See U.S. v. Lopez, 475 F.2d 537, 7 Cir. 1973).

Example. You have warrants to arrest Johnny Coke and to search his home for drugs. You and your partner go to his front door in undercover clothing and ring the bell. A companion of Johnny's comes to the door and asks what you want. You answer, "We've got business with the man, hurry up." Johnny's friend asks you to come in. Once you're inside you identify yourself, arrest Johnny, and execute the drug warrant. Have you violated the knock-and-announce rule?

No. The rule does not apply to entries gained by invitation, even when the agents misrepresent their identity and purpose, as when they pose as buyers and enter to purchase drugs (See Lewis v. U.S.,

87 S.Ct. 424, 1966; U.S. v. Hutchinson, 488 F.2d 484, 8 Cir. 1973; U.S. v. Glassel, 488 F.2d 143, 9 Cir. 1973).

10) Comment

Don't be confused if two or more of the above-described "no-knock" exceptions seem to apply to your cases. These rules frequently overlap, particularly in drug investigations. You must be familiar with each of the exceptions and let your prosecutor choose which to argue.

Example. You obtain a warrant to arrest Henry Horse and to search his farm-home for heroin. You have a tip that he is heavily armed. Henry has just received a large shipment and is distributing it to waiting buyers. As you approach the house with shotguns and dressed in DEA raid jackets and hats, you spot Henry standing in an open doorway talking to a suspected purchaser. Henry sees you, races inside and slams the door. Must you knock and announce before entering?

No. First, it appears it would be a useless gesture since Henry knows you are there and has seen your DEA costumes and shotguns. He must know you are there to search or arrest. Second, drug violators, particularly those occupying rural farms are frequently armed. Here, you have a tip that Henry is armed. Bodily harm is likely to result if you delay entry and give Henry time to get to a weapon.

Third, Henry is undoubtedly on his way to the toilet to flush the evidence. Fourth, if he is not flushing evidence, he may be trying to escape by another exit. Each of these exceptions can reasonably be applied in this case (See U.S. v. Cisneros, 448 F.2d 298, 9 Cir. 1971). You should learn to articulate all the possible exceptions.

e. Receipt for Seized Property
Although officers are not required to exhibit a search warrant before conducting the search, they are required by statute to leave a copy of the warrant and a receipt for property taken with the occupant, or at the premises, after the search is completed (FRCP, Rule 41(d); 68 Am Jur 2d at 771).

f. Returning the Warrant to the Court
Although the 4th Amendment does not set any specific requirements regarding the return of a search warrant, statutes often set out the mechanics for returning the warrant (Cady v. Dombrowski, 93 S.Ct. 2523,1973).

For example, Rule 41(d) of the Federal Rules of Criminal Procedures provides in part: "The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall 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, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer." (Emphasis added).

A failure to comply with the technical requirements regarding "return" will generally not affect the validity of the search warrant, provided the defendant has not been prejudiced by the error (U.S. v. Hall, 505 F.2d 961, 3 Cir. 1974).

4. Search Can't Exceed Warrant's Scope

A search warrant restricts the search to only those places, and for only those objects, described in the warrant. The search cannot exceed this scope.

a. Areas to be Searched

As noted earlier, the areas to be searched must be particularly described in the warrant. By restricting the search to these areas, the 4th Amendment protects citizens from overly broad searches, or "fishing" expeditions.

1) Premises
A search of premises under a warrant can extend to all parts of the property necessarily a part of the premises, even if not specifically described in the warrant (68 Am Jur 2d at 767). Thus, the curtillage and appurtenances are considered part of the premises. Examples of appurtenances include the garage and adjacent outbuildings. Curtilage would include driveways, walkways, etc., immediate to the main dwelling.

2) Vehicles on Premises
Although many courts consider vehicles parked upon the curtillage to be a part of the premises and subject to search, it is not clear whether vehicles can always be searched as part of the premises (47 ALR 2d 1444; Joyner v. State, 303 So. 2d 60, FLA App. 1974).

3) Persons on Premises
A search warrant for premises does not automatically authorize a full search of persons either found on the premises or who come onto the premises while the search is in progress (U.S. v. Di Re. 68 S.Ct. 222, 1948; U.S. v. Festa, 192 F. Supp. 160, DC Mass. 1960; Smith v. State, 289 So 2d 816, Ala. 1974; State v. Bradbury, 243 A.2d 302, N.H. 1968; State v. Carufel, 263 A.2d 686, R.I. 1970; State v. Fox, 168 N.W. 2d 260, Minn. 1969; State v. Massie, 120 S.E. 514, W.Va. 1923; People v. Smith, 234 N.E. 2d 460, N.Y. 1967; Purkay v. Maby, 193 P. 79, Idaho, 1920).

If, on the other hand, the persons on the premises or coming onto the premises are connected to the illegal activity, and could be concealing objects named in the warrant, they can be searched for those objects (See U.S. v. Peep, 490 F.2d 903, 8 Cir. 1974; U.S. v. Micheli, 487 F.2d 429, 1 Cir. 1973; U.S. v. Johnson, 475 F.2d 977, DC Cir. 1973).

It is not clear whether you need probable cause or simply a reasonable suspicion to believe persons on premises are concealing items named in the warrant, but you must be able to articulate some facts which make it likely.

Example. You have probable cause to believe Charlie is distributing drugs to a steady stream of buyers visiting his house trailer. You get a valid warrant to search the trailer and Charlie for drugs. While executing the warrant you find marihuana, scales, plastic baggies, rolled marihuana cigarettes, meth-amphetamines and other drug paraphernalia.

The phone rings. You answer it. A man asks for Charlie. You say "He's busy, but come on over." Within a few minutes a man knocks and you let him in. He is carrying a brown paper bag. Does the warrant permit you to conduct a full search of this visitor?

Yes. Although a search warrant for premises does not automatically extend to persons on the premises, you have sufficient facts and circumstances to believe the visitor is there either to buy from or to supply Charlie with drugs, and that he may be concealing items named in the warrant. Therefore, he can be searched (See Earnest v. State, 314 So. 2d 796, Fla App. 1975).

Example. You have probable cause to believe that Milt is involved in drug trafficking and that he stores large quantities of heroin at his barber shop. You have no indication that Milt is selling to shop customers. You obtain a warrant to search Milt and his shop. You execute the warrant at noon on a business day. While you are searching, a clean-cut male, dressed in a three-piece suit comes to the shop and you let him in. One of the barbers tells him the shop is closed and to come back tomorrow. You know nothing about the man. May you subject him to a full search under the warrant?

No. There is no evidence that the shop is retailing drugs to a steady stream of customers. You have no information to link the visitor to criminal activity. The man is very likely to be an innocent customer who knows nothing of Milt's activities. Therefore, the warrant to search the shop does not extend to him (See Smith v. State, 227 S.E. 2d 911 Ga. App. 1976; Smith v. State, 289 S.2d 816, Ala. 1974; U.S. v. Branch, 545 F.2d 177, DC Cir. 1976).

4) Extent of Search
The extent to which you can search an area depends entirely upon the objects for which you are searching. If you are lawfully searching a home for a stolen elephant, you may not look in dresser drawers or the breadbox. You must confine your search to areas where the elephant could be.

Drug agents often forget this basic principle because drugs can be hidden virtually anywhere. Nevertheless, this rule applies to drug searches, and if the object of the search could not be easily concealed, such as a large package or a clandestine lab, the search must be limited to areas where the objects could be hidden.

5) Search Time
Officers may remain on the premises for as long as is necessary to conduct a thorough search for the objects named in the warrant (Levin v. Blair, 17 F.2d 151, D. Pa. 1927).

YOU MUST STOP SEARCHING ONCE YOU FIND ALL THE OBJECTS NAMED IN THE WARRANT. (U.S. v. Odland, 502 F.2d 148, 7 Cir. 1974; U.S. v. Feldman, 366 F.Supp. 356, Hawaii 1973; U.S. v. Highfill, 334 F.Supp. 700, ED Ark. 1971)

Example. You get a warrant to search the home of Jim Hash for a delivery of hashish which he has just received from a soldier in Germany. The hashish was delivered several hours earlier by mail, in an 8" by 12" by 14" package addressed to James Hash. You describe the package in detail in the warrant. You go to Jim's home, arrest him as he is leaving the house, and begin your search. You immediately find the unopened package on the floor of a closet next to the front door. You continue searching and find marihuana and other evidence in Jim's upstairs bedroom. Will the evidence found in the bedroom be admissable in court?

No. Once you found the object named in the warrant - here the unopened package of hashish - you should have stopped searching. By continuing to search you went beyond the scope of the warrant (See U.S. v. Highfill, above).

b. Things to be Seized

The activity of the officers executing the warrant must be limited to searching for those items named in the warrant and no others. The most frequently quoted explanation of this rule is that of the U.S. Supreme Court in Marron v. U.S. 48 S.Ct. 74(1927):

"The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant."

The only exception to this restriction are seizures made under the "plain view" theory, discussed later in this outline. But, as we shall see, plain view seizures do not allow searching officers to plan to seize the items in plain view, nor can the original area to be searched be extended to find "plain view" evidence, nor can the extent, time, or invasiveness of the search be expanded to find plain view evidence. Plain view will only apply to items which are immediately apparent evidence and which are inadvertently found within the scope of the originally limited search for those items named in the warrant. (See "Plain View" below).

5. Protective Measures

A search warrant is an order issued by a judicial officer in the name of the government, commanding an officer to conduct a search for specified objects.

Persons do not have the right to forcibly resist the execution of a search warrant, even though the warrant may later be held to be invalid (U.S. v. Ferrone, 438 F.2d 381, 3 Cir. cert. den., 91 S.Ct. 2188, 1971).

a. Anything Necessary and Proper
Subject to department restrictions (for example, restrictions on the offensive use of firearms) and to restrictions imposed by statute, you may do whatever is necessary and proper under the circumstances to execute the warrant (Clifton v. Cox, 549 F.2d 722, 9 Cir. 1977).

b. Securing Persons
You can restrict the movement of persons on the premises both to protect yourself and to prevent interference (U.S. v. McKethan, 247 F. Supp. 324, D.DC. 1965)

You may be justified in frisking persons found on the premises for your protection while executing the search. See the "Stop & Frisk" section of this outline for a discussion of the right to frisk.

Remember: Your right to secure the persons found on the premises does not automatically include the right to conduct a full search of their person.

c. Securing Weapons

You have the right to locate and take temporary possession of any weapons in the area which you reasonably believe could be used against you (U.S. v. Chapman, 549 F2d 1075, 6 Cir. 1977; U.S. v. Bowdach, 414 F. Supp. 1346, SD Fla. 1976; U.S. v. Gilbert, 378 F.Supp. 82, WD So. Dak. 1974; U.S. v. James, 408 F. Supp. 527, SD Miss. 1973).

Of course, once the search is over and the danger has passed, continued possession of the weapon cannot be justified as a safety measure. Unless some other justification exists for retaining the weapon it must be returned to the owner (See the "Plain View" section of this outline).

d. Protective Impoundment

In addition to seizing objects under the warrant, you can take temporary custody of personal property, such as currency, jewels, weapons, etc., which require safekeeping when the owner has been arrested and the premises are no longer secure (U.S. v. Lacey, 530 F2d 821, 8 Cir. 1976; U.S. v. Lipscomb, 435 F2d 795, 5 Cir. 1970; U.S. v. Wilson, 524 F2d 595, 8 Cir. 1975; U.S. v. Nash, 394 F. Supp. 1257, ED Wis. 1975).

D. ARE THERE EXIGENT CIRCUMSTANCES?

A search supported by probable cause and conducted pursuant to a valid warrant is a lawful 4th Amendment search. If, however, there is probable cause to search, but the search is conducted without obtaining a warrant, then we must ask: Are there exigent circumstances?

1. Definition

The term "exigent circumstances" is used to identify all those situations in which there is:

a. PROBABLE CAUSE TO SEARCH,

AND

B. SOME COMPELLING URGENCY

which justifies the failure to obtain a search warrant.

2. Common Patterns

Cases of exigent circumstances generally fall into one of three common patterns.

(i) HOT PURSUIT OF A FLEEING FELON
(ii) SEARCHES OF MOBILE VEHICLES; AND
(iii) SEARCHES TO PREVENT REMOVAL OR DESTRUCTION OF EVIDENCE

A fourth, or "catchall", class of cases is referred to as:

(iv) "EMERGENCY SEARCHES"

a. Hot Pursuit

An agent may enter and search premises if he is chasing a suspect who is in the process of escaping and whose whereabouts are continually known by the agent (Warden v. Hayden, 87 S.Ct. 1642, 1967).

THERE MUST BE PROBABLE CAUSE TO ARREST; and

THE AGENT MUST HAVE A CONTINUOUS KNOWLEDGE OF THE SUSPECT'S WHEREABOUTS; and

THERE MUST BE A NEED FOR SPEED; and

THERE MUST BE PROBABLE CAUSE TO BELIEVE THE SUSPECT IS IN THE PARTICULAR PREMISE.

(U.S. v. Scott, 520 F.2d 697, 9 Cir. 1975; U.S. v. Lindsay, 506 F.2d 166, D.C. Cir. 1974).

For example, in U.S. v. Santana, local narcotics agents had probable cause to believe that Santana had marked money in her possession, which had just been used to make a heroin buy. They spotted her standing in the doorway of her home holding a paper bag. As they approached the house she retreated inside and the officers had to enter to effect her arrest. In the process they seized the bag which contained the marked money and some heroin that fell from the bag. The Supreme Court held that this warrantless entry into the house to effect the arrest was "in hot pursuit". (96 S.Ct. 2406, 1976)

b. Searches of Mobile Vehicles

1) True Mobile Vehicles (Carroll)

WHERE THERE IS PROBABLE CAUSE TO SEARCH A VEHICLE AND THE VEHICLE IS MOVING OR IS CAPABLE OF BEING MOVED, A WARRANT IS NOT REQUIRED TO STOP THE VEHICLE AND CONDUCT THE SEARCH (CARROLL v. U.S., 45 S.Ct. 280, 1925).

The possibility of movement is generally enough of an exigent circumstance to justify a search without a warrant.

The scope of the search may extend to the trunk of the vehicle (U.S. v. Kemper, 503 F2d 327, 6 Cir 1974, cert. den. 95 S.Ct. 810, 1975) and to the opening of luggage and packages within the vehicle which could contain the objects being sought. (U.S. v. Anderson, 500 F2d 1311, 5 Cir. 1974).

2) The Chambers Rule

If you lawfully impound a vehicle which is subject to a full search under the Carroll Doctrine, you may conduct the Carroll search after impoundment (Chambers v. Maroney, 90 S.Ct. 1975. 1970).

To justify a vehicle search under the Chambers Doctrine it must be shown that:

a) The vehicle was subject to search at the time it was stopped (Carroll); and

b) The vehicle was lawfully taken into custody; and

c) At the time of the search there was still probable cause to believe the vehicle contained seizable items; and

d) the search occurred immediately after taking the vehicle into custody.

3) Immobile Vehicles

The Carroll Doctrine relys on the mobility of a vehicle as being enough of an "exigent circumstance" to justify a warrantless search. WHERE, HOWEVER, A VEHICLE HAS BEEN COMPLETELY IMMOBILIZED OR IS OTHERWISE NOT LIKELY TO BE MOVED, THEN THE CARROLL DOCTRINE NO LONGER APPLIES (Coolidge v. New Hampshire, 91 S.Ct.2022, 1971).

For example, the vehicle may be in a garage for repairs; or may be parked in the same place for so long that it is not likely to be quickly removed; or the vehicle may be immobilized in the suspect's driveway. Any factor which disproves the need for speed may undermine the right to make a Carroll-type search.

4) Planned Searches Prohibited

The need to make a Carroll search of a vehicle must arise suddenly. AGENTS CANNOT PLAN TO CONDUCT CARROLL SEARCHES. If probable cause to search a vehicle develops sufficiently in advance so as to make it practical to obtain a warrant, you must do so. You cannot rely on the vehicle's mobility to justify the search.

For example, where agents have probable cause to believe that the driver of a milk truck makes regular deliveries of drugs in the course of his daily rounds, they should not rely on the mobility of the truck to justify a warrantless search, because there is ample time to obtain a warrant before stopping the truck. (See Clay v. U.S., 239 F.2d 196, 5 Cir. 1956).

Example. You have probable cause to believe that V is distributing methamphetamine ("speed") from his home. You obtain a court order to wiretap his phone. At 4 p.m. you hear V talking to D, a suspected buyer. D tells V that he has raised the cash and will be right over to deal. Within minutes D arrives in a VW. He enters V's home empty-handed. Ten minutes later D leaves V's home carrying a brown paper bag, gets in his car and drives off. May you stop and search D's car for drugs without having a a warrant?

Yes. You have probable cause to believe that D just bought speed from V and has it in his car. The car is mobile. You had no prior opportunity to get a warrant. Therefore, you can stop and search D's car under the Carroll Doctrine (See U.S. v. Vento, 533 F.2d 838, 3 Cir. 1976).

Example. A private citizen comes to you and says he has been hired to drive a truck containing a ton of marihuana into the U.S. from Mexico. He tells you about his instructions to fly to Texas, to cross the border to Mexico, to pick up the truck and to deliver it to a certain Holiday Inn in San Antonio. He gives you a full description of the truck, its route and the date he expects to make the crossing and arrive at the Holiday Inn. You verify every detail of his information and you coordinate with other DEA offices to conduct a surveillance of the crossing. One

week later the crossing occurs exactly as planned. When the truck arrives at the Holiday Inn you are there to meet it. As several suspects attempt to open the truck you place them under arrest. Can you open and search the truck under the Carroll Doctrine?

No. You have probable cause to search the truck and it is mobile or potentially mobile. But the Carroll Doctrine does not apply to "planned" searches. Here, you had probable cause to search the truck almost one week prior to the search. You planned and prepared for the search and never lost sight of the truck during the whole trip (See U.S. v. Mitchell, 525 F.2d 1275, 5 Cir. 1976).

c. Destruction of Evidence: The "Now or Never" Doctrine

AN AGENT MAY CONDUCT A WARRANTLESS SEARCH IF:

i) THERE IS PROBABLE CAUSE TO SEARCH, AND

ii) THERE IS PROBABLE CAUSE TO BELIEVE THE EVIDENCE IS THREATENED WITH IMMEDIATE REMOVAL OR DESTRUCTION

(U.S. v. Jeffers, 72 S.Ct.93, 1951; McDonald v. U.S. 69 S.Ct. 191, 1948)

This type of "exigent circumstances" extends to vehicles, buildings, containers, or any other area. It also extends to emergency searches of individuals. (Schmerber v. California, 86 S.Ct.1826, 1966).

1) Probable Cause Standard

Actual knowledge that evidence is being destroyed is not necessary (U.S. v. Rubin, 474 F.2d 262, 3 Cir. 1973). On the other hand, a generalized fear that evidence, especially drugs, will be quickly removed or destroyed is not enough to establish exigent circumstances (Vale v. Louisiana, 90 S.Ct. 1969, 1970).

AGENTS MUST HAVE PROBABLE CAUSE TO BELIEVE THE EVIDENCE IS IN DANGER OF IMMEDIATE REMOVAL OR DESTRUCTION.

2) Government Negligence

If the exigency arises because the government has deliberately and unreasonably delayed in getting a warrant, it is not a true "exigent circumstance". Similarly, if the conduct of the government negligently creates the emergency, it is not an "exigent circumstance". In other words, THE GOVERNMENT MUST NOT BE THE CAUSE OF EXIGENT CIRCUMSTANCES (See U.S. v. Curran, 498 F.2d 30, 9 Cir. 1974).

3) Vehicles

As previously explained, the mobility of a vehicle is generally considered enough of an exigent circumstance to justify a warrantless search. But there may be grounds other than mobility for justifying a vehicle search as an exigent circumstance.

Thus, the fact that confederates or other persons may have the chance to return to the vehicle and remove or destroy the evidence has been considered an exigent circumstance (U.S. v. Evans, 481 F.2d 990, 9 Cir. 1973; U.S. v. McClain, 531 F.2d 431, 9 Cir. 1976).

Example. You and your partner make a valid arrest of Mr. C at his home. At the same time, you develop probable cause to believe that C's car, which is on blocks in his driveway, contains a stash of cocaine. C has an accomplice who was seen in the vicinity of C's house just minutes before C's arrest. Surveillance on the accomplice has been lost. May you search C's car for cocaine without having a warrant?

Yes. You have probable cause to search and probable cause to believe that the evidence in the car is threatened with immediate removal or destruction. If you do not seize it, C's accomplice might get to it before you return. (See U.S. v. Connolly, 479 F.2d 930, 9 Cir. 1973).

4) Premises

An agent may enter premises without a search warrant if he has probable cause to believe that the evidence or contraband that is inside is threatened with immediate removal or destruction (U.S. v. Rubin, 474 F.2d 262, 3 Cir., cert. den. 94 S.Ct.173, 1973).

Example. You receive a tip from one of your informants that Mr. X has just returned from New York with a large shipment of heroin and is now at his apartment cutting it for immediate distribution. The informant warns you that if you don't hurry, the junk will be on the streets within 30 minutes. Assuming this tip meets the Aquillar-Spinelli test and establishes probable cause to search, may you go to X's apartment and conduct a warrantless search for heroin?

Yes. You have probable cause to search and probable cause to believe that the evidence will be removed within minutes. You have no time to get a warrant. Therefore, exigent circumstances justify a warrantless search. It's now or never. (See U.S. v. Davis, 461 F.2d 1026, 3 Cir. 1972).

Example. You buy an ounce of LSD from a man named Leonard. Leonard asks if you can handle pounds. You say you can. You negotiate a buy of 30 pounds of parsley impregnated with LSD. The price is $19,000 and Leonard is to deliver it in a park the next day. When Leonard shows up he has only 10 pounds. He tells you his people wouldn't let him come with the whole shipment. He wants $6,000 now. According to Leonard: his people have the rest of the LSD and are waiting in a nearby apartment; they expect him to return in 20 minutes with the $6,000; if he doesn't return in time with the money they'll know something is wrong; if everything goes well, he'll be back with the other 20 pounds within an hour. You arrest Leonard. Seeing that "he has both feet deeply in the bear trap", Leonard decides to "sing". He tells you all he knows and takes you to his acccomplice's apartment. Can you search the apartment without a warrant?

Yes. You have probable cause to search the apartment for LSD, and you have probable cause to believe that it will be removed within minutes by Leonard's accomplices when he doesn't return as planned. You had no prior opportunity to get a warrant for the apartment, therefore, there are exigent circumstances. (See U.S. v. Shima, 545 F2d 1026, 5 Cir. 1977).

Example. You have a valid warrant to search W's home for cocaine. W is a rich, female socialite. When you find the coke, W decides to cooperate. She insists she and all her friends use coke "socially" and that they are not traffickers. She tells you she gets her coke from a friend named F, and that F always has some coke at his beach-front home. By coincidence, F arrives at W's driving a new Rolls Royce. You place both W and F under arrest. Can you search F's home without a warrant?

No. Although you have probable cause to believe F has cocaine in his home, you do not have probable cause to believe that it is in danger of immediate removal or destruction. F has no known accomplices. He is not a typical trafficker. You have no indication that anyone other than F has access to F's house. A generalized fear that evidence will be removed is not enough. Therefore, there are no exigent circumstances (See Ferrara v. State, 319 So. 2d 629, Fla. App. 1975; U.S. v. Hayes, 518 F.2d 675, 6 Cir. 1975).

Example. After buying several ounces of cocaine from G you arrest him. G decides to cooperate and identifies H, and H's wife W, as his source. G calls H at his home to set up a buy. You are not sure if, or where, H and W have the coke, so you put a surveillance on their home and on their cars, and you tail G when he meets H to make the buy. As H and G exit H's home, G pulls his shirt tails out of his pants -- a signal to you that the coke is in the house. You immediately arrest H and G on the front lawn. G says W is still in the house. Can you search the house without a warrant?

Yes. When G signaled you that the coke was inside you had probable cause to search. And, knowing that W is still inside, that she is a defendant, that she has probably seen or will soon see the arrest on the front lawn, you have probable cause to believe that the coke is in danger of immediate destruction by W. It's now or never. Moreover, you did not have a prior opportunity to get a warrant for the home, since probable cause to believe the coke was in the home didn't arise until the informant gave the signal. There are exigent circumstances. (See U.S. v. Gardner, 553 F2d 946, 5 Cir. 1977; U.S. v. Fulton, 549 F2d 1325, 9 Cir. 1977; Lentile v. State, 222 S.E. 2d 86, Ga. App. 1975)

5) Persons

In most instances, the existence of probable cause to search a person, particularly for drugs, also creates probable cause to arrest, and the warrantless search will be upheld as incident to the arrest.

In the rare case where probable cause to search a person exists, but not probable cause to arrest, a warrantless search will be justified if there are exigent circumstances. (See Cupp v. Murphy, 93 S.Ct. 2000, 1973)

As to the need to conduct Body Cavity searches, see the Search Incident to Arrest section of this outline.

6) Goods in Transit

The Carroll Doctrine, which justifies the warrantless search of a vehicle because of its mobility, is now being used by some

courts to justify the search of goods in the course of transit by a common carrier (U.S. v. De La Fuente, 548 F2d 528, 5 Cir. 1977; U.S. v. Martin, 562 F2d673,DC Cir. April 4, 1977; U.S. v. Valen, 479 F2d 467, 3 Cir. 1973; U.S. v. Mehciz, 437 F2d 145, 9 Cir. 1971).

To conduct a warrantless search of goods in transit:

i) there must be probable cause to search the bag; and

ii) the bag must be in transit in the custody of a common carrier; and

iii) there must be a valid reason for not seizing the bag and obtaining a warrant.

Example. You are lawfully wiretapping Mr. X's phone. The tap has revealed the existence of a large heroin-distribution conspiracy. You overhear conversations indicating that S, a courier for X, will soon be making a delivery of heroin to a buyer in Pittsburgh. You see S leave X's home carrying a suitcase. You follow him to an airport where he purchases a ticket to Pittsburgh, checks his suitcase, and goes to the boarding gate. His plane leaves in 20 minutes. You intend to tail S to Pittsburgh and develop your case by identifying other members of the conspiracy. Therefore, you don't want to seize his luggage or arrest him. But, you are also concerned that the suitcase could be lost in transit or that you will lose your surveillance of S, thereby losing the heroin as evidence. Can you conduct a warrantless search of the bag before it is put on the plane?

Yes. You have probable cause to search the bag for heroin. It is in transit in the custody of a common carrier. And, you have good reasons for not seizing it and getting a warrant (See De La Fuente above) (Note: the DEA agent who searched the luggage did not seize the heroin. He photographed the heroin inside the suitcase, did a quick inventory, closed it, and put it on the plane).

d. Other "Emergency Searches"

The types of "exigent circumstances" just described (hot pursuit, mobile vehicles, removal or destruction of evidence) are not inclusive. Any emergency which justifies an entry or search without a warrant can be considered an "exigent circumstance". Chief Justice Berger summarized this exception as follows:

> "A myriad of circumstances could fall within the terms 'exigent circumstances' . . . smoke coming out of a window or under a door, the sound of gunfire in a house, threats from the inside to shoot through the door at police, reasonable grounds to believe an injured or seriously ill person is being held within" (and so forth) (Wayne v. U.S., 318 F2d 205 at 212, DC Cir., 1963).

Example. You are called to the emergency room of a local hospital by Dr. X. He tells you they just picked up a young girl suffering from an overdose of drugs. She told the doctor she got the pills from her girlfriend. The doctor says her condition is very serious and he needs to know what kind of pills she took if he is to counteract them. He is afraid the girl may die if not treated promptly. You rush to the local school and

find the girlfriend. She is also beginning to show overdose symptoms. She admits to stealing the pills from a home where she babysat the night before. She does not have any pills on her. She agrees to show you the house. You go to the house. No one answers the door. You force entry to locate the pills. At the girlfriend's direction, you find them in a dufflebag in an upstairs bedroom. You seize the bag and all the pills. They turn out to be illegally manufactured depressants. Is the warrantless search lawful?

Yes. Saving a life is more important than protecting privacy. Your entry into the home and the search and seizure of drugs was compelled by exigent circumstances. (See Long v. State, 310 So. 2d 35, Fla. App. 1975).

Comment: An emergency search must be limited in scope to responding to the emergency. It is not a "carte blanche" to conduct a general search.

Example. At 4 p.m., local officers are called to assist ambulance attendants who are responding to a report of a drug-overdose victim. When the officers arrive they find the victim lying unconscious on the floor of his living room, surrounded by hypodermic needles, pills, marihuana butts, and drug paraphernalia. They immediately call you. You arrive before the ambulance leaves and you enter the living room through the open door. The family is talking to the officers and attendants. You see the evidence still on the floor. You overhear the victim's brother tell the attendants that his brother had probably reacted to the cocaine he has been shooting. You inspect the other rooms of the house and find more drugs in the victims bedroom. Is your warrantless search of the bedroom lawful?

No. The emergency which justifies the presence of the police is confined to the living room. The ambulance is leaving. The evidence found in plain view around the victim is seizable, but the emergency entry cannot be "stretched" into a search of other rooms.(See U.S. v. Brand, 556 F2d 1312, 5 Cir. 1977).

E. PROBABLE CAUSE & WARRANT EXCEPTIONS

In a limited number of situations, a search may be "reasonable", and therefore valid under the 4th Amendment, even though there is no probable cause to search, there is no warrant and there are no exigent circumstances. The following are the most commonly recognized exceptions to the probable cause to search requirement:

(i) Search incident to arrest
(ii) Consent searches
(iii) Stop & frisk
(iv) Plain view
(v) Forfeiture searches
(vi) Routine inventories
(vii) Border searches
(viii) FAA security searches
(ix) Regulatory inspections.

Keep in mind that the existence of probable cause to search, or the use of a warrant, are irrelevant to searches conducted under one of these exceptions.

1. SEARCH INCIDENT TO A LAWFUL ARREST

The search of a suspect incident to his arrest is the most frequently used exception to the warrant and probable cause to search requirements.

INCIDENT TO A LAWFUL ARREST, AN AGENT MAY

(i) CONDUCT A FULL BODY SEARCH OF THE ARRESTEE, AND

(ii) SEARCH THE AREA WITHIN THE ARRESTEE'S IMMEDIATE REACH.

No probable cause to search is required. No warrant is required. No exigent circumstances are required. The right to search is triggered solely by the custodial arrest.

a. Full Search of the Person

The arrestee and everything worn by the arrestee is subject to a complete inspection. U.S. v. Robinson, 94 S.Ct. 467 (1973).

1) Strip Searches

The search may include requiring the arrestee to remove his clothes for inspection as well as a visual inspection of the arrestee's body surfaces. U.S. v. Edwards, 94 S.Ct.1234, (1974); U.S. v. Klein, 522 F.2d 296 (1 Cir. 1975); People v. Knutson, 131 Cal. Rptr. 846 (1976); People v. Williams, 557 P.2d 399 (Colo. 1976); State v. Clift, 339 S.2d 755 (La. 1976); State v. Babcock, 361 A.2d 911 (Me. 1976).

CAUTION: STRIP SEARCHES MUST BE REASONABLE UNDER ALL THE CIRCUMSTANCES.

If the arrestee is unreasonably embarrassed by the search it will be unlawful (for example, by doing a strip search in public, or by strip searching a female in the presence of males, or by strip searching a female who is nine months pregnant) U.S. ex rel Guy v. McCauley, 385 F.Supp. 193 (E.D. Wis. 1974).

2) Body Cavity Searches

Body cavity searches involve intrusions beyond the body's surfaces. For example, into the mouth, stomach, rectum, vagina, and so forth. Prior to a search of a body cavity, there must be a "clear indication" that there is contraband in the cavity. U.S. v. Mastberg, 503 F.2d 465 (9 Cir. 1974).

Reasonable force may be used to make the person submit to an examination of a body cavity. Blackford v. U.S., 247 F.2d 745 (9 Cir. 1957).

Also, reasonable force may be used to prevent a person from swallowing evidence. U.S. v. Caldera, 421 F.2d 152 (9 Cir. 1970).

CAUTION: WHENEVER POSSIBLE, BODY CAVITY SEARCHES MUST BE CONDUCTED BY MEDICAL PERSONNEL PURSUANT TO A WARRANT.

3) Property Carried by Arrestee

ANYTHING CARRIED BY THE ARRESTEE MAY BE SEARCHED.

These things might include a cigarette pack, a suitcase, a purse, a wallet or anything in the actual possession of the arrestee. U.S. v. Robinson, above; U.S. v. Gill, 555 F.2d 597 (6 Cir. 1977); U.S. v. Schleis, 543 F.2d 59 (8 Cir. 1976); McKissick v. Bridges, 528 F.2d 506 (5 Cir. 1976); U.S. v. Lam Muk Chiu, 522 F.2d 330 (2 Cir. 1975); U.S. v. Eatherton, 519 F.2d 603 (1 Cir. 1975).

Property not being carried by, nor in the actual possession of, the arrestee is not subject to search under the arrest theory. See U.S. v. Anderson, 500 F.2d 1311 (5 Cir. 1974).

Example. You arrest Mr. A at an airport. In his pocket you find a key to a nearby traveler's locker. You open the locker and find a suitcase belonging to A. Can you search the suitcase under the search incident to arrest theory?

NO. You may search the arrestee and property within his actual possession. Here the suitcase was not in his actual possession. It was in his constructive possession, and is not searchable incident to arrest (See Anderson, above).

b. Areas Within Immediate Reach

Areas within the arrestee's immediate control, into which he might reach to grasp a weapon or to destroy evidence, may also be searched. Chimel v. California, 89 S.Ct. 2034 (1969). Areas within the arrestee's immediate reach might include: a desk, a cabinet, an unlocked glove compartment, under a bed, under a seat, and so forth.

Example. You lawfully enter premises to arrest the occupants for possession of heroin. You locate the suspects seated at a kitchen table. On the table there is heroin and drug-cutting paraphernalia. Can you seize the objects on the table as incident to the arrest?

Yes. This is the clearest example of the Chimel rule. The objects on the table are within the immediate reach of the arrestees (See U.S. v. Artieri, 491 F.2d 440, 2 Cir. 1974).

Example. You and one of your informants buy several packages of cocaine from W at W's home. Immediately after the purchase other drug agents knock at the door. As W runs to the back bedroom to escape, you draw your weapon and order him to stop and lie on the floor. Your informant tells you that there is more cocaine in the bottom drawer of the dresser, within three feet of where W is lying. Can you open the drawer and search for the cocaine under the search incident to arrest theory?

Yes. The drawer is within W's immediate reach and, as such, is searchable under the Chimel rule (See U.S. v. Weaklem, 517 F.2d 70, 9 Cir. 1975).

Example. You have probable cause to arrest R because he has just delivered a large shipment of heroin to the home of a local distributor. At the time of arrest, R is seated in his vehicle. There is a motorcycle helmet on the front seat. You seize and search the helmet, which contains almost a pound of heroin. Is the search lawful?

Yes. At the time of arrest, the helmet was within R's immediate reach. R could have reached into the helmet to grab a weapon or destroy evidence. Therefore, it is searchable incident to the arrest (See U.S. v. Regan, 525 F.2d 1151, 8 Cir. 1975).

Example. You and seven other drug agents lawfully enter M's apartment to arrest her for possession of heroin. You find her dressed in nightclothes at the side of her bed. You surround her, draw your weapons and place her under arrest. On the other side of the room, over ten feet from where M is standing, there is a closet which you suspect might contain heroin. Can you search the closet incident to M's arrest?

No. The closet is over ten feet away. It is not within M's immediate reach. Eight of you have her surrounded. How could she reach the closet to grab a weapon or destroy evidence? (See U.S. v. Mapp, 476 F.2d 67, 2 Cir. 1973).

There are two other limitations on searching areas within the arrestee's immediate reach.

First, ONCE YOU REMOVE THE ARRESTEE FROM THE ARREST AREA, YOU MAY NOT RETURN TO SEARCH THAT AREA AS INCIDENT TO THE ARREST.

Example. You arrest Mr. X seated in his car. You order him out, frisk him, and place him in a government vehicle. Can you return to X's car and search the areas within reach of where he had been sitting?

No. Not under the arrest theory. Although you could have searched the areas of the car within X's reach at the time of arrest, you cannot search them once X has been removed to another area (See Brooks v. U.S., 367 A.2d 1297, D.C. App. 1976; People v. Lee, 354 N.E.2d 543, Ill.App. 1976; Wilson v. State, 511 S.W.2d 531, Tex. App. 1974; Lawson v. State, 484 P.2d 1337, Okl. 1971).

Second, YOU CANNOT ALLOW THE ARRESTEE THE FREEDOM TO ROAM, AND THEN JUSTIFY THE SEARCH OF EVERY AREA INTO WHICH HE MOVES AS INCIDENT TO HIS ARREST.

Example. You enter G's hotel room to arrest him. When you enter, G is nude and is just coming out of the bathroom. You do not handcuff him. Instead, you order him to dress. As G walks around the room you search every area into which he goes. As a result, you find and seize weapons and a substantial quantity of drugs. Is this a lawful search incident to arrest?

No. You cannot permit the arrestee the freedom to roam about and then search every area into which he roams. If there is danger that he might grab a weapon, you are responsible for creating that danger by allowing him to roam (See U.S. v. Griffith, 537 F.2d 900, 7 Cir. 1976 ; U.S. v. Erwin, 507 F.2d 937, 5 Cir. 1975).

Example. You arrest M in his home. At the time of arrest M is only partially dressed. He asks you if he can get a shirt and shoes from his closet. You lead M to the closet, open it, and make a quick search for weapons. You find a pistol. Is this a valid search incident to arrest?

Yes. This is not a situation where the arrestee is free to roam. Here, it is reasonable to grant the arrestee's request for a shirt and shoes and, since he must reach into a closet to get them, the search of the closet for weapons is reasonable as incident to the arrest (See U.S. v. Mason, 523 F.2d 1122 D.C. Cir. 1975).

COMMENT. The better procedure to follow in cases like these is to accompany the arrestee to the area where his clothes are located and allow the arrestee to visually select what he wants, but not allow him to reach for it. You should reach for his clothing.

c. A Lawful Custodial Arrest is Required

THE ARREST MUST BE LAWFUL. If the arrest is unlawful for any reason, the search will also be unlawful and any evidence found will be suppressed (Brown v. Illinois, 95 S.Ct. 2254, 1975).

THE ARREST MUST BE CUSTODIAL. Not all arrests justify a search incident to arrest. A "custodial" arrest depends on (1) the agent's authority to take the arrestee into custody for the offense charged, and (2) the agent's intent to take the arrestee into custody.

d. "Pretextual" and "Timed" Arrests

An arrest must not be used simply as an excuse or pretext to conduct a search for evidence. If an arrest is pretextual or timed, the search incident to arrest will be invalid. U.S. v. Lefkowitz, 52 S.Ct. 420 (1932).

1) Pretextual Arrests

When officers make an arrest that they would otherwise not make, because they want to conduct a search incident to arrest, the arrest is "pretextual."

A SEARCH INCIDENT TO A PRETEXTUAL ARREST IS INVALID.

Example. You suspect Mr. X deals in heroin and that he transports heroin in his car. You have neither probable cause to arrest nor probable cause to search for drugs. You tail X as he drives around the city. X commits a traffic violation for which most drivers are cited but not arrested. Because X is technically subject to arrest, you stop his car, search X, and seize and search a package within reach of X on the front seat. It contains heroin. Is this a lawful search incident to arrest?

No. It is true that X was technically subject to arrest for the traffic violation. It is also true that the heroin was within his immediate reach under the Chimel rule. But, the arrest was pretextual. You arrested X because you wanted to search for drugs. Otherwise you would not have arrested him for the traffic violation. The search is unlawful. (See Amador-Gonzalez v. U.S., 391 F.2d 308, 5 Cir. 1968 ; Taglavore v. U.S., 291 F.2d 262, 9 Cir. 1961).

2) Timed Arrests

If an arrest is not pretextual, but the officers delay the arrest with the bad faith intent of searching an area into which the arrestee goes, the arrest is "timed."

A SEARCH OF AREAS WITHIN AN ARRESTEE'S REACH IS INVALID IF THE ARREST IS TIMED. Carlo v. U.S., 286 F.2d 841 (2 Cir 1961); Bowyer v. Superior Court of Santa Cruz County, 111 Cal. Rptr. 628 (Cal. App. 1974).

To determine if an arrest has been timed, courts will look at: (i) whether a valid investigative purpose existed for delaying the arrest; and (ii) whether there is evidence that the officers delayed in a bad faith effort to conduct a search.

Example. Posing as a student at a local university, you develop probable cause to arrest E for distributing PCP. E is a student and a member of ZAP fraternity house. Intending to arrest E, you go to his fraternity and find him in the patio area. Thirty-five to fifty of his brothers are visible in a nearby dining room. E asks what you want. You suggest that the two of you discuss it in his room. He takes you upstairs. As soon as you enter his private bedroom, you place him under arrest.

Incident to the arrest, you seize evidence lying on a nearby dresser in plain view. Is this limited search of the room lawful?

It depends. If you can articulate a valid investivative reason for delaying the arrest until you reached his room, and if you did not intend to search his room in bad faith, then the plain view seizure is lawful as incident to the arrest. On the other hand, if your motive in getting E up to his room was to conduct a search for evidence, then the search is invalid. In this case, the arresting officers testified that they arrested E upstairs because they feared his brothers would interfere with the arrest, and also that their undercover status would be compromised if E were arrested downstairs. Since they had a valid reason for the delay and there was no evidence of bad faith, the court upheld the plain view seizure in the bedroom. (See Eiseman v. Superior Court of Santa Clara County, 98 Cal. Rptr. 342, Cal. App. 1972).

d. What is "Incidental to the Arrest"

In addition to being limited to a search of the arrestee and the areas within his immediate control, a search "incident to the arrest" must be contemporaneous in time with the arrest. Preston v. U.S., 84 S.Ct,881, 1964.

1) Immediately Preceeding the Arrest

If probable cause to arrest exists, agents may validly search a person simultaneously or even prior to the time when the actual arrest takes place. However, the probable cause to arrest must exist prior to the search. Peters v. N.Y., 88 S.Ct.1912, 1968; Cupp v. Murphy, 93 S.Ct.2000, 1973; U.S. v. Jenkins, 496 F.2d 57 2 Cir. 1974 ; Dixon v. State, 343 So.2d 1345 Fla. App. 1977 .

2) Immediately Following the Arrest

Obviously, a search conducted immediately following the arrest is contemporaneous in time with the arrest.

3) During the "Booking Process"

Searches conducted as part of the "booking process" are lawful either as "incidental to the arrest" or as a "routine inventory." U.S. v. Edwards, 94 S.Ct.1234, 1974.

4) After the Booking Process

Even searches which take place after the booking process may be upheld as "incident to the arrest" if there is a legitimate reason for the delay. U.S. v. Edwards, above; U.S. v. Schleis, 543 F.2d 59, 8 Cir. 1976 ; U.S. v. Maslanka, 501 F.2d 208, 5 Cir. 1974 ; State v. Gonzales, 523 P.2d 66, Ariz. 1974 .

Example. You have a reasonable suspicion to stop a vehicle and its occupant for questioning. As you approach the car you notice a great deal of smoke coming from the vehicle and you detect the very strong odor of marihuana. You ask the occupant to get out of the car and you return to your vehicle to call for a backup. Within a few minutes other officers arrive. You search the car and find nothing. You search the driver and find a package of PCP in his pocket. You then advise the driver that he is under arrest. Is the discovery of the PCP lawful?

Yes. You had a reasonable suspicion to stop the car and to question the occupant. As you approached the car, the smoke and smell of marihuana gave you probable cause to arrest the driver for possession of marihuana. Incident to the arrest you have the right to

make a full search of the arrestee. As long as probable cause to arrest exists, the search incident to arrest can immediately preceed the actual arrest (See Dixon v. State, above).

Example. You and three other agents stumble on a nine ton pile of marihuana in a very rural area of Florida. You arrest three suspects who approach the pile. You transport the suspects to the nearest jail and return to guard the pile, bag it up, and prepare it for shipment in the morning. You spend all night, without sleep, guarding and working on the pile. In the morning, after help has arrived, you return to the jail, force the suspects to undress, and send their clothes to a lab. The lab reports show the clothes contain marihuana debris. Is this search lawful?

Yes. Assuming the validity of the arrest, you could have searched the clothes at the time the arrest took place or during the booking process. You could also delay the search beyond the booking process if you had a good reason for the delay. Here, you were shorthanded and were forced to guard and package the pile of marihuana until help came, before you could spend time searching the suspects' clothes. Since the delay is reasonable, the search is valid as incident to the arrest (See U.S. v. Maslanka, above).

f. SEARCH PURPOSES

Warrantless searches conducted incident to an arrest are justified by the need:

1) TO PROTECT THE ARRESTING AGENTS by allowing them to remove any weapons;

2) TO PREVENT CONCEALMENT OR DESTRUCTION OF EVIDENCE BY THE ARRESTEE; and

3) TO PREVENT ESCAPE.

WARNING: Many courts treat the above three purposes as additional limits on the scope of a search incident to arrest. In the view of these courts, once the arrestee is under control, the area into which he can reach shrinks or becomes non-existent, and the right to search the area around the arrestee is narrowed.

Example. You arrest Mr. X in the bedroom of his home. At the time of arrest he is standing a few feet from his bed and a dresser. You immediately search Mr. X and handcuff him. May you search under the bed or in the dresser?

Yes, if you are in a jurisdiction where the courts always allow the search of areas within the arrestee's immediate reach (See U.S. v. Schleis, above; State v. Shane, 255 NW2d 324, Iowa 1977).

No, if you are in a jurisdiction where the courts insist that a search incident to arrest be limited to areas within the arrestee's immediate reach under circumstances where there is a real danger the arrestee could grab at those areas (See U.S. v. Griffith, above).

g. Protective Sweeps

In the course of making a custodial arrest within a building, AGENTS MAY MAKE A QUICK "PROTECTIVE SWEEP" OF PREMISES IF:

1) THERE IS REASONABLE CAUSE TO BELIEVE OTHERS ARE ON THE PREMISES:

2) THE SWEEP IS LIMITED TO A QUICK SEARCH FOR PEOPLE; and

3) THE SWEEP IS NOT A PRETEXT TO SEARCH FOR EVIDENCE.

Warden v. Hayden, 87 S.Ct. 1642 (1967); U.S. v. Chapman, 549 F.2d 1075 (6 Cir. 1977); U.S. v. Sellers, 520 F.2d 1281

(4 Cir. 1975); U.S. v. Blake, 484 F.2d 50 (8 Cir. 1973); U.S. v. Looney, 481 F.2d 31 (5 Cir. 1973).

You must be able to articulate facts and circumstances which give you a reasonable belief that others could be present who might be dangerous or who might interfere with the arrest. Such facts might include: the criminal record or reputation of the arrestee; a tip that others are on the premises; the nature of the crime; noises or movement within the premises; the at-large status of accomplices; the probable presence of a wife, lover, or others; and so forth (McLaughlin, The Protective Sweep, 43 FBI Bulletin 25, Aug. 1974).

Example. At 1 a.m. you get a tip that two fugitives are at a local restaurant. You go to the restaurant in time to see A and B getting into a car. Both A and B are high-level drug violators with arrest warrants outstanding. You call for a backup and follow A and B to a home. When help arrives you knock at the door. C, whom you do not know, opens it. C immediately yells, "Hey, you guys, its the cops." You force entry and arrest A and B who are standing in the living room. A is armed with a pistol. Suddenly, you hear scuffling in a nearby bathroom. You open the door and find D hiding in the shower with a large amount of cocaine and drug paraphernalia. Is your search of the bathroom lawful?

Yes. The arrest of A and B was lawfully conducted under the arrest warrants. The scuffling in the bathroom, the lateness of the hour, the fact that A was armed with a pistol, gave you a reasonable belief that others might be present in the bathroom who could be a danger to you. Your entry into the bathroom was to look for persons, not evidence. Therefore, it was a lawful "protective sweep." Moreover, the drugs which you saw in plain view are seizable and will be admissible in evidence (See U.S. v. Cravero, 545 F.2d 406, 5 Cir. 1977).

Example. As part of an investigation being conducted by your office, you and a fellow agent are assigned to interview the occupants of 50 apartments in a certain building. You knock on the door of Mr. and Mrs. B's unit and are invited inside. During the interview you notice that Mr. and Mrs. B, who are sitting on a sofa, have been smoking marihuana and you see two partially smoked marihuana cigarettes on a nearby table. You immediately place the B's under arrest. Your partner takes a quick tour of the entire apartment. In one of the bedrooms he finds a shopping bag filled with newspaper, with several kilo bricks of marihuana hidden in the bottom. Is this a valid protective sweep?

No. You have no knowledge of any facts which would indicate that there are others in the apartment that might be a danger to you. Therefore, you cannot do a protective sweep. Assuming you could do a protective sweep, the sweep must be limited to a quick search for people in places where people could be. A sweep does not justify a search of a shopping bag. Under these facts, the logical inference is that you used the sweep as a pretext to search for drugs. In short, the search of the other rooms is unlawful (See U.S. v. Bravo, 403 F.Supp. 297, S.D.N.Y. 1975).

2. CONSENT SEARCHES

If an individual freely consents to a search, the search is reasonable under the 4th Amendment. Neither probable cause nor a warrant is required to conduct a consent search.

a. Elements of a Valid Consent

A CONSENT SEARCH IS LAWFUL IF:

(i) THERE IS A VOLUNTARY PERMISSION TO SEARCH;

(ii) GIVEN BY A PERSON WITH A RIGHT TO EQUAL ACCESS TO THE PROPERTY; and

(iii) THE SEARCH IS CONFINED TO THE SCOPE OF CONSENT.

b. Voluntary Permission

Consent to search must be freely and voluntarily given. The voluntariness of a consent is a question of fact which must be determined from all of the surrounding circumstances. Schneckloth v. Bustamonte, 93 S.Ct. 2041 (1973).

NO ONE FACTOR DETERMINES THE VOLUNTARINESS OF A CONSENT.

1) Relevant Factors

The following are among the most important factors to consider:

a) Coercion

Any coercion, intimidation, or

threat, whether actual or implied, will tend to invalidate the consent. U.S. v. Bolin, 514 F.2d 554 (7th Cir. 1975).

b) Bad Faith Threat to Obtain Warrant

Where an agent has no grounds to believe he can obtain a warrant, but "threatens" a person that unless he consents, he or his property will be held until a warrant is obtained, any permission to search is probably invalid.

The same is true where an agent claims to have a warrant, but does not; or has a warrant which is invalid. Bumper v. North Carolina, 88 S.Ct.1788,(1968).

Of course, if the agent does have grounds to obtain a warrant and simply informs the person in a polite way of the realities of the situation, the consent will be valid. U.S. v. Miley, 513 F.2d 1191 (2nd Cir. 1975); Comm. v. Woods, 368 A.2d 304 (Pa. App. 1976).

The agent must be careful not to mislead a person into believing that the only variable in his decision about whether to consent is time, rather than whether the agent will ever be able to get a warrant. U.S. v. Faruolo, 506 F.2d 490 (2nd Cir. 1974);

c) Show of Force

Where agents enter premises or approach a person with weapons drawn, a consent to search is likely to be invalid. Kirvelaitis v. Gray, 513 F.2d 213 (6th Cir. 1975).

d) Unlawful Custody

The fact that a person is in custody when he consents, is merely another factor to be considered in deciding the validity of the consent given.

Where, however, a suspect is unlawfully taken into custody, the Government bears a very heavy burden of showing that his consent is voluntary. U.S. v. Watson, 504 F. 2d 849 (9th Cir. 1974), cert. denied, 95 S.Ct. 1117 (1975).

e) Knowledge of Right to Refuse

While a person's knowledge of his right to refuse to give consent is a factor to consider, it is not controlling. An agent who seeks a consent to search need not inform the person of his right to refuse. Schneckloth v. Bustamonte, above.

CAUTION: State Supreme Courts may require that you advise a suspect of his right to refuse before obtaining his consent. New Jersey is one such state. State v. Johnson, 346 A.2d 66 (N.J. 1975). Of course, these State Supreme Court rulings do not affect cases brought in federal court.

f) Miranda Warnings

The failure to give Miranda warnings before obtaining a consent from a suspect in custody is an element to consider in determining voluntariness, but is not controlling. U.S. v. Heimforth, 493 F.2d 970, 9th Cir., cert. denied, 94 S.Ct. 1615, (1974); State v. Price, 521 P.2d 376 (Hawaii, 1974); People v. Strander, 34 Cal. App. 3d 370 (1973).

g) Capacity

The age, education, intelligence, physical and psychological condition of the person who consents must be considered in determining voluntariness. Certainly, if a person is mentally incompetent at the time he gives consent, the consent will not be considered voluntary. U.S. v. Elrod, 441 F.2d 353 (5th Cir. 1971).

h) Written Consent

A signed written consent is evidence that the consent is voluntary, but it is not controlling.

For example, in U.S. v. Bolin, the defendant signed a written consent which was later held invalid because the agents had threatened his girl-friend with prosecution if he did not sign. 514 F.2d 554 (7th Cir. 1975).

Conversely, in U.S. v. Farnandez, the defendant read the consent form, refused to sign, but gave an oral consent to search. Nevertheless, the court held the oral consent valid. 456 F.2d 638 (2nd Cir. 1972).

i) "Finessing" a Consent

A consent may be validly "finessed" under the voluntariess test. Thus, a consent is not rendered involuntary simply because it was given in exchange for a promise of immunity (U.S. v. Dowdy, 479 F.2d 213, 4th Cir. 1973), a suspended sentence (U.S. v. Silva, 449 F.2d 145, 1st Cir. 1971), a lighter sentence (U.S. v. Lippman, 492 F.2d 314, 6th Cir. 1974), or leniency for the defendant's guilty wife (U.S. v. Culp, 472 F.2d 459, 8th Cir. 1973).

Of course, such promises must be made in good faith and must not be implied threats. (See U.S. v. Bolin, above).

j) Consent Following a Confession

The fact that a suspect has made a valid confession before he consents to a search, tends to show that the consent is voluntary. See U.S. v. Williams, 385 F.Supp. 1400 (E.D. Mich. 1974) (and cases cited therein).

k) Entry by Trick

A consent to enter premises, even if obtained by misrepresentation or trick, is a valid consent. U.S. v. Glassell, 488 F.2d 143 (9th Cir. 1973).

2) Balancing the Factors

The above listed factors are not inclusive. Every factor which bears upon the voluntariness of the consent must be considered. Courts generally balance those factors which suggest the consent was coerced, against those that suggest it was voluntary. U.S. v. Race, 529 F.2d 12 (1st Cir. 1976); U.S. v. Hearn, 496 F.2d 236 (6th Cir. 1974); U.S. v. Rothman, 492 F.2d 1260 (9th Cir. 1973).

3) Burden of Proof

REMEMBER:

THE BURDEN IS ON AN AGENT TO SHOW A CONSENT IS VOLUNTARY.

If the balance of factors fails to clearly show a voluntary consent, the consent is invalid. U.S. v. Boston, 508 F.2d 1171 (2nd Cir. 1974).

Example: You have an arrest warrant for Bobby M and you have probable cause to believe M is in W's apartment. You knock at the door and M opens it. You immediately place him under arrest. You step four feet into the apartment and close the door. As you read M his rights, you notice white powder on his mustache. It's heroin. You see more drugs on a nearby table. You ask M if you can search the apartment. He says the place is W's, not his. Suddenly, you hear someone at the door. You and your fellow agents draw your weapons. As W opens the door he sees the weapons pointed at him. You "yank" him inside, throw him up against the wall, and frisk him. You handcuff him and force

him to sit. You do not advise him of his rights. He asks for a lawyer. You tell him he can make a phone call later. He asks to see a search warrant. You ignore him. Eventually, you advise him of his rights. You ask if he has drugs in his apartment. He denies it. You ask if you can search the apartment. He says nothing. You tell him if he doesn't consent, you'll get a warrant. He answers: "You're going to do what you want anyway, so you might as well do it." Has W given you a valid consent?

No. The drawn weapons pointed at W, slamming him against the wall, not allowing him to call a lawyer, not immediately adivsing him of his rights, placing him in custody, telling him you'll get a warrant to search if he doesn't consent - these are all coercive factors. As for W's statement "You're going to do what you want anyway, so you might as well do it", this seems more like submission to authority than a voluntary consent. Since you cannot show that W's so-called consent is truely voluntary, the consent is invalid. (See U.S. v. Williams, 385 F.Supp 1400, E.D. Mich. 1974).

Example: You use a drug-trained dog to screen packages arriving on air express from border states. The dog alerts on a 270 lb. crate from Arizona addressed to "Professor James Row." Within minutes, the professor arrives and claims the crate. Before he can leave, you go up to him and identify yourself. You ask him for permission to open the crate. He doesn't answer. You tell him he's under arrest

and you advise him of his rights. He says he understands his rights because he is a professor of government and law at the State University. You suggest to the professor that he might like to talk to the prosecutor on whether he should consent to the search. After a brief silence, the professor smiles, says he thinks that's an excellent idea, and asks to be taken to the prosecutor. The meeting lasts over an hour. The professor is relaxed, responsive and very articulate. He asks many questions and discusses the law and the facts of his case with the prosecutor. The prosecutor advises the professor he need not consent to a search. The professor insists he understands. At the end of the meeting, the professor writes the following in his own hand: "I, James Row, having been informed of my constitutional right not to have a search made of my crate, without a search warrant, and of my right to refuse to consent to such a search, hereby authorize a complete search of my crate." Is this consent valid?

Yes. Only two factors seem coercive: the professor was surrounded by you and other agents, and he was arrested. All the other facts tend to show the consent was voluntary: no force was used; no weapons were displayed; you were very courteous; he is highly intelligent, educated, and knows the law; you gave him the Miranda warnings; you let him discuss it with the prosecutor; you advised him he need not consent; he is relaxed and talkative; he writes out the consent in his own handwritting; and so forth. In short, the balance of all

the factors overwhelmingly points to the voluntariness of the consent. (See U.S. v. Race, 529 F.2d 12, 1st Cir. 1976).

Example: You receive a tip which establishes probable cause to believe a commercially operated bus is towing a rented trailer that has 300 lbs. of marihuana hidden in it. You race to locate the bus, stop it on the open road, and tell the driver to get out and open the trailer. You look in the trailer and find all the marihuana exactly where the informant said it would be. You call for a backup of six uniformed officers. When they arrive you order all the commercially ticketed passengers out of the bus and order them to claim their luggage from the trailer. Once all the luggage has been claimed you tell the passengers: "Please open your suitcases for inspection." One of the passengers is Mexican and speaks very little English. As everyone opens their bags he opens his too. Inside his bags you find 25 lbs. of heroin. Assuming a judge decides you have no evidence to connect the commercial passengers to the illegal activity of the driver and, therefore, that they and their bags are not subject to search, can you say the Mexican passenger consented to the search of his bags?

No. It is true that no force was used and that the Mexican passenger opened his bags himself. This is some evidence of voluntariness. On the other hand, he was stopped on an open road, ordered out of his bus, ordered to identify his baggage, he was surrounded by six armed and uniformed officers, he spoke very little English, he probably doesn't

understand any of his rights under our Constitution, and he is told to open his bag for inspection. On balance, his opening the bag cannot be considered a voluntary consent. (See U.S. v. Rodriguez, 525 F.2d 1313, 10th Cir. 1975).

Example: At midnight you arrest A for possession of heroin with intent to distribute. A quickly identifies B as his source of supply. You drive to B's home and arrive at 1:00 am. The house is lit-up and you hear music coming from inside. You knock at the door. B asks who you are. You say "Hey, B, they just arrested A and hauled him downtown on a drug rap." Thinking you are a friend of A's, B opens the door and lets you in. B asks you when and where A was arrested. You tell him. B gets very nervous. At this point, you identify yourself as a drug agent. You open B's door and allow two more agents to step inside. You ask B if he has any heroin in the house. He says he doesn't. You tell B that A has identified him as his source and that you believe you have enough information to get a search warrant for his home. You tell him if he doesn't consent, you'll try to get a warrant. B says "Ok, I don't have any drugs, but, I do have a stash of 'buy money' in my bedroom." As B turns to go to the bedroom you stop him. You tell him "You know, you don't have to give us the money or show us where it is. You can make us try to get a warrant." B says he understands, and he leads you to the buy money in the bedroom. Is this search of B's home a lawful consent search?

Yes. First, the entry into B's home was with his consent, even if it was obtained by trick. And, once you were lawfully inside and had identified yourself as an agent, it was not unreasonable to allow several other agents to step in the door. So, the entry is lawful. Second, as for B's permission to search the bedroom, there are a number of factors that point to the conclusion that it was coerced: it was 1:00 am; you tricked B into inviting you in; other agents entered the door; you did not advise B of his rights; and you told B you would try to get a warrant if he didn't consent to a search. But, there are also factors tending to show the consent was voluntary: you did not use force to enter; you were all in street clothes and didn't display your weapons; B was not in custody; B was told he did not have to consent; you did not "threaten" B that you'd get a warrant, instead you told him the probable cause you had and that you'd try to get a warrant; finally, B volunteered the information about the buy money and led you to it. On balance, his consent appears to be voluntary. Remember: No one factor determines the voluntariness of a consent. You must weigh all the surrounding circumstances. (See U.S. v. Raines, 536 F.2d 796, 8th Cir. 1976).

c. Third Party Consent

Effective consent to a warrantless search may be given either by the accused or by any third party with right to equal access to the property. U.S. v. Matlock, 94 S.Ct.988, (1974).

1) Rationale

The reasoning behind allowing such third party consent was explained by Justice White in the Matlock decision:

> "The authority which justifies the third party consent does not rest upon the law of property, with its attendant historical and legal refinements, . . . but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the coinhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched."

2) Common Examples

The following rules, which are based upon the relationship of the parties, provide some guidance on who can give a third party consent.

Caution: These rules are only generalizations. They are subject to a number of exceptions. You must always look to the facts of each case to determine if the consenting party has a true right to equal access to the property.

a) Husband-Wife

A spouse can consent to the search of any property over which common authority exists with respect to the other spouse. U.S. v. Hayles, 492 F.2d 125 (5th Cir. 1974).

b) Paramours

A man and woman who hold themselves out to be husband and wife, although they are actually unmarried, have the same authority to consent to a search of their common property as they would have if they were married. White v. U.S., 444 F.2d 724, (10th Cir. 1971).

c) Parent-Child

A parent can generally consent to a search of premises occupied by a dependent child. U.S. v. Mix, 446 F.2d 615 (5th Cir. 1971).

d) Host-House Guest

A host can generally consent to a search of premises occupied by a guest. U.S. v. Buckles, 495 F.2d 1377 (8th Cir. 1974).

e) Joint Tenants

A joint tenant can consent to a search of jointly held premises. U.S. v. Jenkins, 496 F.2d 57 (2nd Cir. 1974).

f) Hotel Guest

A hotel clerk cannot consent to the search of a room which is registered to a guest. Stoner v. California, 84 S.Ct.889, (1964).

Authorization for hotel personnel to enter rooms for purposes of cleaning and repair does not authorize entry for unrelated purposes.

Of course, once the term of occupancy expires and the room is vacated, the hotel can consent to a search. U.S. v. Parizo, 514 F.2d 52 (2nd Cir. 1975).

g) Landlord - Tenant

A landlord cannot consent to a search of the tenant's premises unless the tenant has abandoned them or has been evicted. U.S. v. Wilson, 472 F.2d 901 (9th Cir. 1973).

h) Employer - Employee

An employer cannot consent to a search of the personal belongings of an employee in areas assigned to the employee for his exclusive use. U.S. v. Blok, 188 F.2d 1019 (D.C. Cir. 1951).

i) Partners

A partner's consent to a search of the business premises is binding upon the other partners. U.S. v. SFERAS, 210 F.2d 69 (7th Cir. 1954).

j) Bailor - Bailee

A person with custody of personal property belonging to another may consent to its search if he has been given sufficient control over it so that he has a right to equal access or use. Frazier v. Culp, 89 S.Ct.1420, (1969).

3) Apparent Right to Equal Access

In some cases a person may reasonably appear to have an equal right to the use of and access to property, but, in actuality, he does not have that right. In a few states, particularly California, the consent may still be valid, provided the circumstances and conduct of the consenting party reasonably lead the agent to conclude the individual has authority to consent. People v. Gorg, 291 P.2d 469 (Cal. 1955).

No federal court has directly decided the validity of a consent given by one with only apparent authority. So the federal rule on this issue is unclear. See U.S. v. DiPrima, 472 F.2d 550 (1st Cir. 1973); U.S. v. Sells, 496 F.2d 912 (7th Cir. 1974).

4) Limitations to Third Party Consents

The equal access, or third party consent rule, has several limitations.

a) AREAS RESERVED FOR PRIVATE USE MUST REMAIN PRIVATE

When a closet, a desk, a room or any other object or area is reserved by a person for his exclusive use, others, even parents, wives, or lovers, cannot consent to a search of that object or area. Holzhey v. U.S. 223 F.2d 823 (5th Cir. 1955); U.S. v. Blok, 188 F.2d 1019 (D.C. Cir. 1951); People v. Nunn, 304 N.E. 2d 81 (Ill. 1973); State v. McCarthy, 253 N.E. 2d 789 (Ohio App. 1969); State v. Evans, 372 P.2d 365 (Hawaii 1962).

b) Suspect Objects

A THIRD PARTY CONSENT IS INVALID IF THE SUSPECT IS PRESENT AND OBJECTS.

The right of the objecting party to protect his privacy is considered superior to the right of the third party to consent. If a search is conducted over his protest, any evidence found cannot be used against him. Lucero v. Donovan, 354 F.2d 16 (9th Cir. 1965); Silva v. State, 344 So. 2d 559 (Fla. 1977); Tompkins v. Superior Court, 378 P.2d 113 (Cal. 1963).

c) Abandoned Right to Access

A person with a legally recognized right to equal access who, in fact, does not normally exercise such a right, cannot consent. For example, a mother who had a right to equal access to her son's room but who had, for a lengthy period, respected the son's desire that she not enter his room, could not consent to the rooms' search. People v. Nunn, 304 N.E. 2nd 81 (1973).

d) Scope of Consent

THE SEARCH MUST BE CONFINED TO THE SCOPE OF CONSENT THAT IS GIVEN.

An agent cannot obtain a consent to search by representing that he intends to look only for certain items or in certain areas, and then use that consent as an excuse to conduct a general search. Both the area searched and the intrusiveness of the search must be limited to the consent given.

U.S. v. Dichiarinte, 445 F.2d 126 (7th Cir. 1971).

e) Revocation

A CONSENT CAN BE REVOKED AT ANY TIME.

It can be revoked by the party who gave consent, or by any party who is present and who possesses an equal right to consent. However, all evidence found prior to the revocation may be lawfully seized and used as evidence. Lucero v. Donovan, above.

Example: A is a major source of Thai heroin. A is very careful never to deal directly with buyers. Instead, A uses B to find potential buyers. A then rents a motel room in the vicinity, leaves the heroin in the room, and gives the motel room key to B. B gives the key and location to the buyer when the buyer has paid the purchase price. B generally never sees the room. After A has deposited the heroin in the room, he never returns to it. You arrest B before he can complete a buy. B agrees to give you the key and lead you to the motel. Can B consent to a search of the room?

Yes. After A rented the room and hid heroin there he never intended to return to it. On the contrary, when A gave the key to B he gave B access to, and complete control over, the room. Since B has an equal right to access, B can consent to the search. Note, it makes no difference that the room was rented by A and not by B. Property concepts do not control who can consent. The test is B's right

to equal access (See U.S. v. Gulma, 563 F.2d 386, 9th Cir. 1977).

Example: G asks R to help him smuggle large quantities of marihuana into the U.S. R agrees. G rents a house in R's name and gives him a housekey. Although G is to pay all expenses, all the utilities are placed in R's name. R is given his own bedroom and has permission to use all the common areas of the house. G keeps a separate bedroom for his own use. In the middle of a smuggling operation, R has a change of heart. He comes to you and confesses to the entire scheme. He offers to let you search the house. You accept the offer and go with him. In R's room you find 12 lbs. of marihuana. In the garage, you find 880 lbs. of marihuana. In G's bedroom you find 400 lbs. of marihuana and a large quantity of amphetamines. Is this consent search lawful?

Yes. As to his room, the garage, and all the other common areas of the house, R has been given an equal right to access and use. Therefore, he can give a consent to search these areas, even though the house is being rented and paid for by G. The exception is G's bedroom. It appears that G has reserved his bedroom for his exclusive use and that he has sought to retain his privacy there. Since R does not have an equal right to access to G's room, he cannot give you a valid consent to search it. The amphetamines and marihuana found in G's room will be suppressed. (See U.S. v. Green, 523 F.2d 968, 9th Cir. 1975).

Example: H and W are married and lease an apartment as husband and wife. H is involved in drug trafficking and has drugs and other evidence in the apartment. H and W have an argument. W decides to get even with H. She calls you and asks you to come to the house. When you arrive, you find W standing outside. H is inside and has locked the door. W manages to get the door open and both of you enter. H is standing inside and tells you to leave. W urges you to search for drugs. Is W's consent to search valid?

No. It is true that a wife can generally consent to the search of marital property because she has a right to equal access of such property. But a third-party consent is invalid if the suspect is present and objects. You cannot search over H's protest and use the evidence against him in court (See Silva v. State, above).

Example: You negotiate with H to buy 200 "Thai sticks." H tells you he will have the shipment at his farmhouse at 7:00 pm and to come over then. When you arrive, H greets you at the front door and invites you in. He tells you that the drugs and his source of supply are in the living room, but that you cannot meet the source. He escorts you through a kitchen to his den and tells you to sit down. He asks to see your money. You "flash" it to him. He tells you to stay in the den while he goes to get the drugs. He insists

that you not leave the den, because his source is very shy. Once H has left, you sneak into the kitchen and peek through a crack in the door leading to the living room. You are able to identify Mr. M, H's source. You see where the drugs are hidden, and you overhear H and M talking about their next drug deal. Is your conduct a "search" under the Katz test? If so, is it justified by H's consent for you to enter his home?

Yes. Your conduct is a search within the meaning of the 4th Amendment. Both H and M expected privacy in the living room and their expectation is reasonable: they took steps to put you far away from the room and ordered you to stay put in the den.

No. Your surveillance or search of the living room is not justified by H's invitation that you enter his home. Although a consent to enter is valid, even if obtained by ruse or trick, the entry must be confined in scope to the consent given. Here, H expressly restricted your entry to the den. By ignoring his instructions you went beyond the scope of his consent. (See State v. Monahan, 251 N.W. 2d 421, Wis. 1977).

3. STOP AND FRISK

When an agent observes unusual behavior that leads him to believe that a person might be engaged in criminal activity, he may stop that person for questioning and, if he reasonably believes the person might be armed, may frisk him for weapons (Terry v. Ohio, 88 S.Ct.1868, 1968).

a. Elements of a Valid "Stop and Frisk"

TO CONDUCT A STOP AND FRISK:

(i) THERE MUST BE A "REASONABLE SUSPICION" OF CRIMINAL BEHAVIOR;

(ii) THE STOP MUST BE A LIMITED DETENTION;

(iii) A FRISK MUST BE INDEPENDENTLY JUSTIFIED BY A REASONABLE FEAR OF DANGER; AND

(iv) MUST BE STRICTLY LIMITED TO A SEARCH FOR WEAPONS.

b. Reasonable Suspicion to Stop

AN AGENT MUST BE ABLE TO ARTICULATE SPECIFIC FACTS which reasonably lead him to suspect that a person MIGHT be engaged in criminal activity. The logical conclusion that "criminal activity is afoot" need not be probable; it need only be reasonably possible. Probable cause to search or arrest is not required. U.S. v. Magda, 547 F.2d 756 (2 Cir. 1976).

Example: You are surveilling a restaurant known to you to be a center for narcotics trafficking. You see a prominent figure in the heroin trade come out carrying a brown paper bag and enter his car. You follow his car to a nearby apartment. He enters the apartment carrying the bag. Ten minutes later he comes out with a second brown bag and enters his car. You stop him for questioning. As he steps out of his car, you inadvertently see several packets of white powder on the floor on the driver's side. You seize the bags and place him under arrest. If your conduct lawful?

Yes. Although you did not have probable cause to search the car or arrest the driver before you stopped him, you did have enough facts to create a reasonable suspicion to stop him for questioning. Since the stop was lawful, the heroin seen in plain view gave you probable cause to arrest and search. (See U.S. v. Santana, 485 F.2d 365, 2 Cir. 1973, cert. denied, 94 S.Ct. 1444, 1974).

Example: A previously reliable informant comes up to you late at night on the street. He points to W, who is seated in the driver's seat of a car parked across the street, and tells you that W has a loaded pistol in his waistband and drugs in his car. You immediately approach the car and ask W to open the door. When W opens the window, you reach into the car and grab the loaded revolver from his waistband. Is your conduct lawful?

Yes. First, you did not have probable cause to believe W was armed and had drugs in his car. You cannot establish probable cause with a tip that fails the Aguillar-Spinelli test. Here, although the informant was credible (reliable), you don't know where

he got his information. But, probable cause is not required to make a stop and frisk. All that is required is a reasonable suspicion. In this case, the tip establishes a reasonable suspicion that W is armed and dangerous. (See Adams v. Williams, 92 S.Ct. 1921, 1972).

As this example points out, an informant's tip which fails the Aguillar-Spinelli test might be enough to create a reasonable suspicion to stop.

c. What is a "Stop"?

1) Interviews

AN INTERVIEW IS NOT A STOP. Neither probable cause nor reasonable suspicion is required to interview a suspect. U.S. Supreme Court Justice White emphasized this in the Terry decision:

> "There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets. Absent special circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go his way."

2) Stops

A STOP INVOLVES SOME DEGREE OF DETENTION UNDER COLOR OF AUTHORITY. A stop is a "seizure" of a person under the 4th Amendment. As such, it must be reasonable. In addition to having a

reasonable suspicion to stop, THE STOP MUST BE A LIMITED DETENTION FOR QUESTIONING.

3) "Long Stop" v. "Short Arrest"

No rule-of-thumb exists for determining where a stop ends and where an arrest begins. A stop might become an arrest if the suspect is:

a) held too long, or

b) moved too far, or

c) physically restrained, or

d) subjected to a search, or

e) read his rights.

In such cases, the detention will be unlawful unless the agents have probable cause to arrest. (See Berner, Search and Seizure: Status and Methodology, 8 Valp. U.L. Rev. 471, 1974; Manning v. Jarnigan, 501 F2d 408, 6 Cir. 1974).

THE REASONABLENESS OF THE STOP UNDER ALL THE CIRCUMSTANCES IS THE TEST.

Example: You see three individuals arrive on a flight from Los Angeles. They appear nervous. They have only one carry-on bag and do not claim any luggage. You stop the three as they leave the terminal and ask them for identification. They identify themselves and answer your questions, but you are still suspicious because the bag they are

carrying has a 4th name on it. You escort them back into the terminal to a semi-private room. You advise them of their Miranda rights and ask for consent to search the bag. You warn them that if they don't consent, you will get a search warrant. They consent, and you find a large quantity of heroin. Is this a lawful stop?

No. First, you did not have a reasonable suspicion to stop. Being nervous at an airport, having only light luggage, and coming from Los Angeles are not facts which would reasonably lead you to believe that the travelers might be carrying drugs. Assuming these facts gave you reasonable suspicion to stop, you did not confine the stop to a limited detention. Instead, you ordered the suspects back into the terminal and escorted them to a private room. You read them their rights and threatened them with getting a warrant if they didn't consent to a search. In effect, you arrested them. And, you had no probable cause for arrest. In summary, the stop was arguably unlawful, it ripened into an unlawful arrest, which invalidates the consent. (See U.S. v. McCaleb, 552 F.2d 717, 6 Cir. 1977).

d. Frisk for Weapons

1) Must be Independently Justified

AN AGENT MUST BE ABLE TO ARTICULATE SPECIFIC FACTS which reasonably lead him to suspect THAT HE MIGHT BE IN DANGER. The fact that you have a reasonable suspicion to stop does not

automatically give you a right to frisk.

Example: You receive several anonymous tips that a certain apartment is the center for a large heroin distribution ring. You and your partner place the apartment under surveillance. You see P enter the apartment, stay for a few minutes and leave. He does this twice within one hour. You approach P and show him your identification. P immediately turns away from you and places his hand under his shirt, which he is wearing tail out. You hear a rustling noise. You draw your weapon, point it at P, and tell him to take his hand from his belt. P does nothing. You order P to "freeze". You reach under his shirt and remove a .32 caliber pistol from his waistband. Several clear cellophane bags of white powder fall to the ground. Is your conduct lawful?

Yes. The anonymous tips and P's coming-and-goings gave you a reasonable suspicion to stop P for questioning. Your frisk of P was independently justified by his conduct in turning from you and reaching under his shirt. Your limited search of P to remove the weapon from under his shirt was, therefore, lawful, and the heroin fell to the ground in plain view. (See Parker v. State, 544 S.W. 2d 149, Tex. App. 1976).

Example: You have a warrant to search the apartment of Mack and Jack for narcotics. Their apartment is in a high crime district. Only Jack is at home when you arrive. Before you finish the search, Mack walks in. Mack is a known felon and is suspected of trafficking in

heroin. He is dressed in an oversized trench coat. Jack suddenly yells to Mack: "Quick, it's the cops". You immediately frisk Mack and feel a weapon-like lump under his coat. The lump turns out to be a loaded .38 caliber revolver. Is your conduct lawful?

Yes. You certainly have the right to stop Mack. Moreover, you have facts which reasonably lead you to suspect that you might be in danger: Mack is a convicted felon, he is wearing a garment that could easily hide a weapon, he is "warned" by Jack, it is a high crime area, he is a suspected heroin pusher, and so forth. Therefore, the frisk is justified. (See U.S. v. Mack, 421 F.Supp. 561, WD Pa. 1976).

Example: You have a warrant to search B's apartment for drugs. You find cocaine, hashish and marihuana. During the search there is a knock at the door. You open it and a young man walks in. You have no information to connect him to any illegal activity. Apparently, he is just a visitor. May you frisk him?

No. You have the right to stop him and ask a few questions as to who he is and why he is there. You do not automatically have the right to frisk him. Unless you can articulate specific facts which reasonably lead you to believe he might be a danger, you should simply ask him to leave. (See U.S. v. Branch, 545 F.2d 177, D.C. Cir. 1976; U.S. v. Miller, 546 F.2d 251, 8 Cir. 1976; State v. Smith, 227 S.E. 2d 911, Ga. App. 1976).

Comment: Courts are generally very lenient in deciding if there is a reasonable fear of danger which justifies a frisk. They don't want to second guess officers on factual questions involving physical safety. As long as you can articulate some facts which point to a possibility of danger, a frisk is likely to be upheld. On the other hand, a generalized fear that drug suspects will always be dangerous does not sit well with the courts. You must be able to articulate your fears and you must never resort to a frisk as a pretext to conduct a search for evidence. (U.S. v. Marshal, 488 F.2d 1169, 9 Cir. 1973).

2) Protective Search

A FRISK MUST BE LIMITED TO A PROTECTIVE SEARCH FOR CONCEALED WEAPONS.

It must be confined to a search reasonably designed to discover guns, knives, clubs or other weapons.

a) Pat-Down of Outer Clothing

Normally, a "frisk" consists of a "pat-down" of the outer clothing of the suspect. An agent may not reach inside a suspect's clothing unless the pat-down gives him reasonable grounds to believe he is carrying a weapon, i.e., the pat-down reveals a weapon-like lump under the clothing. U.S. v. Del Toro, 464 F.2d 520 (2 Cir. 1972).

Example: You have an arrest warrant for Johnny Coke. You locate Johnny Coke at 1:00 am with an unknown male

companion walking on a street in a high crime area of the city. You arrest Johnny, search him and find a small amount of cocaine in his pocket Your partner frisks the unknown companion. In the course of the frisk he feels "a small, soft, creased object" in the companion's breast pocket. He removes the object, which turns out to be a folded ten dollar bill. Your partner unfolds the bill and finds cocaine. It is common knowledge in your department that coke users often carry their coke in folded currency. Is the discovery of the cocaine on the companion lawful?

No. Clearly, you did not have probable cause to arrest or to search Johnny's companion. The mere fact that he is with Johnny does not make it probable that he is concealing contraband or that he is guilty of a crime. Moreover, you cannot frisk an individual simply because he is with a fugitive. To frisk the companion you must have a reasonable fear that you might be in danger. Arguably, you were in danger in this case, based upon the location, the time of night, and the fact that you and your partner were alone and faced with two males who could easily resist the arrest. But, a frisk must be confined to a limited search for weapons. When your partner did the pat-down, he didn't feel anything that could be a weapon. The only thing he felt was a small, soft, creased object. Therefore, he was not justified in reaching into the companion's pocket and seizing the

folded bill, nor was he justified in unfolding the bill to satisfy his curiosity. (See U.S. v. Del Toro, above).

b) Handbags, Boots, etc.

A "frisk" is not limited to just a pat-down. A frisk may extend to any areas where the suspect is likely to hide a weapon which he could grasp quickly. U.S. v. Hill, 545 F.2d 1191 (9 Cir. 1976); U.S. v. Jeffers, 520 F.2d 1256 (7 Cir. 1975); U.S. v. Poms, 484 F.2d 919 (4 Cir. 1973).

Example: You and several other agents are executing a search warrant for an apartment which you know contains cocaine. P, the mistress of the owner-violator, steps off an elevator and heads toward the apartment. You have been tipped anonymously that P is always armed. P is carrying a shoulder bag with the zipper half open. Her hand is resting near the opening. You stop P, grab the bag and look inside. It contains a loaded .38 caliber pistol and several glassine packets of powder. Is your conduct lawful?

Yes. P's relationship to the owner-violator, her approach to the search site, the tip about her always being armed, her hand being near a partially opened shoulder bag - these are facts which reasonably lead you to suspect that you might be in danger. Therefore, a frisk of P is justified. The frisk need not be limited to a pat-down. It can extend to P's bag, since she could easily reach into the bag

for a weapon. If P were wearing boots which could conceal a weapon, you could also make a quick search of her boots. (See U.S. v. Poms, and U.S. v. Jeffers, above.)

3) Plain View

As the above examples indicate, as long as the stop and frisk are lawful, you may seize any weapon you uncover and any other evidence, which inadvertently comes into plain view.

e. Probable Cause to Arrest

As the result of a lawful stop and frisk, you may develop probable cause to arrest. The answers given by a suspect, his conduct, evidence found in plain view, and so forth, can be used to establish probable cause. If probable cause to arrest does develop, you can make a more thorough search of the suspect under the "Search Incident to Arrest Theory."

IF PROBABLE CAUSE TO ARREST DOES NOT DEVELOP SOON, YOU MUST LET THE SUSPECT GO FREE.

4. PLAIN VIEW

If in the course of a lawful 4th Amendment intrusion an agent inadvertently finds incriminating evidence "in plain view", he may lawfully seize it without a warrant. Coolidge v. New Hampshire, 91 S.Ct. 2022, 1971.

a. Rationale

The most quoted explanation of this rule can be found in the Coolidge decision:

> "What the 'plain view' cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification--whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused--and permits the warrantless seizure. Of course, the extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them; the "plain view" doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges."

b. Elements of Plain View

Lower courts, both state and federal, have reduced the Plain View rule to a three-pronged test.

AN OBJECT IS "IN PLAIN VIEW" ONLY IF:

(i) IT IS IMMEDIATELY APPARENT EVIDENCE,

(ii) INADVERTENTLY DISCOVERED,

(iii) DURING A LAWFUL 4th AMENDMENT INTRUSION.

Unless all three conditions are met, a seizure is not justified. United States v. Sokolow, 450 F.2d 324 (5 Cir. 1971); United States v. Truitt, 521 F.2d 1174 (6 Cir. 1975); United States v. Gray, 484 F.2d 352 (6 Cir. 1973) cert. den., 414 U.S. 1158 (1974); United States v. Clark, 531 F.2d 928 (8 Cir. 1973); United States v. Johnson, 541 F.2d 1311 (8 Cir. 1976); and United States v. Sedillo, 496 F.2d 151 (9 Cir. 1974) (Hufstedler, J., dissenting); State v. Murray, 527 P.2d 1303 (Wash. 1974) cert. den., 421 U.S. 1004 (1975); State v. Fearn, 345 So. 2d 468 (La. 1977); State v. Wilson, 367 A. 2d 1223 (Md. App. 1977); and Bies v. State, 251 N.W. 2d 461 (Wis. 1977).

c. Immediately Apparent Evidence

Objects must be immediately recognizable as evidence before they can be seized under the Plain View rule. United States v. Maude, 481 F.2d 1062 (DC Cir. 1973); Seymour v. United States, 369 F.2d 825 (10 Cir. 1966); Truitt, Gray and Sedillo, above; Kinard v. State, 335 So.2d 924 (Ala. 1976); State v. Davenport, 510 P.2d 78 (Alaska, 1973); State v. Phillips, 366 A.2d 1203 (Del. Super. 1976); State v. Wilson, 367 A.2d 1223 (Md. 1977); People v. Hunter, 249 N.W. 2d 351 (Mich. App. 1976); People v. Haas, 390 N.Y.S. 2d 202 (N.Y. App. 1976); and Bies v. State, above.

This requirement has two distinct parts.

1) THERE MUST BE PROBABLE CAUSE TO SEIZE.
Agents must possess sufficient facts and circumstances which reasonably lead them to believe that the objects found are evidence of a crime. If an object does not appear to be contraband or other evidence of a crime, it may not be seized under the Plain View rule.

2) THE CONNECTION MUST BE IMMEDIATELY APPARENT.
The connection between the objects found and a crime must be immediately apparent. In other words, probable cause to seize the objects must arise as soon as the objects are found, without any further efforts on an agent's part. Objects which do not appear to be evidence and which can be linked to a crime only after further investigation, are not seizable under this rule.

3) Rationale
This prong of the test is designed to prevent agents from using the Plain View rule as an excuse to conduct a general search for everything that might be incriminating. It is intended to prevent "rummaging".

d. Inadvertently Discovered

Officers cannot "plan" to seize objects under the Plain View rule. The discovery of Plain View evidence must be inadvertent.

1) Probable Cause is the Test

A SEIZURE IS "PLANNED" IF AGENTS DEVELOP PROBABLE CAUSE SUFFICIENTLY IN ADVANCE TO SUPPORT THE ISSUANCE OF A SEARCH WARRANT FOR THE OBJECT.

2) Rationale
The purpose behind this limitation is clear: when agents have probable cause to seize an object and sufficient time to get a warrant prior to the search or seizure, they should do so. Agents cannot seize objects under the Plain View rule, when they could have obtained a warrant for these objects in advance of their entry.

3. Lawfully Present
Finally, the lawfulness of a Plain View seizure depends on the agent being in a place where he has a right to be under the 4th Amendment.

1) Plain View Always Involves a "Search"
As the U. S. Supreme Court pointed out in the Coolidge decision:

"THE PLAIN VIEW DOCTRINE . . . DOES NOT OCCUR UNTIL A SEARCH IS IN PROGRESS."

It may be a search conducted under a warrant, or under exigent circumstances, or by consent, or incident to arrest, and so forth; but, a 4th Amendment search is always involved before the Plain View rule can be applied.

2) THE INTRUSION MUST BE LAWFUL
The 4th Amendment search, or intrusion, must be lawful before the Plain View rule can apply. For example, if you are searching under a warrant, then the warrant must be lawful and the search must be restricted to the scope of the warrant. And, if you are searching incident to arrest, the arrest must be lawful and you must confine your search to the proper scope of a search incident to arrest. A short-hand way of expressing this requirement is "your eyes must be

lawfully at the looking post." You cannot conduct an unlawful search, find evidence, and seize it under the Plain View rule.

Example. You are searching A's home for drugs under the authority of a valid warrant. During the search you notice that A has an amateur "dark room" set up in a corner of his basement. You see many strips of photographic negatives hanging in the dark corner. You take one of the strips and carry it to a window to examine it in the light. The negatives show Mr. A and local children posing in the nude. You seize the photos and arrest A on various sex charges. Is this a Plain View seizure?

No. An object is "in plain view" only if (i) it is immediately apparent evidence, (ii) inadvertently discovered, (iii) during a lawful 4th Amendment intrusion. When you noticed the negatives in the dark corner, they were not immediately apparent evidence. You did not know what was on them, so you certainly didn't have probable cause to seize them. Only by carrying the negatives to the window could you tell they were evidence. Since the nature of the photos as evidence was not "immediately apparent" to you, you cannot seize them under the Plain View Rule. In addition, your eyes were not lawfully at the looking post. While it is true you were present under the authority of a drug warrant, you exceeded the scope of the search for drugs when you carried the photos to the window. Since you exceeded the scope of the warrant to view the photos, the third prong of the Plain View rule is also not met. (See Anderson v. State, 555 P.2d 251, Alaska, 1976).

Example. You have probable cause to arrest B and his girlfriend for conspiracy to distribute cocaine. You knock on B's door. When he opens it, you push him inside and place him under arrest. Knowing that B's girlfriend lives with him, you handcuff B to some furniture while your partner makes a protective sweep of the apartment for the girlfriend. He finds her in another room, brings her back, and handcuffs her to B. Just as you are about to leave, you notice a billfold laying upon a table across the room. You walk over and open it. It contains $3,200 in marked currency that had been used by your partner to buy cocaine from B. You seize the money. Is the seizure lawful under the Plain View rule?

No. Remember, an object is in plain view only if (i) it is immediately apparent evidence, (ii) inadvertently found, (iii) during a lawful 4th Amendment search. When you first saw the billfold, you had no probable cause to seize it. Probable cause to seize did not arise until you went over and opened it. Thus, the billfold with the money was not "immediately apparent" evidence. And, your eyes were not lawfully at the looking post. When you opened the billfold you exceeded your authority under the Search Incident to Arrest rules. So, the third prong of the Plain View rule is not met. In short, the money will not be admissable against the defendants. (See U.S. v. Berenguer, 562 F.2d 206, 2 Cir. 1977).

Example. You have a valid warrant to search P's home for drugs. In the course of the search you find a sawed-off shotgun next to his bed. May you seize it under the Plain View rule?

Yes. First, possession of sawed-off shotguns, machine guns, cannons, automatic weapons, and so forth, is virtually always illegal. Once an officer finds such weapons he has probable cause to believe they are possessed in violation of the law. Unless the possessor can prove the weapons are properly registered, the weapons are "immediately apparent" evidence of a crime. Second, your discovery of the weapon is inadvertent. There is no indication that you had probable cause to seize the weapon before you entered to execute the drug warrant. Third, you are lawfully present under the warrant and you are not exceeding its scope when you find the shotgun laying by the bed. Therefore, the gun is seizable under the Plain View rule. (See U.S. v. Puckett, 551 F.2d 59, 5 Cir. 1977; U.S. v. Chapman, 549 F.2d 1075, 6 Cir. 1977; U.S. v. Brown, 548 F.2d 204, 7 Cir. 1977, U.S. v. Johnson, 541 F.2d 1311, 8 Cir. 1976; U.S. v. Canestri, 518 F.2d 269, 2 Cir. 1975).

Example. You have a warrant to search X's home for drugs. X is a drug-violator with a long history of convictions for drug-felonies. In the course of the search you find a .22 caliber pistol in a dresser next to X's bed. May you seize it under the Plain View rule?

Yes. First, it is a federal offense for a convicted felon to possess firearms. 18 U.S.C. App. 1202(a)(1). The pistol is "immediately apparent" evidence of this offense. Second, your discovery of the weapon appears to be inadvertent. You did not have probable cause to get a warrant for the pistol before you entered to search for drugs. Third, you were lawfully

present under the authority of the drug warrant, and you confined your search to one for drugs. (Your eyes were lawfully at the looking post). Therefore, you can seize the pistol under the Plain View rule. (See U.S. v. Isham, 501 F.2d 989, 6 Cir. 1974).

Example. You have a warrant to search C's home for drugs. You don't find any drugs, but you do find several hunting rifles hanging on a wall and a loaded pistol in the bedroom. C has no prior criminal record. May you seize the weapons under the Plain View rule?

No. These weapons are not immediately apparent evidence. They are not the type of weapons the mere possession of which is unlawful. Many citizens lawfully possess such weapons. And, C is not a convicted felon. What facts do you have to believe these weapons are evidence of a crime? There are none. Since you do not have probable cause to believe the weapons are evidence, they are not seizable under the Plain View rule. (See U.S. v. Clark, 531 F.2d 928, 8 Cir. 1976).

In the above example, could you run a quick serial number check to determine if the weapons are properly registered or otherwise connected to a crime, and then seize them if the report is positive?

No. Objects which do not appear to be evidence, and which can be linked to a crime only after additional investigation are not seizable under the Plain View rule. The connection between the weapons and a crime must be "immediately apparent" to you. And note, recording the numbers and running a check on the weapons is an

activity which goes beyond the scope of your warrant to search for drugs. (See Clark, above)

In the above example, could you simply record the serial numbers, finish your search for drugs, make a serial number check at a later date, and if it turns up positive, then get a second warrant to return and seize the weapons?

No. Most courts consider the copying of serial numbers of objects on private property to be itself a form of "seizure". Unless the property or the serial numbers are "immediately apparent" evidence, they cannot even be recorded (See Clark, Sokolow, Gray, State v. Murray and State v. Wilson, above.)

Example. You make several buys of heroin from Mr. W at his country home. At each transaction Mr. W, who is a convicted felon, is armed with a rifle "just in case things go wrong". You do not arrest W, because you are developing a larger conspiracy, of which W is only a very small part. Two months later, you get indictments on everyone involved. You also get an arrest warrant for W and a warrant to search W's home for drugs. During the search you find and seize the rifle W had been armed with during his drug transactions. Is this a lawful Plain View seizure?

No. Your discovery of the rifle was "planned"; it was not inadvertent. You had probable cause to believe W, a convicted felon, was in unlawful possession of the rifle for over two months. You could have easily obtained a warrant to search W's for the rifle before you entered to search for drugs.

Since the probable cause to seize the rifle existed sufficiently in advance to enable you to get a warrant, you cannot seize it under the Plain View rule (See U.S. v. Wright, 405 F. Supp. 1236, EDTex. 1975).

Example. You get a valid warrant to search C's home for heroin. C is a convicted felon and you have heard rumors that he is always armed. During the execution of the search warrant, you find a loaded .38 caliber revolver and a large amount of heroin in C's dresser. Can you make a Plain View seizure of the revolver?

Yes. First, the revolver is immediately apparent evidence of a firearms violation. As a convicted felon, C is prohibited from possessing firearms. Possession of the firearms need not be actual, it can be constructive possession. So, probable cause exists to seize the revolver. Second, your discovery of the revolver was inadvertent. The rumors you had heard that C was always armed did not give you probable cause to get a warrant for the revolver. You did not have an opportunity to get a warrant for this weapon before you conducted the drug search. Remember, the test for determining if the discovery is planned, or inadvertent, is the existence of probable cause to get a warrant for the object before the entry. Third, your eyes were lawfully at the looking post when you found the revolver. You discovered it within the scope of a search under a warrant. Therefore, the revolver is seizable under the Plain View rule. (See U.S. v. Carwell, 491 F.2d 1334, 8 Cir. 1974.)

f. Plain View, Open View, and Warrantless Seizures

1) Plain View Seizures

IF THE THREE LIMITATIONS OF THE PLAIN VIEW RULE ARE MET, EVIDENCE FOUND IN PLAIN VIEW CAN BE IMMEDIATELY SEIZED WITHOUT A WARRANT.

2) Open View Seizures

Occasionally, a court will say that "Plain view alone is never enough to justify the warrantless seizure of evidence." Statements like this are unfortunate.

They confuse the Plain View rule with the Open View rules. Instead, they should say:

OPEN VIEW, STANDING ALONE, IS NOT ENOUGH TO JUSTIFY A WARRANTLESS SEARCH AND SEIZURE.

It is important to know the difference. Plain View justifies a seizure because a lawful "search" has already occured. Open View, by definition, does not involve a 4th Amendment "search".

Example. A calls you and says that his neighbor P has marihuana in his garage. You drive to A's and he leads you to his rear yard. From A's yard you can see through a large window in P's garage. On a table in the garage is a large quantity of marihuana. May you enter the garage and seize the marihuana.

No. First, this is a case of Open View, not Plain View. Your observations of the marihuana do not invade on P's reasonable expectations of privacy.

Second, although your observations clearly give you probable cause to search, probable cause alone is never enough to justify a warrantless search. No amount of probable cause, standing alone, justifies your entry into the garage without a warrant. Moreover, none of the exceptions to the warrant requirement are present in this case. (See Pendleton v. Nelson, 404 F.2d 1074, 9 Cir. 1968).

Example. You approach a suspect's house to question him about a possible violation of law. After knocking, and while waiting for him to answer, you notice many burlap bags hidden in an enclosed, although visible, crawl space under the house. You also detect a faint smell of marihuana. Can you force open the enclosure and seize the bags?

No. This is a case of Open View, not Plain View. Standing at the suspect's doorstep and seeing visible objects under his house does not involve a 4th Amendment "search". The smell and the bags give you probable cause to search, but no amount of probable cause is enough, standing alone, to justify a warrantless search. To enter the crawl space you need a warrant. (See U.S. v. Pacheco-Ruiz, 549 F.2d 1204, 9 Cir. 1976).

g. Plain View & the Five "Senses"
The Plain View doctrine is not limited to visual observations. It applies to all five human senses.

1) Plain Hearing
It applies to things that are heard--the "plain hearing" or "naked ear" rule.

U.S. v. Lopez, 475 F.2d 537 (7 Cir. 1973); U.S. v. Fisch, 474 F.2d 1071 (9 Cir. 1973); U.S. v. Ortega, 471 F.2d 1350 (2 Cir. 1972); U.S. v. Pagan, 395 F. Supp. 1052 (PR 1975); U.S. v. Perry, 339 F. Supp. 209 (SD Cal 1972).

2) Plain Smell
It extends to the sense of smell. U.S. v. Bronstein, 521 F.2d 459 (2Cir 1975); U.S. v. Anderson, 468 F.2d 1280 (10 Cir 1972); U.S. v. Curran, 498 F.2d 30 (9 Cir. 1974)

3) Plain Touch
It appears to apply to the sense of touch. U.S. v. Mulligan, 488 F.2d 732 (9 Cir. 1973).

4) Plain Taste?
And it might even extend to the sense of taste, although no reported decision could be found on this point.

h. Plain View & Sensing Aids
The use of sensing aids, such as flashlights or binoculars, does not make a plain view observation unlawful. U.S. v. Thomas, 551 F.2d 347 (DC Cir. 1976); U.S. v. Coplen, 541 F.2d 211 (9 Cir. 1976); U.S. v. Johnson, 506 F.2d 674 (8 Cir. 1976); Sanders v. State, 230 NW 2d 845 (Wis. 1975).

5. FORFEITURE

Most federal courts have held that:

FORFEITABLE CONVEYANCES ARE SEIZABLE AND SEARCHABLE WITHOUT A WARRANT.

If federal agents have probable cause to believe that a vehicle, vessel or aircraft has been used in violation of a federal forfeiture statute, they may seize and search the vehicle without obtaining a warrant. The only requirement for both the seizure and the search is probable cause to believe that the vehicle is subject to forfeiture (U.S. v. Panebianco, 543 F.2d 447, 2 Cir. 1976; U.S. v. Zaicek, 519 F.2d 412, 2 Cir. 1975; U.S. v. Troiano, 365 F.2d 416, 3 Cir. 1966; U.S. v. Trotta, 401 F.2d 514, 4 Cir. 1968; U.S. v. White, 488 F.2d 563, 6 Cir. 1973; U.S. v. Drummond, 350 F.2d 983, 8 Cir. 1965; U.S. v. Stout, 434 F.2d 1264, 10 Cir. 1970).

Example. You and your partner have negotiated with N to purchase heroin at his home. You place N's home under surveillance. Just before the purchase, you see A and B arrive at N's driving a blue Oldsmobile. After the car leaves, you enter N's home and buy the heroin. Within a month you make a second purchase under identical circumstances. As before, A and B arrive at N's just before you make the buy. One month later you drive to N's gas station to make a third buy. As you drive up, you see A and B talking to N. They leave before you finish the buy. You arrest N. A short time later you see the blue Oldsmobile cruising the area. You follow the Olds which takes evasive action. You stop the Olds, order A and B to get out, arrest them, and search the car. Inside you find an envelope containing a pound of heroin. Is your warrantless search of the car lawful?

Yes. At the time of the stop, you did not have probable cause to search the car, therefore, a warrantless search cannot be justified by the Carroll rule. A and B were arrested outside the car, therefore, the search is not incident to arrest. It is also clear that A and B did not consent to

search. But, the Olds is subject to forfeiture. There is probable cause to believe that A and B used it to deliver heroin to N's home on prior occasions. Since there is probable cause to seize the car for forfeiture, it can be seized and searched without a warrant. (See U.S. v. Panebianco, abcve).

a. Rationale
Federal forfeiture statutes take effect at the moment a conveyance is used illegally. U.S. v. Stowell, 10 S.Ct. 244 (1890); O'Reilly v. U.S., 486 F.2d 208 (8 Cir. 1973), cert. den. 94 S.Ct. 546; Simons v. U.S., 541 F.2d 1351 (9 Cir. 1976). Therefore, once there is probable cause to forfeit a vehicle, the government has a superior right to take possession of it, and a warrantless search becomes reasonable.

b. Forfeiture v. Carroll
21 U.S.C. 881 is DEA's forfeiture statute. It provides for the forfeiture of:

> "All conveyances . . . which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment. . . (of drugs in violation of the Controlled Substances Act) . . ."

If there is probable cause to believe that a vehicle contains contraband drugs or contraband equipment products or materials, the vehicle is subject to forfeiture and may be seized and searched without a warrant. If the same vehicle is also mobile or potentially mobile, it may also be searched under the Carroll doctrine. Thus, when contraband is believed to be in a vehicle, both the forfeiture doctrine and the Carroll doctrine allow a warrantless search. To this extent, the doctrines overlap.

But, FORFEITURE SEARCHES CAN EXCEED CARROLL SEARCHES.

The forfeiture laws are not restricted to mobile vehicles which contain contraband at the time of seizure. Conveyances which have contained or transported contraband in the past are subject to forfeiture, even though they are empty, or "clean", at the time they are seized. And, conveyances which are used, or are intended for use to "facilitate" the transportation, sale, receipt, possession, or concealment of contraband are also forfeitable. And these are also subject to search and seizure without warrant.

The "facilitation" provision extends to the following vehicles:

1) Convoy vehicles

So-called "convoy vehicles", used as lookouts, pilots, decoys, armed guards, etc., for other vehicles containing contraband, are subject to forfeiture under 21 U.S.C. 881 (U.S. v. One 1972 Datsun, etc. 378 F. Supp. 1200, D.C. N.H. 1974).

2) Transfer of Drugs

The transfer of drugs within a vehicle as part of an unlawful sale subjects the vehicle to forfeiture (U.S. v. One 1971 Porshe Coupe, 364 F. Supp. 745, E.D. P.A. 1973).

3) Place of Payment

Vehicles which have never contained contraband, but which are used as places of payment are subject to forfeiture (U.S. v. One 1970 Pontiac GTO; etc., 529 F.2d 65, 9 Cir. 1976).

4) Conducting Negotiations

A vehicle which has never contained contraband, but which is used to conduct negotiations resulting in an unlawful sale of contraband drugs, is subject to forfeiture (U.S. v. One 1950 Buick Sedan, 231 F.2d 219, 3 Cir. 1956).

c. Minority View

Since 1974, a minority of federal courts, and a large number of state courts, have modified the above rules. These courts have held that, BEFORE SEIZING A CONVEYANCE FOR FORFEITURE, AN AGENT MUST FIRST OBTAIN A WARRANT, EXCEPT IN CIRCUMSTANCES WHICH QUALIFY AS AN EXCEPTION TO THE WARRANT REQUIREMENT. U.S. v. McCormick, 502 F.2d 281 (9 Cir. 1974); U.S. v. Pruett, 551 F.2d 1365 (5 Cir. 1977); U.S. v. One 1972 Chevrolet Nova, 560 F.2d 464 (1 Cir. 1977).

The argument used by these courts is simple:

(i) The 4th Amendment applies equally to searches and to seizures;

(ii) The 4th Amendment requires searches and seizures to be conducted under a warrant whenever possible;

(iii) Forfeiture statutes, which allow for warrantless seizures, cannot overrule the 4th Amendment;

(iv) Therefore, the 4th Amendment warrant requirement applies to pre-forfeiture seizures.

Example. You have an arrest warrant for M. Furthermore, you have probable cause to seize M's car for forfeiture because he used it on a prior occasion to transport contraband. You

go to M's home and block off the driveway where his car is parked. You arrest M in his house. Within an hour after the arrest, you seize M's car and drive it to your impound lot. You search it and find evidence. Will this evidence, found during a warrantless search of a forfeitable vehicle, be admissible in court?

The answer is yes, if you are in one of the majority jurisdictions that allow warrantless seizures and searches of forfeitable vehicles.

The answer is no, if you are in a minority jurisdiction where the warrant requirement has been applied to forfeitures. You had ample time to get a warrant to seize the car before you went to M's. Your failure to get a warrant is not justified by any of the exceptions to the warrant requirement. The seizure was not incident to arrest, because M was arrested in his house, whereas his car was seized an hour later from his driveway. M did not consent to the seizure. There were no exigent circumstances, and so forth. Since the search of the car without a warrant is unlawful, the evidence will be suppressed. (See U.S. v. McCormick, above.)

Note: Even in these minority jurisdictions, an improper seizure of a forfeitable conveyance affects only the admissibility of evidence found as a result of the seizure; the improper seizure has no effect on the ultimate forfeiture of the car. U.S. v. Karp, 508 F.2d 1122 (9 Cir. 1974)

d. Comment

If probable cause to forfeit a conveyance develops sufficiently in advance of the seizure so as to make it practical to obtain a warrant, you should apply for one. This is especially true when the delay between the illegal use of

the car and the seizure, results in an innocent third-party obtaining possession of the vehicle.

DON'T PLAN TO MAKE WARRANTLESS SEIZURES FOR FORFEITURE.

6. ROUTINE INVENTORIES

Agents may conduct routine, non-investigative inventories of vehicles, and other property, that are lawfully within governmental custody. Neither probable cause to search nor a warrant is required South Dakota v. Opperman, 96 S.Ct. 3092 (1976).

a. Elements of a Valid Inventory

AN INVENTORY SEARCH IS VALID IF:

1) THERE IS A LAWFUL BASIS FOR TAKING CUSTODY OF THE VEHICLE;

2) THE INVENTORY IS NON-INVESTIGATIVE; AND

3) THE SEARCH IS LIMITED IN SCOPE TO LOCATING VALUABLES FOR STORAGE.

b. Lawful Impoundment

Agents must have a lawful basis for taking custody of the vehicle, or other property, before an inventory will be justified.

1) Forfeiture

A vehicle subject to forfeiture is subject to seizure and can be searched under the inventory theory. However, it can also be searched under the forfeiture doctrine which permits a very detailed search, rather than a limited inventory.

2) Evidence

Property which constitutes evidence of a crime is subject to seizure, pending final disposition of the criminal proceedings. Vehicles seized as evidence are lawfully impounded and are subject to inventory (Harris v. U.S., 88 S.Ct. 992,1968).

3) Abandoned or Disabled Vehicles

Abandoned vehicles are subject to impoundment by state and local officers as part of their community caretaking function. Duncan v. State, 366 A.2d 1058 (Md. App. 1976); Godbee v. State, 224 So2d 441 (Fla. App. 1969).

Disabled or damaged vehicles, or vehicles which are impeding traffic can also be lawfully impounded by state and local officers. People v. Sullivan, 323 N.Y. S.2d 945, (1971).

It is unclear whether federal agents can routinely impound for these "caretaking" functions. It is advisable for federal agents not to impound abandoned or disabled vehicles unless the abandonment or damage was the direct result of federal investigative activity.

4) Driver Arrested

A vehicle being driven by a defendant who is arrested away from his home or work, may generally be impounded for safekeeping, by either state or federal officers, rather than leaving it unattended in a public area. U.S. v. Lustig, 555 F.2d 737 (9 Cir. 1977); U.S. v. McCambridge, 551 F.2d 865 (1 Cir. 1977); U.S. v. Colclough, 549 F.2d 937 (4 Cir. 1977); Jackson v. Alabama, 534 F.2d 1136 (5 Cir. 1976).

Warning. Arresting an owner-driver does not always trigger the right to impound his vehicle. Impoundment of property incident to the owner's arrest is a caretaking function. If the driver's passengers request to take care of the vehicle and the driver approves, or if the arrestee can take steps to safeguard

the car himself, such as by calling a relative to pick it up, and so forth, forced impoundment would be unreasonable. Opperman, above, at 3108, n. 12; Jones v. State, 345 So. 2d 809 (Fla. App. 1977); Mullins v. State, 371 A.2d 713 (Md. App. 1977); State v. Goodrich, 256 N.W. 2d 506, (Minn. 1977).

5) Motel Guest Arrested
When a defendant is arrested at his motel or hotel room, which is not his customary dwelling, the arresting agents may generally gather together the defendant's belongings and impound them for safekeeping. U.S. v. Friesen, 545 F.2d 672 (9Cir. 1976); U.S. v. Sifuentes, 504 F.2d 845 (4 Cir. 1974); U.S. v. Lipscomb, 435 F.2d 795 (5 Cir. 1970); U.S. v. Blackburn, 389 F.2d 93 (6 Cir. 1968).

6) Private Premises Unsecure
Where officers lawfully enter private premises, for example, to execute a search warrant or to make an arrest, and they discover very valuable or dangerous personal property, such as diamonds, large sums of currency, or weapons, they might be justified in seizing those items for safekeeping if the occupants have been arrested, or otherwise incapacitated, and the premises are not secure. U.S. v. Lacey, 530 F.2d 821 (8 Cir. 1976); U.S. v. Nash, 394 F. Supp 1257 (DC Wis. 1975).

c. Non-Investigative Purpose

Routine inventories must not be conducted for investigative purposes. The sole purpose of the inventory must be:

1) Protection of the owner's property while it remains in government custody;

2) Protection of the government against claims and disputes over lost or stolen property; and

3) Protection of government personnel and facilities from any danger associated with the property (e.g. the vehicle may contain hazardous materials, explosives, and so forth).

If there is evidence that an inventory was a pretext to conceal an investigative motive to search, the inventory will be unlawful. Opperman, above, at 3100; U.S. v. Hellman, 556 F.2d 442 (9 Cir. 1977); State v. Johnson, 530 P.2d 910 (Ariz. App. 1975).

For this reason, it is important for agents to conduct an inventory as soon as possible after impoundment, of all vehicles and property, according to the appropriate regulations. If you inventory some cars, but not others, or if you delay the inventory for days or weeks, you expose yourself and the inventory to challenge on the grounds that you searched with an investigative intent.

d. Inventory Must Be Limited in Scope

The scope of an inventory search must be limited to locating valuables for storage. An inventory is not an intensive search for evidence.

1) Interior and Unlocked Compartments

The scope of the inventory may extend to all interior areas of a vehicle, and to all unlocked compartments, such as a glove compartment or unlocked trunk.

2) Locked Compartments

The law on this issue is unclear. In the Opperman decision, Justice Powell was careful to note:

> "The Court does not consider . . . whether the police might open and search the glove compartment if it is locked, or whether the police might search a locked trunk or other compartment." (96 S.Ct. at 3104 n.1).

A number of state courts and legal commentators have taken the position that an inventory may extend to the search of locked trunks and to locked glove compartments. Rissler, Inventorying Impounded Motor Vehicles, FBI Bulletin, Nov. 1976. In the words of the Arizona Supreme Court:

> "If one of the reasons for conducting the inventory is to safeguard valuables which might be present, it is illogical to prohibit law enforcement officials from searching these areas wherein valuables are most likely to be placed" (In Re One 1965 Econoline, 109 Ariz. 433, 1973).

3) Containers Within the Vehicle

The Opperman decision "does not authorize the inspection of suitcases, boxes, or other containers which might themselves be sealed, removed and secured without further intrusion." (96 S.Ct. at 3106, n. 6).

If the container is already locked and is secure from tampering, then an inventory of it is not justified. U.S. v. Chadwick, 97 S.Ct. 2476 (1977); U.S. v. Lawson, 487 F.2d 468 (8 Cir. 1973); State v. McDougal, 228 N.W. 2d 671 (Wis. 1975)

If, on the other hand, the container is not locked, or is otherwise unsecure, it can be inventoried. U.S. v. Sifuentes, 504 F.2d 845 (4 Cir. 1974).

e. "Booking" Inventories

A routine inventory search of an arrestee made at the time he is booked is lawful, either as a "search incident to arrest" or as a reasonable procedure for incarceration (Kaufman v. U.S., 453 F.2d 798, 8 Cir. 1971; U.S. v. Edwards, 94 S.Ct.1234,1974).

7. BORDER SEARCHES

Any person or thing coming into the United States is subject to search by that fact alone. Neither probable cause to search nor a warrant is required (Almedia-Sanchez v. U.S., 93 S.Ct. 2535, 1973).

a. Elements of a Valid Border Search

A warrantless border search is lawful if:

1. The agents conducting the search have border-search authority;

2. The person or property searched has crossed the border;

3. The search is conducted at the border or its functional equivalent; and

4. The search is reasonably limited to a full search of that person's luggage, automobile and other effects and a search of the person's outer clothing (Henderson v. U.S., 390 F.2d 805, 9th Cir. 1967).

b. Border Search Authority

The officers conducting the search must have border search authority. For example, Customs officers have authority to conduct border searches under 19 U.S.C. 482, 1581 (a) and 1582. Border Patrol agents have search authority under 8 U.S.C.1357.

Although DEA agents can make arrests when they have probable cause to believe the customs laws have been violated (21 U.S.C. 878 (3)), they do not possess authority to make border searches.

c. Functional Equivalents of the Border

The "border" is an imaginary line which might not coincide with a geographic landmark, such as a river, road, and so forth. Common

sense dictates that the government must be allowed to conduct searches at points which are not precisely on the borderline, but are the "functional equivalent" of the border (e.g., a customs checkpoint 1/4 mile north of the borderline, on a major highway for border traffic). How is a "functional equivalent" of the border identified?

1. Definitions of "Functional Equivalent"

Although the law in this area is far from clear and is now undergoing some very rapid changes, it can generally be said that ". . . if a search takes place at a location where virtually everyone searched has just come from the other side of the border, the search is a functional equivalent of a border search. In contrast, if a search takes place at a location where a significant number of those stopped are domestic travelers going from one point to another within the United States, the search is not the functional equivalent of a border search." (U.S. v. Bowen, 500 F.2d 960, 9th Cir., affirmed, 95 S.Ct. 2569, , June 30, 1975).

2. Examples

For example, searches at an established station near the border, at a point marking the confluence of two or more roads that extend from the border might be the functional equivalent. And, a search of the passengers and cargo of an airplane arriving after a nonstop international flight would clearly be the functional equivalent of a border search (Almeida-Sanchez, 93 S.Ct. at 2539).

d. Searches Away from the Border

At points beyond the border or its functional equivalent, the authority of the government to search travelers is subject to all the 4th Amendment limitations.

For example, roving border patrols not at the border or its functional equivalent cannot stop a vehicle without "founded suspicion" that occupants are illegal aliens (U.S. v. Brignoni-Ponce, 95 S.Ct. 2574, 1975); nor can they search a vehicle without a warrant, absent consent or probable cause (Almeida-Sanchez, above).

Similarly, fixed-checkpoint searches, not at the border or its functional equivalent, without warrants are unconstitutional, absent consent or probable cause (U.S. v. Bowen, above).

e. Strip & Cavity Searches

As already noted, neither probable cause nor a warrant is required to search luggage, vehicles and other effects together with the clothing of a person crossing the border. Such routine searches, however, do not permit "strip" or "body cavity" searches without some articulable justification. Thus, to conduct a strip search, even at the border, agents must be able to point to facts and circumstances together with logical inferences amounting to a "reasonable suspicion" that contraband is hidden under body garments.

To conduct a body cavity search, agents must have more than a "reasonable suspicion." They must have a "clear indication" that contraband is in a body cavity.

f. International Mail

Mail entering the U.S. from any foreign country is subject to routine search by Postal and Customs authorities without a warrant or probable cause (U.S. v. Ramsey, 97 S.Ct. 1972, June 6, 1977).

However, by statute, the agents must have reason to believe that the mail contains other than correspondence.

8. AIRPORT SECURITY SEARCHES

A limited search of air travelers by FAA-Trained personnel is permissible without probable cause or a warrant, if the purpose of the search is to discover weapons or prevent air piracy (U.S. v. Palazzo, 488 F.2d 942, 5th Cir. 1975).

(i) ONLY FAA-TRAINED PERSONNEL CAN CONDUCT SECURITY SEARCHES

(ii) THE SOLE PURPOSE MUST BE TO PREVENT AIR PIRACY

a. Rationale

The reason courts have been willing to permit warrantless searches of air travelers was recently expressed by Judge Joiner of the Eastern District of Michigan:

> "The would-be air pirate, by obstructing the right to travel and endangering life in wholesale fashion, threatens the fabric of the republic and strikes at the very heart of our legal and moral relationships with one another. To protect public life and liberty, the law has sanctioned the development of special rules governing airport security searches as long as they are 'reasonable' within the meaning of the Fourth Amendment. Reasonableness must be tested against the need to search. When the public danger, and hence the need, is as great as it is in the case of airport security, reasonableness within the meaning of the Fourth Amendment requires less factual justification." (U.S. v. Van Lewis, 409 F. Supp. 535, at 542, 1976).

b. Legal Justifications

Although all courts have agreed that security searches are permissible, they have disagreed on which legal theory permits the search.

1) Implied Consent

Some courts have held that an air traveler, knowing that he will be searched, impliedly consents to the search by buying a ticket and boarding the plane (U.S. v. Miner, 484 F.2d 1075, 9th Cir. 1973).

2) Stop & Frisk

Other courts have held that there is always a "reasonable suspicion and fear" that travelers may be armed and, therefore, they can be "frisked" under the Terry doctrine (U.S. v. Bell, 464 F.2d 667, 2d Cir. 1974).

3) Analogous to Border Searches

A few courts have held that these searches are analogous to border searches and can be upheld on that theory (U.S. v. Moreno, 475 F.2d 44, 5th Cir. 1973).

4) Administrative Searches

Still other courts have justified the searches under the "Administrative Search" Doctrine, which allows for warrantless inspections in regulatory matters (e.g., license checks, housing inspections, etc.) People v. Hyde, 524 P. 2d 830 (Cal. 1974).

c. Plain View

If the search is conducted by FAA personnel and is limited to a search for weapons, all non-weapon evidence discovered in plain view is seizable and admissible into evidence (U.S. v. Dalpiaz, 494 F.2d 374, 6th Cir. 1974).

d. Warning:

It should be clear to the reader that airport security searches are a new and very limited exception to the probable cause and warrant requirement. It should also be clear that the courts cannot agree on the legal theories that support this exception. Any attempt by law enforcement agencies to recruit or train FAA personnel to use security searches as a tool to screen travelers for drugs, or other contraband, could jeopardize the existing system and court rulings.

DO NOT RECRUIT OR TRAIN FAA SECURITY SEARCHERS TO HELP YOU ENFORCE THE DRUG LAWS

9. REGULATORY INSPECTIONS

The 4th Amendment does not require the government to develop "probable cause" or to obtain a traditional search warrant to conduct "regulatory inspections" of government licensees, heavily regulated businesses, and other activities involving an urgent public interest. United States v. Biswell, 92 S.Ct. 1593 (1972).

a. Elements of a Valid Inspection

WARRANTLESS INSPECTIONS ARE REASONABLE BECAUSE THEY:

(i) ARE LIMITED IN SCOPE

(ii) ARE NON-INVESTIGATIVE,

(iii) SERVE IMPORTANT PUBLIC INTERESTS, and

(iv) INVADE LESS PRIVACY

b. Government Licensed Activities

1) Vehicle Inspections

The most familiar example of regulatory inspections is the vehicle license check. State and local police may stop a vehicle for a routine driver's license and registration check, for a safety check, for a weight check, and so forth. These stops may be made at random or at a check-point. They can be made without probable cause or even suspicion to believe there has been a violation. United States v. Millar, 543 F.2d 1280 (10 Cir. 1976).

2) Government Licensed Businesses

Licensed drivers are not the only ones subject to regulatory inspections. A businessman who accepts a license to engage in a government-regulated activity is also subject to warrantless inspections

required by statute. Colonade Catering Corp. v. United States, 90 S.Ct.774,(1970); United States v. Biswell, cited above; and Almeida-Sanchez v. United States, 93 S.Ct. 2535, at 2538 (1973).

a) Conditionally Legal Rationale

Many of these activites can be characterized as "conditionally legal". Since the Government has, or has had, the power to prohibit them entirely (e.g., gambling, horseracing and the liquor industry), they are subject to complete government control, including warrantless inspections. (Colonade (liquor sales); Lanchester v. Penn. State Horse Racing Comm., 325 A.2d 648 (1974) (licensed horse trainer).

b) Implied Consent Rationale

Even businesses which are not conditionally legal are subject to warrantless inspections if they accept a government license. By accepting the license, they impliedly consent to all inspections provided for by statute. Biswell (a federally licensed dealer in firearms); United States v. Genareo, 467 F.2d 476 (3 Cir. 1972) (licensed motor vehicle inspection station); Uzzilli v. Comm. of Health, 367 N.Y. S.2d 795 (1975) (licensed nursing home); People v. Spinelli, 354 N.Y.S. 2d 77, (1974) (licensed junk dealer); State v. Marconi, 309 A.2d 505 (New Hampshire, 1973) (licensed lobster boat); State v. Wybierala, 235 N.W. 2d 197 (Minn. 1975) (licensed garbage collector).

3) Drug Registrants

The Controlled Substances Act provides that "Every person who manufactures, distributes, or dispenses any controlled substance . . . shall obtain annually a registration issued by the Attorney General . . ." 21 U.S.C. 822.

To engage in these activities without a federal registration (license) is a serious violation of federal law. 21 U.S.C. 841.

a) 4th Amendment Law v. Congresional Permission

As government licensees, drug registrants could be subject under the 4th Amendment to warrantless inspection; but the United States Congress has not been as generous with its search authority. By statute, Congress has required DEA Compliance Investigators to obtain "Administrative Inspecton Warrants" before they inspect drug registrants. 21 U.S.C. 880; United States v. Goldfine, 538 F.2d 815 (9 Cir. 1976); United States v. Pugh, 417 F. Supp. 1019 (W.D. Mich. 1976); United States v. Ensero, 401 F. Supp. 460 (W.D. N.Y. 1975).

Administrative Inspection Warrants are not the equivalent of a criminal search warrant. Moreover, they need not be based upon "probable cause" in the traditional sense. To obtain an Administrative Inspection Warrant, DEA Compliance Investigators need only show some "valid public interest in the effective enforcement of . . . (the CSA and its regulations)."

This "valid public interest" could be met by merely showing that the registrant has not been inspected for a substantial period of time. United States v. Greenberg, 334 F. Supp. 364 (WDPA 1971). Any suspicious conduct by the registrant, such as making unusually large drug purchases, would be enough of a "valid public interest" to justify an inspection. United States v. Montrom, 345 F. Supp. 1337 aff'd 480 F.2d 918 (3 Cir. 1972). Of course, if the

investigators have"probable cause" to search the registrant's business they can and should obtain a criminal search warrant (FRCP, 41). United States v. Goldfine, cited above.

b) Scope of Inspection

Armed with an Administrative Inspection Warrant, a DEA Compliance Investigator can examine and copy all drug records required to be kept under the CSA. He can inspect all of the controlled parts of the premises, equipment, raw materials, finished and unfinished drugs, and so forth. He may not examine financial data, nor may he inspect areas not related to controlled substances.

As long as the investigators confine their inspection to the scope of the Administrative Inspection Warrant, all evidence uncovered by them will be admissible in court against the registrant. If the investigators wish to go beyond a normal inspection and conduct a more intensive search, then they must get a search warrant. Goldfine, above.

c) State Drug Registrants

Under the Uniform Controlled Substances Act, state drug registrants are subject to the same type of warrantless inspection: Section 302 requires drug handlers to obtain a state registration; Section 501 grants state inspectors the power to make regulatory inspections of registrants; and Section 502 lays out the minimal requirements for obtaining Administrative Inspection Warrants.

c. Activities Involving "Urgent Public Interests"

Some activities, although not licensed by the Government, are nevertheless subject to very close governmental scrutiny and regulation. Because these activities involve "urgent public interests", they too can be subject to warrantless inspections.

1) Heavily Regulated Industries

Heavily regulated industries provide a good example of this type of activity. Thus, while you don't need a government license to operate a coal mine, you must comply with the many government regulations concerning your operation. Therefore, you are subject to warrantless inspections by the government. Youghiogheny & Ohio Coal Co. v. Morton, 364 F. Supp. 45 (S.D. Ohio 1973).

2) Military Inspections

Soldiers are subject to routine, warrantless inspections by military authorities. The need for obedience, discipline, and constant readiness in the military is an "urgent public interest". In addition, the expectation of privacy by soldiers is lower than in civilian life, and inspections are generally routine. Thus, drugs found in the course of these inspections are admissible into evidence. Committee for GI Rights v. Callaway, 518 F.2d 466 (D.C. Cir. 1975).

3) Parolees

Parole officers generally have very broad authority to conduct warrantless searches of parolees under their supervision. Supervising parolees who would otherwise be in prison is an "urgent public interest". And, like soldiers, parolees have a diminished expectation of privacy. The search of the

parolee must be made by or under the supervision of the parole officer and must be reasonable. Latta v. Fitzharris, 521 F.2d 246 (9 Cir. 1975).

These are just a few examples of the constitutionality of warrantless inspections involving "urgent public interests". As noted earlier in this outline, some courts believe FAA Security searches fall under this exception.

d. Rationale

At first glance, the "Regulatory Inspection" exception to the 4th Amendment appears to be a crazyquilt of smaller exceptions. How could inspections of vehicles be "lumped in" with inspection of soldiers, coal mines, parolees and so forth? The answer is that all of these inspections have four (4) basic points in common. First, the subjects of the inspections have a lower expectation of privacy. Second, the purpose of the inspections is regulatory, not criminal. Third, the inspections are limited in scope so as to achieve their purpose. And fourth, the public has very important interests to be protected, which require inspections.

These four factors, when balanced against each other, justify warrantless inspections. But what if this "balance" is changed? What if the subject of the inspection has a very high expectation of privacy, such as in a home? What if the inspection is used as a pretext to conduct a criminal investigation? What if the inspection is not limited in scope, but becomes a broad search? What if the public interest in conducting the inspection is not very "urgent"?

As the remaining sections demonstrate, any change in this balance can affect the government's right under the 4th Amendment to conduct warrantless inspections.

e. Health & Safety Inspections of Homes

Because of the high level of privacy associated with a private home, the Supreme Court has held that routine regulatory inspections of homes for fire, plumbing, electrical violations, etc., can be made only by warrant. The court did not go so far as to require inspectors to have search warrants, but the court did insist that inspectors obtain "Administrative Warrants" similar to those discussed above under the CSA. Camara v. Municipal Court, 87 S.Ct.1727,(1967).

In a companion case, the court established the same "Administrative Warrant" requirement for the inspection of non-licensed, non-regulated, private businesses. See v. Seattle, 87 S.Ct. 1737,(1967).

f. Pretextual Searches

A regulatory inspection cannot be used as a pretext to conduct a criminal, investigative search.

For example, evidence found by DEA agents who "accompanied" Coast Guard Officers in making a warrantless safety check of an American vessel, has been excluded by the courts. United States v. Warren,550 F.2d 219,(1977). Had the Coast Guard inspection been confined to a true safety check, instead of a search for drugs, it would have been upheld by the court under 14 U.S.C. 89.

Similarly, the warrantless search of a parolee by DEA agents who were looking for drugs, was struck down by the Ninth Circuit in United States v. Consuelo-Gonzalez, 521 F.2d 259 (1975).

We have already seen that the pretextual stop of a vehicle will result in suppression of evidence.

g. Exceeding the Scope of Inspection

Exceeding the scope of an authorized inspection may result in suppression. Investigators who

wish to search beyond the limited scope of an Administrative Inspection Warrant must obtain a traditional search warrant. United States v. Goldfine, cited above.