

## RED BADGE



**“Can They Do That?”**

**By**

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**CASE LAW & COMMENTARY ON HOW PEACE OFFICERS  
FUNCTION UNDER THE FOURTH AMENDMENT**

This publication provides the reader with an understanding of how search and seizure “case law” applies to the streets of America from the peace officer’s perspective. Much of the case law is from the author’s home state of Idaho and others are from federal case law; most appear in *italics*. While all states have similar case law each has its own nuances. Nothing in this book is intended as legal advice. Peace officers using the index as a quick (field) reference should always confer with their prosecutor for advice, direction and the most current case law.

\*\*In my book, [Red Badge](#) -- *A Veteran Peace Officer’s Commentary on the Marxist Subversion of American Law Enforcement and Culture*, I explain why “case law” is a misnomer. Our U.S. Constitution does not give the judicial branch the authority to make law. Nonetheless, it is the accepted and driving force of the unconstitutional Administrative State that lords over us. \*\*

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### DEFINITIONS:

**Reasonable Suspicion (RS)**, (The standard to detain): Is based on the “totality of circumstances.” An officer may detain based on “...specific and articulable facts that the suspect has been, is, or is about to engage in criminal activity.”

**Probable Cause (PC) #1**, (The standard to arrest): “...information that would lead a person of ordinary care and prudence (good judgment) to entertain an honest and strong suspicion that the person arrested has committed a crime.”

**Probable Cause (PC) #2**, (The standard for a search warrant): PC to issue a search warrant is determined by evaluating the totality of circumstances and making a “practical, common-sense decision whether, given all the circumstances set forth in the affidavit before {the magistrate}, including the *veracity* (reliability/credibility) and ‘basis of knowledge’ of persons supplying hearsay information, contraband or evidence of a crime will be found in a particular place.”

Investigative detentions are an essential part of effective, proactive police work.

Being a professional requires that you know the rules for detaining subjects and searching them for weapons. These rules come from federal case law in *Terry v. Ohio*.

### TERRY V. OHIO

An investigative detention requires reasonable suspicion defined above. Although RS is enough to stop and investigate, it is not enough to search for weapons.

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A Terry pat down (also called “stop and frisk”) requires three things:

- 1) Reasonable Suspicion (grounds for the investigative stop)
- 2) Officer reasonably believes the subject is armed
- 3) Officer has an immediate concern for his safety

Case law makes the area of stop and frisk somewhat murky. On one hand Idaho law (State v. Wright, A., 134 Idaho 73,996 P.2d 292 (2000): and Fleenor) does not require the officer be absolutely certain the subject is armed and dangerous. The standard is the totality of circumstances from which the officer infers the subject was armed AND dangerous.

On the other hand, Idaho law (State v. Muir, 116 Idaho 565,777 P.2d 1238 (Ct. App. 1989) holds police to an objective and subjective standard.

Objectively, would a reasonable person in the officer’s situation believe the subject was armed and dangerous? Remember, believing the subject is armed is not enough: Armed and dangerous is the standard. Someone you contact that is merely open carrying a gun or knife is not justification to search or disarm.

Subjectively, at the time of the frisk, did the officer actually have an immediate concern for his safety or the safety of others?

**Note:** During a Terry pat down the *Plain Feel Doctrine* allows you to seize non-threatening items if its incriminating character is “...immediately apparent to touch.” You cannot use continued manipulation if you have ruled out a weapon.

*Search of a container on suspect’s person during a Terry pat down was lawful when suspect admitted it contained drugs. This*

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*admission switched your search authority from Terry to a broader scope based on Probable Cause to search for contraband.*

### **TERRY SEARCH ON A CONSENSUAL CONTACT**

Can an officer do a Terry pat down for weapons on a consensual contact? Yes, provided two of the three requirements for stop and frisk are present:

- Officer believes the subject is armed
- Officer has an immediate concern for his safety

During a consensual encounter the subject answers in the affirmative to the officer's question about having any weapons on him. This alone is not enough to frisk. (*State v. Henage*, 143 Idaho 655, 152 p.3d (2007)). You must articulate an immediate concern for your safety.

A citizen lawfully exercising his Second Amendment Right to open carry too often results in officers overreacting. Game Wardens talk with people wearing a sidearm frequently. Absent an immediate concern for your safety this is no different than you talking to someone wearing a sidearm in the Wal-Mart parking lot. Idaho is an open-carry state. Although not common it is perfectly legal to open carry (not withstanding prohibited areas) in Idaho. Lateral transfer peace officers from other states need to adjust their mindset to the cultural and legal distinctions that make places like Idaho *different* (more free). Proponents of Open Carry are acting lawfully. Although until now it has been an uncommon practice, it is nonetheless – legal. Open carry by itself is not a “suspicious” act; it is a citizen's right – a right you swore to protect. Dispatchers should advise the reporting party that we do not respond to lawful behavior. Even in California it is legal to open carry, so long as the gun is un-loaded.

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### Scenario:

You enter a house with the subject's consent and develop grounds for a Terry pat down.

Do it! Too often officers are more afraid of their administration than the bad guys. This causes them to under react and gets them hurt out of fear of a complaint. Knowing the guardrails of case law is liberating because you can act with greater confidence.

### **FLIGHT**

Mere flight is enough to detain, but it is not enough to arrest for *R&O* (resisting and obstructing an officer in the performance of his duties). *Illinois v. Wardlow*, 5428 U.S. 119,120 S. Ct. 673 (2000).

If you give chase and the subject stops and lets you conduct business there is no crime. Your being out of breath and mad does not change this fact. On the other hand, if the subject stops and squares off with you or resists a police lead, or lies about his identity, you have a crime. The subject has a duty to submit to your authority for a *legitimate* investigative stop.

You can make a warrantless entry into a residence to complete a Terry Stop (*State v. Manthei*, 130 Idaho 237, 939 P.2d 556 (1997)). Obviously, this could be quite dangerous for many reasons including the likely animated objection by the subject who may be operating under a King's X mentality.

Similarly, an officer with probable cause to arrest for a misdemeanor or felony in a public place can make warrantless entry into a residence if the suspect flees inside.

### **TERRY SEARCHES OF VEHICLES**

A Terry pat down of a subject outside of a vehicle may extend to the passenger compartment when the subject has access to weapons inside the automobile (i.e. a rifle in a rack, or saddle bags on a motorcycle). \*However, the vehicle must be located

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within the subject's lunge area. Michigan V. Long, 463 U.S. 1032, 103 S. Ct. 3469 (1983).

### **Scenario:**

Driver is evasive and fidgety. He continues to move his hands to his waist when told not to. You believe he could be trying to access a weapon to harm you. You order him out of the car.

Frisk him and then search the lunge area under a limited scope for weapons.

**Note:** A weapon "concealed" includes between the seats, i.e., the butt of a gun sticking out, "...not enough to be discernible by ordinary observer."

*Suspect arrested 15 feet from his backpack. Search of the backpack was unlawful. There was no PC to search it and no RS to search it under Terry given it was outside the lunge area (too far away to pose a possible threat). If he denies ownership you may search it as abandoned property.*

*Officer saw a syringe protruding from driver's pocket. Driver and passenger were removed from the car. Passenger compartment was searched, including passenger's purse where drugs were found: Good search based on PC.*

Conducting a Terry search of the driver for additional syringes before searching the car could be possible in part out of concern that a syringe could be used as a weapon.

### **Scenario:**

You have reasonable suspicion to detain gang members for fighting in a park. It appears as though you arrived at the close of a jumping-in initiation for a new member. They are within lunge distance of a car that you know is

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associated with and/or frequently driven by members of the gang.

In addition to doing a frisk for weapons of all of the subjects there you can do a search of the car limited to weapons.

### **Problem:**

With the exception of scenarios like the one above, procedurally, on a traffic stop, once you remove someone from a car and sit him on the curb you have placed him physically at a disadvantage from lunging and perhaps even outside of the lunge area. This may make it more difficult to articulate meeting the requirements of a Terry search on the car. However, if the subject continues to move closer to the car disobeying your reasonable and necessary commands to not move, you may have stronger grounds to act accordingly within the three requirements for a Terry search of the car.

Always check your motive. On a traffic stop you can only search the car for weapons if you sincerely have a concern that it contains a weapon and have immediate concern for your safety. Honoring our oath is what separates us from the criminal. Mr. Big might drive off with the dope under his seat, but it is better that he get away today than an officer break the rules to get in his car. We need to be digging for crime by making lots of good contacts, not by stretching the rules of search and seizure and compromising our oath.

Every contact we make either builds or erodes public confidence in the eyes of the law-abiding population and the criminal. We need credibility with both camps. I know that it is difficult to let someone go when your gut tells you there is contraband in the car, but we follow the rules because we are bound by our oath.

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An internal monologue is helpful for an officer to regulate his conduct within the guardrails of the case law governing each of these three kinds of contacts:

- **Consensual:** requires the consent of the party contacted
- **Detention:** requires Reasonable Suspicion
- **Arrest:** requires Probable Cause

Furthermore, it is a good practice to tell the subject his status. For example, “You are not under arrest. I am detaining you while I sort out what is going on here. Have a seat.” If the subject runs after being told this, then your PC to arrest for resisting and obstructing an officer in the performance of his duties is stronger in light of your clear communication with him over his detention status.

### 1. CONSENT CONTACTS

During a Consent Contact an officer may ask for ID and may ask to search. The person can refuse. Do not take offense when a citizen asserts his right. While this may frustrate you — contempt of cop is not a crime. Remember, the right to be free from government intrusion is just that: a right.

Motorist assists should be treated as consent contacts unless the officer develops RS or PC to do otherwise.

*A vehicle legally parked on the side of the road with a subject inside need NOT give you his driver license although you may ask for it. This is a consent contact. If you stop behind it with rear ambers on, it is still a consent contact, but if you have a blue light to the front you’ve made it an unlawful detention.*

### 2. DETENTIONS

Detentions require responsible suspicion to make.

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**Mere flight IS grounds for an investigative detention.** The cause and effect relationship of a person seeing a uniformed police officer and instantly fleeing does support reasonable suspicion. *Illinois v. Wardlow*, 528 U.S. 119, 120 S. Ct. 673 (2000) and *In re Deen*, 131 Idaho 435, 958 P.2d 592 (1998). This can turn into an arrest depending whether or not the person ultimately detained physically resists you in the process or obstructs you with lies.

“Excessively cautious driving” can be among reasons for investigative detention i.e. the car and occupant(s) match the description of suspect(s) & vehicle of a fresh crime nearby. We rely here on the totality of circumstances to articulate RS.

Officers cannot make an investigative stop for *DWP* (driving without privilege /suspended license) unless the physical description of the driver matches more specifically than gender alone.

### Scenario:

An officer runs a registration and driver license check on the registered owner of a vehicle. The registered owner comes back with a suspended driving privilege and you confirm the effective dates of the suspension.

You cannot stop the car unless the driver matches the description of the person with the suspended privilege.

Reasonable Suspicion can be formed by *collective knowledge* of all officers involved in an investigation to support an investigative stop i.e. a recent police bulletin, or radio traffic among multiple officers updating information about a crime they are working. (See Arrests on Pages 17 and 18 for transferring PC to another officer. Do not confuse the two.)

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Anonymous tips alone are not enough to support RS to detain. The officer needs to add his own observations to what an anonymous tipster or reliable tipster provides for a foundation of reasonable suspicion.

Consider that the agenda of an anonymous reporting party is never known. In the course of my twenty-eight year career citizens have tried to use me as a pawn to harass a neighbor or former spouse.

The following case law does give weight to a reporting party that identifies himself to dispatch.

### **STATE v. VAN DORNE**

**STATE of Idaho, Plaintiff-Respondent, v. Dawn Jeanine VAN DORNE, Defendant-Appellant.**

**No. 29379.**

March 16, 2004

*This Court has stated that where the information comes from a known citizen informant rather than an anonymous tipster, the citizen's disclosure of her identity, which carries the risk of accountability if the allegations turn out to be fabricated, is generally deemed adequate to show veracity and reliability.* See State v. Alexander, 138 Idaho 18, 24, 56 P.3d 780, 786 (Ct.App.2002); Larson, 135 Idaho at 101, 15 P.3d at 336. A known citizen is one who provides facts from which his or her identity can be readily ascertained. Larson, 135 Idaho at 102, 15 P.3d at 337.

Even with the above case law, we need to measure the circumstances described by the known citizen **RP** (Reporting Party) against the definition of RS.

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### Scenario:

Dispatch assigns you to a known citizen's report of an "armed subject." The RP is Professor Sanchez who reported a white male wearing a t-shirt that says, "Stop the Invasion" on the front and "Minute Man" on the back. The subject is said to be wearing a sidearm in plain view walking down a public sidewalk by the university.

Based on this information alone there are no grounds to detain. The professor may *expect* you to detain the subject and prone him out, but all you have is one citizen reporting another citizen for exercising his First and Second Amendment rights simultaneously (a T-shirt with a political statement and a gun). We cannot allow the perception, agenda or intolerance of the professor to fuel a politically correct, illegal detention. Your options are three: (1) Advise the RP of the facts of life in a free society and go "10-8" (back in service), (2) Observe the subject (perhaps using an available plain-clothes unit) in order to assess his candid behavior, or (3) attempt a consent contact. Had the call been properly screened it should not have been dispatched or broadcasted as "area information" only.

### **TRAFFIC STOPS**

*Driving through 3 intersections with a turn signal on is sufficient for a traffic stop to investigate inattentive driving.*

*An investigative stop of a car with out-of-state plates can be made (for failure to register within 90 days) if officer is familiar with the driver and car.*

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*Only a severely cracked windshield is a violation of (IC 49-902 (1)), not small cracks and chips. Remember the **spirit of the law** and use good judgment.*

*Officers cannot make a stop for a vehicle code violation and then without reasonable suspicion question occupants about drug possession. (State vs. Myers 118 Idaho 608,798 p.2d 453 (ct.app.1990). How offended would you be if you were questioned without cause? Sometimes when off duty I know that I look a little rough in my "Mr. Fix It" clothes driving my old pickup.*

*PC existed when a credible CI (confidential informant) said suspect would be driving from point A to point B in a yellow car with a gun and drugs. The vehicle registration showed that the suspect owned a yellow car. CI picked suspect out of a photo lineup. On the date the CI said, the suspect was driving the expected route. Good stop and search.*

*A traffic stop on a subject leaving a house where a controlled drug buy just took place is a good investigative traffic stop.*

*Officers can order passengers out of a car even if they are not involved in criminal activity and the situation appears normal and benign, Maryland v. Wilson, 519 U.S. 408, 117 S. Ct. 882 (1997), but let's not abuse this. Check your motive when you order an occupant out of the car. **Are your actions ethical, necessary and reasonable?***

Handcuffing the driver and/or passenger does not convert the contact into an arrest State v. Wright, E., 134 Idaho 79, 996 P.2d 298 (2000). This action can be based on the totality of circumstances i.e. intimidating, uncooperative behavior, furtive movement, and hyper-nervousness can all be used to articulate the well-founded reasons for your action to control the contact.

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Frisking the subject for weapons first and then doing a search of the car limited to weapons is reasonable because presumably he will be released from handcuffs and free to return to the car (at the conclusion of the contact) where a weapon could be waiting.

Tell him his status when cuffing. Tell him he is being detained and is not under arrest and why you are cuffing him. "Your behavior is causing me concern for my safety. You are not under arrest, but I am detaining you. Turn around...." Granted, there may not be time for conversation until after restoring order by cuffing the apparent threat first. In either case, everyone deserves an explanation.

There are times when we have good reason to do a Terry pat down, but fail to articulate it in the police report resulting in a suppression hearing and/or an internal affairs complaint. This makes our intentions look less than honorable to the public we serve.

*Even after the original grounds for an investigative traffic stop have dissipated the officer may continue to detain the driver to get Driver License, Insurance and Registration.*

### **Scenario:**

You pull a car over for no plates and then determine there is a valid temporary registration had on the rear window. You can still run a registration check, driver license check and warrants check, and demand DL, and INS.

### **2(B) PRETEXT STOPS**

Pretext stops are lawful so long as there is an objectively reasonable ground to make the traffic stop. Ulterior motives are irrelevant.

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\*If you have reasonable, objective grounds for the traffic stop any underlying motive to stop the subject, as pretext to search for drugs is irrelevant. (Pg. I-26 State vs. Law, 115 Idaho 769,769 9.2d1141 (ct. app 1989). In other words, if you are doing surveillance on a subject's house for suspicion of drug sales or gang related crime and he drives off and you know he is DWP, you can stop him. Even though your primary interest is another kind of crime, the DWP would stand on its own therefore the pretext is not a problem. The same goes for bald tires or any other valid violation for a stop. The general public confuses this with what the media spin as "profiling."

### **DISTINGUISHING THE CHIMEL RULE FROM TERRY**

Do not blur the line of a search between Chimel and Terry. **Chimel is tied to probable cause** (arrest). It allows a search for weapons **and** evidence within the lunge area, i.e. beer cans related to a DUI arrest (Idaho v. Cantrell). \*\*\*The search can be made before or after the physical arrest.\*\*\*

**Terry is tied to reasonable suspicion.** It relates *only* to officer safety and allows you to look exclusively for weapons only in places where they could reasonably be found and accessible.

### **2(C) PROTECTIVE SEARCHES OF VEHICLES**

You may search the passenger compartment limited to places a weapon may be hidden if:

- You have made a lawful stop
- You reasonably believe the subject is armed and poses danger to you and/or
- You reasonably believe the subject may gain immediate control of weapon in car

You can search a car for weapons if the subject is outside of it. The court recognizes that the subject could run to the car and arm himself and/or go to it after he is released and harm officers.

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Contraband found in plain view during a weapons search is lawful to seize and charge.

### **Scenario:**

You respond to a property damage collision. One of the parties is belligerent toward you and has prison tattoos. In the car on the floorboard you see a roofing hammer. The subject hears you running a warrant check and driver license check on him. He fails to stay where you told him to stand and moves toward the car.

If based on behavioral cues and/or failure to obey reasonable and necessary orders to stay put, you believe he may be moving to a position of advantage to arm himself you may pat him down and search the car for weapons.

If under this scenario you search the car first for weapons and find contraband anywhere a weapon might have been, you will lose it in a suppression hearing. Why? Answer: If you truly felt concerned for your safety you would have begun with a frisk of the subject and then the car — in that order.

### **2 (D) PROTECTIVE SWEEPS**

Officers may search areas immediately adjoining the area of arrest — where an attack could be launched Buie, 494 U.S. at 334.

Officers can search closets and other spaces immediately adjoining the place of arrest provided, “...that the search must be narrowly confined to a “cursory inspection of those spaces where a person may be found.” *Id.* at 335. Further, the sweep may last “no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises.” *Id.* at 335–36.

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Usually these sweeps are done when executing a search warrant or arrest warrant, but if you respond to a crime of violence like domestic battery, murder, robbery or kidnap you may be able to articulate a sweep for additional victims/suspects.

During a protective sweep you may seize evidence you see in **plain view**. You will need a search warrant to search for additional evidence not in plain view.

*Although Buie involved an in-home arrest, courts have applied the doctrine when police are executing a search warrant so as to allow a protective sweep of areas beyond the boundaries allowed by the warrant. State v. Schaffer, 133 Idaho 126, 982 P.2d 961.*

Further clarification on the expansion of protective sweeps is found in: State of Idaho, Plaintiff–Respondent, v. Arnaldo ROJAS–TAPIA, Defendant–Appellant.No. 37582. August 10, 2011

### **FACTS AND PROCEDURE**

*In September 2009, Officer Scott Ward was executing a search warrant on premises in Gooding County, where it was believed a small marijuana grow was being conducted. Specifically, the search warrant was for a trailer on the premises identified as “Trailer B” and the property around that trailer. Officer Ward later testified that prior to execution of the warrant, officers did not know who lived at the residence or if the occupants had any weapons or dogs, but believed there to be at least two to three people living in the trailer.*

*When Officer Ward and others arrived to execute the warrant they saw a Hispanic male, later identified as Arnaldo Rojas–Tapia, outside Trailer B in a “garden area.” While Officer Ward and another officer were “securing” Rojas–Tapia, they observed two other Hispanic males exiting what was described as a “rock building” on the premises, approximately ten yards from Trailer B. The two men were handcuffed, searched, and removed to the*

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*front of the house. According to Officer Ward's testimony, in order to "secure the scene" and ensure officer safety, several officers entered the rock building to "make sure there was nobody in it" and that no one would come out of the building brandishing a gun. Inside the rock building, officers noticed multiple drying marijuana plants. Officer Ward then obtained a search warrant for the rock building and the subsequent search uncovered approximately forty hanging marijuana plants...*

*... Turning to the facts of the case, the court noted several factors: The distance between Trailer B (described in the warrant) and the rock building was approximately 10 yards; Detective Ward had over twenty years' experience in narcotics investigations and testified that, based on this experience, those involved in narcotics often carry guns;*

*Given the fact that officers had observed two males exit the Rock Building at the time of execution of the search warrant, and given [the] location and proximity of the Rock House to the area where the defendant and others were being detained, a reasonable and prudent law enforcement officer would take precautions to make sure that no other individuals were located within the Rock Building.*

*Accordingly, we conclude that the officers possessed the requisite articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the premises—namely that the persons present on the premises were suspected of drug activity, persons involved in drug activity often carried guns...*

### **2(D) 1. PROTECTIVE FRISK**

When executing a search warrant you may detain and handcuff anyone there in order to control the scene. However, you may search them for weapons ***only*** if you have RS that they are armed. Your training and experience play a big part in articulating RS to

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search for weapons. For instance, while serving a search warrant on a SUREÑO XIII gang house it is reasonable that anyone present wearing gang attire could be armed. You know this based on your training and experience. Elaborate on this in your report.

On the other hand arresting Dan the Doper in his Aunt Mabel's house does not allow you to search her for weapons "just because."

**Safety Tip:** When rounding up the occupants search the sofa and chairs for weapons before sitting them down on it.

### 3. ARRESTS

An arrest is a seizure of a person. It is defined by detention + significant movement. This is why we bring the witness to the suspect where he is being detained for a field show-up and not the other way around \*(unless the witness is badly injured and cannot be transported).

**Warrantless arrests are presumptively illegal. The exceptions to the arrest warrant requirement are statutory, unlike the exceptions to warrantless searches that are based upon case law.**

Evidence or contraband discovered after a warrantless arrest cannot be used retroactively to strengthen the grounds for the arrest. If you did not have PC before you arrested the suspect anything you find or learn thereafter cannot be retroactively applied to strengthen your foundation (fruit of the poisonous tree).

One officer may transfer PC to another officer so long as the crime is a felony. State v. Oakley, 119 Idaho 1006, 812 P.2d 313 (Ct. App. 1991) and Idaho Code 19-603 (3).

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If dispatch or car-to-car communication is the only grounds for the arrest, then the communication itself must be based upon reliable information strong enough to establish PC.

### **3(A). MISDEMEANORS OFFICERS CAN ARREST FOR WHEN NOT COMMITTED IN HIS PRESENCE:**

- Assault and battery when police response is immediately following the event (IC 19-603)
- Domestic Battery
- Violation of Protection Orders, NCOs and second degree stalking
- Helping with a citizen's arrest (for example, but not limited to a store loss prevention agent wrestling with a shoplifter)
- Drug Offenses IC 37-2740 (3)
- Fish and Game Violations
- Status Offenses i.e. tobacco, curfew, juvenile beyond control
- Misdemeanors committed by juveniles
- Any crime aboard an aircraft
- Motor vehicle offenses listed under IC 49-1405

IDAHO CODE 49-1405: ARRESTS FOR SERIOUS OFFENSES. (1) The authority to make an arrest is the same as it would be for a felony when any person is charged with any of the following offenses:

- A. Negligent homicide.
- B. Driving, or being in actual physical control, of a vehicle or operating a vessel while under the influence of alcohol or other intoxicating beverage.
- C. Driving a vehicle or operating a vessel while under the influence of any narcotic drug, or driving a vehicle or operating a vessel while under the influence of any other drug to a degree which renders the person incapable of safely driving a vehicle.

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- D. Failure to stop, or failure to give information, or failure to render reasonable assistance, in the event of an accident resulting in death or personal injuries.
- E. Failure to stop, or failure to give information, in the event of an accident resulting in damage to a vehicle or vessel or to fixtures or other property legally upon or adjacent to a highway or waterway.
- F. Reckless driving.
- G. Fleeing or attempting to elude a peace officer.

Misdemeanor DUI is treated like a felony for purpose of investigation and arrest (State v. Ruhter, 107 Idaho 282, 688 p.2d 1187 (1984))

*An officer can arrest for a misdemeanor attempted or continued in his presence. For example, an officer can arrest for driving without privileges (DWP) when it is attempted in his presence.*

### **Scenario:**

You cited a driver last week for DWP. This week falls within the effective dates of the suspension and you see him walking toward a car. You observe him open the driver door, sit in the driver seat, close the door and put on his seatbelt.

Without letting him drive you could cite him for attempting to drive while DWP. Would a reasonable person believe he was about to drive?

### **Scenario:**

The manager at a movie theater told suspect to leave, but he refused. On the manager's behalf the officer tells suspect to leave and he refuses.

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Although the original crime was not committed in the officer's presence, the continuation of the crime was. The officer may arrest for trespass committed in his presence.

### 3(B) WARRANTLESS ENTRY

Officers may enter residence to affect arrest (including motel room) when:

- PC is established in a public place for a felony or misdemeanor and suspect flees inside
- Hot pursuit
- Exigency i.e. you hear screaming, or see smoke
- Consent i.e. any person with "*apparent authority*" (See Pages 27, 28). For example, the live-in girlfriend of a Domestic Violence suspect gives you consent to enter.

You can only make warrantless entry if the contact began outside the residence.

Example: Officers knock on door of apartment "A." The tenant of apartment "B" opens the door and the officer smells the odor of marijuana and/or sees paraphernalia in plain view inside. Officer cannot make a warrantless entry of apartment "B" **because the contact did not begin outside**. Furthermore, the evidence is of non-violent crime. *State v. Curl*, 125 Idaho 224, 869 P.2d 224 (1993).

*Officer cannot force entry to suspect's home to arrest for DUI where a citizen reports it and there was no fresh pursuit.*

*Officer can do so if on his own investigative traffic stop the defendant goes inside the residence.*

On a misdemeanor arrest warrant officers can trick defendant outside and arrest him in a public place. **\*Normally misdemeanor**

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**arrest warrants cannot be served in the home between the hours of \*8:00 PM and 08:00 AM.**

**NOTE:** On a warrantless misdemeanor arrest, if defendant opens his door and is standing in the threshold officers CAN arrest him. If he flees inside officers can chase him and arrest him inside.

### **4. PLAIN VIEW DOCTRINE & OPEN VIEW DOCTRINE**

Plain View applies to warrantless seizures of items in a constitutionally protected area.

Open View applies to warrantless searches from a location open to the public.

\*Sense-enhancing technology may constitute a search (expect a suppression hearing).

***Curtilage:*** “Area immediately surrounding and associated with a residence in which a person has a reasonable expectation of privacy.”

Using thermal imaging from inside curtilage is unlawful.

*Custom and terrain is a variable in defining curtilage. A rancher’s broken fence and one no trespassing sign is not curtilage. The officer could go on the property.*

Open Fields doctrine encompasses the unoccupied areas outside the curtilage. Fences and signs do not — per se — create a reasonable expectation of privacy.

The absence of gates and no trespassing signs give implied invitation to enter through the normal path to the door. An officer looking in cars through the windows on the way to the house is lawful under the open view doctrine.

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Because the car is not on a public road you would need a search warrant to seize contraband discovered in open view. Under federal law you could seize it without a warrant, but Idaho Courts have not ruled on this. \*(A state can always give more protection to its citizens than the fed. It would be wise to get a search warrant in this circumstance).

### 5. WARRANTLESS SEARCHES

It is difficult to form a coherent policy on searching when the road map to the exceptions to a search warrant is found in a labyrinth of case law.

Like warrantless arrests, warrantless searches violate the 4th Amendment. As a general rule all warrantless searches and arrests are presumed illegal UNLESS the state can prove the warrantless action clearly fell within the established exceptions and that it was impractical to obtain a warrant. The measuring stick to search based on PC without a warrant is the **Magistrate Standard**: *An officer's assessment of probable cause must be based on objective facts which would be sufficient to persuade a magistrate to issue a warrant under similar circumstances.*

The following are the exceptions where you may make a warrantless search:

#### 5 (A) AUTOMOBILE EXCEPTION

Passenger(s) and driver have a reduced expectation of privacy with property transported in vehicles. There is an inherent exigency in the potential destruction of evidence due to the mobility of a vehicle.

Officer may search any containers; packages or compartments in a vehicle capable of concealing the object of the search provided:

- There is PC to believe the vehicle contains evidence of a crime and

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- The vehicle is “readily mobile” (think of an obviously broken down car on private property as a storage shed shaped like a car).

A motor home connected to power is a gray area, depending how long it has been there (consult your on-call prosecutor).

**IMPORTANT:** Do not confuse PC to search for a specific item with PC to search the entire car, trunk and all.

The object of the search defines the scope of the search. If you are looking for a stolen bicycle you cannot open the glove box. If you have PC to search a suitcase in the trunk for marijuana this does not give you the broader scope to search the passenger compartment. Call for a drug dog.

**Note:** There is no expectation of privacy to open a vehicle door and inspect the VIN # or to look on the dashboard for the same. Officer’s authority to search a container is not affected by apparent or expressed belonging to a passenger or third party. But your authority to search does not extend to the body of a third party or passenger.

To be clear, you can order passengers out of the car, but you may not search them for contraband. Merely being there when the driver is arrested is not PC to search the passenger(s). You can search **anything left in the car** i.e. purses provided the item(s) you have PC to search for could be contained within the area or container searched.

**IMPORTANT:** You cannot order a passenger to leave a purse, backpack or the like in the car, but once they have stepped out and ask to retrieve it you can deny them and it is included in the search.

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Odor of alcoholic beverage gives you PC to search for open containers.

*Officer seized a t-shirt in plain view from inside a vehicle that was stopped during a burglary investigation: Lawful seizure. Officer had RS for the investigative stop.*

### **Scenario:**

RP called dispatch that a car just left a house where a burglary appears to have happened and you make an investigative stop. The behavior of the occupant(s) on the stop support a Terry pat down while detaining them.

Make the stop safe and then slow down. Wait for other officers to verify PC for the burglary at the scene before broadening your search for burglary tools, and stolen property. Don't jump the gun. Make the contact safe first and then wait for an update from the officer who is on-scene. If you do not have PC before the search, what you find — no matter how damning — will not be admissible.

### **TRUNKS**

A minimal amount of contraband i.e. drugs in the passenger compartment does not get you in the trunk.

On the other hand, if you have PC to search the trunk and find something there it may not broaden your search to include the passenger compartment. Call for a drug dog.

When you do make a search incident to arrest out of a car remember that the Chimel rule does not get you into the trunk. The scope of your search is limited to where evidence of the crime could be found and where weapons could be found in the passenger compartment. Chimel keeps you out of the trunk. \*\* Some cars (a particular BMW comes to mind) have a rear seat

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armrest that pulls down and gives a tunnel-like access to the trunk. In this case you can extend your search to the trunk. If you develop PC that evidence is in the trunk you can use the automobile exception to search without a warrant.

### **More on trunks:**

See vehicle inventory searches (Pages 24, 30).

### **TEMPORAL ISSUE**

The search of the car does not have to occur at the same time as the seizure. The same applies to containers within. You can search it at the scene or later at the station once the car is legally seized.

*A suspect is arrested for passing fraudulent checks. His car can be searched at the station.*

*Arresting a suspect from his car and taking his briefcase at the same time— to be searched later— is fine.*

### **5 (B) SEARCHES INCIDENT TO ARREST**

With the important exception of the Arizona V. Gant case (below), an officer may search the area around the arrestee's immediate control \*including open or closed containers for weapons, contraband and evidence of the crime. The area of your search is limited, but the scope is not (Chimel).

### **CITIZEN'S ARREST**

(IC 19-614 Duty of private person making arrest).

An officer may search an arrestee delivered to him by a citizen. The initial burden of proof for PC is on the citizen. In this case the officer can search for weapons and contraband without ascertaining if actual PC exists i.e. shoplifters.

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**Note:** After the search, but before taking custody the officer does have the responsibility to assure the citizen had PC.

A search can precede the arrest so long as the reason for the search is not based on what was found. Example: You stop a burglary suspect. The car he is driving matches the description. The witness positively identifies him. You have PC for the arrest, but have not told him he is under arrest, nor have you cuffed him. You search him and find evidence of the crime and then arrest him: lawful search, but awful officer safety! (Why didn't you tell him his status and handcuff him before the search?)

Have an internal monologue when searching. Ask yourself, "Under what authority am I acting? What is the scope of my search?" Contacts are fluid and we need to be thinking and searching within the constitutional guardrails and case law.

*Defendant cannot defeat officer's authority to search car by hastily separating himself from the car after the officer initiates contact.*

### **Scenario:**

Suspect hurries into a convenience store upon you contacting him and then returns standing near the car. You can still search the car incident to the arrest (unless Gant applies).

### **ARIZONA V. GANT**

This case deals with search incident to arrest from a vehicle for a crime for which there is no physical evidence. There is no physical evidence on a DWP or a warrant arrest, so there can be no search of the car incident to arrest. However, if you develop PC for a

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search unrelated to the arrest i.e. you smell marijuana then you can press on.

### **5 (C) CONSENT SEARCHES**

*“Consent may be manifested by words, gesture or conduct.”*

Consent must be given freely and the person giving it must have the “apparent authority” to give it.

Consent maybe revoked. \*Let’s be honest here. If the subject is screaming, “stop” from the back of your patrol car do not pretend you can’t hear him. We are no better than the Crown’s soldiers who abused the colonialists if we do not respect the rights our founders gave “The People” to be free from us.

Co-owners and co-occupants can give consent **but** only to the common areas; not areas under the consenter’s exclusive control.

Police have no duty to take steps to find a potentially objecting co-tenant.

Unless tenant *abandons* premises the landlord has no authority to permit a search. “Abandon” does not mean owing rent. If the tenant moved things out, made statements about being out of there and/or terminated the utilities...Totality of circumstances can support what constitutes “abandoned.”

### **APPARENT AUTHORITY**

So long as the officer believed the person giving consent had authority he is on solid ground, even if later it turns out that the person giving consent did not have the authority. For example, a girlfriend with a key to the apartment lets you in. You then arrest the male half for domestic battery. If it turns out she is not on the lease, no problem.

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An employer can give third party consent to search employee's hard drive, *Quom v. Arch wireless operating Co. INC 529 F.3d 892 (9th circ-2008)*, but government employees have an expectation of privacy on employer's computer.

### Scenario:

Roommate invites you in. You smell marijuana coming from the other roommate's room. This is not a common area. Furthermore, this is a non-violent misdemeanor.

The roommate has an expectation of privacy in his room. You cannot force entry to recover evidence of a non-violent misdemeanor in Idaho.

**BAC** (Blood, Alcohol Content): Drivers give their implied consent to submit to a BAC test when they get behind the wheel. Until December of 2014 "Forced blood draws" were lawful in Idaho (Idaho Supreme Court. *State v. Diaz*, 144 Idaho 300, 160 P.3d 739 (Idaho 2007)), without a search warrant, but gratefully the policy of most law enforcement agencies tempered this with restraint – only allowing it when part of an Aggravated DUI or vehicular manslaughter case. Don't get me wrong, a DUI arrest is one of the best arrests you can make; it saves lives. This 2014 ruling was refreshing to see. We can make a strong enough case on a standard misdemeanor DUI without subjecting citizens to this level of force routinely.

Note: A probationer on unsupervised probation is still subject to warrantless search by a parole officer based on RS, (*State v. Klinger*, 143 Idaho 494, 148 P.3d 1240 (2006) their consent is a condition of probation.

### **5 (D) EXIGENT CIRCUMSTANCES EXCEPTION**

*Exigent*: "A compelling need for immediate official action and no time to secure a warrant" (*Michigan v. Tyler*).

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Murder alone is insufficient to establish exigency.

You may enter provided you can articulate the immediate need for a protective sweep to preserve life or prevent destruction of evidence (of a violent crime). Examples: Domestic Violence in progress, fire, and fleeing violent felon. Once the scene is secure freeze it and consider a search warrant.

The scope of your search cannot exceed the need created by the exigent circumstance.

Example: Police may follow EMS into a place and seize items in plain view so long as EMS are still tending to the exigent circumstance i.e. EMS in a motel room on an overdose and police seize a *hype kit* (intravenous drug paraphernalia).

### **5 (E) OTHER CIRCUMSTANCES WHEN OFFICER CAN ENTER RESIDENCE WITHOUT A SEARCH WARRANT:**

- Hot pursuit of fleeing felon OR misdemeanor suspect
- Arrest is initiated outside and defendant retreats inside
- On a valid Terry stop initiated in a public place and suspect retreats into residence to avoid detention
- Consent

Officer may make warrantless entry to prevent the destruction of evidence provided the underlying crime is of a violent nature. I.e. murder, rape, robbery... See section 5 (I) under Fresh Pursuit.

#### **Scenario:**

It is a blistering hot summer day. The defendant is under surveillance for murder and just arrived at his mother's home with a gym bag. You notice smoke coming from the chimney. He could be destroying evidence.

Is there time for a warrant? No. Absent the exceptions above officers need to hold a perimeter and get a search warrant.

\*An officer cannot create the exigency by knocking on the door or other means.

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### **5 (F) COMMUNITY CARETAKING EXCEPTION**

RP reports he has not seen his elderly neighbor for a few days. Newspapers are stacked up, mail hasn't been picked up, dog is barking and the dog dish is empty. Officer may force entry to preserve life.

### **5 (G) VEHICLE INVENTORY EXCEPTION**

In accordance with your agency's policy on vehicle impounds officers may look in containers and trunks in order to make inventory search.

This cannot be done in bad faith as a pretext to a criminal investigation.

A vehicle inventory is done in conjunction with impounding ("seizing") it. Therefore, the decision to impound must be reasonable and appropriate otherwise contraband found during the inventory is tainted.

Officer impounding a vehicle to prevent traffic hazard or risk of damage is reasonable.

**\*\*Officer must prove that other viable alternatives were considered before impounding. How well do you know your department's inventory/impound policy? Discuss.**

### **5 (H) SCHOOL SEARCHES**

School officials may conduct warrantless searches of students if they reasonably believe a violation of law or school policy has occurred or is occurring. Scope of search must be reasonably related to the objectives of the search.

**\*A SRO (School Resource Officer) cannot use or direct school officials as his agent(s) to circumvent his requirement to have**

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PC/RS. A SRO can be present when the school conducts an independent search and then act on what was found.

### **5 (I) FRESH PURSUIT**

Officer from out of state may pursue into Idaho in fresh pursuit of a fleeing felon.

Idaho officers in fresh pursuit of a felon can pursue and arrest in any territory in the state. The same goes for any crime or traffic offense.

Officers may cross territorial limits to assist other officers asking for help.

Officer must book suspect in the county he was arrested in. Idaho law defines "fresh pursuit" more broadly than other states.

### **IDAHO'S FRESH PURSUIT LAW**

19-705 IC. "Fresh pursuit" defined. The term "fresh pursuit" as used in this act shall include fresh pursuit as defined by the common law, and also the pursuit of a person who has committed a felony or who is reasonably suspected of having committed a felony. It shall also include the pursuit of a person suspected of having committed a supposed felony, though no felony has actually been committed, if there is reasonable ground for believing that a felony has been committed. Fresh pursuit as used herein shall not necessarily imply "instant" pursuit, but pursuit without unreasonable delay.

For further clarification consider STATE OF IDAHO v. MATTHEW GILBERT SCOTT Docket No. 37018

-- November 23, 2010

*Fresh pursuit thus encompasses: (1) fresh pursuit as defined by the common law; and (2) pursuit of a suspected felon. While I.C.*

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*§ 19-705 seems to cover only the pursuit of felons, both I.C. §§ 50-209 and 19-701A expand fresh pursuit to traffic infractions. In determining whether an officer was in fresh pursuit, other jurisdictions look at factors such as:(1) whether the police acted without unnecessary delay; (2) whether the pursuit was continuous and uninterrupted, even if surveillance or knowledge of the suspect's location was interrupted; and (3) whether a close temporal relationship existed between the commission of the offense, the commencement of the pursuit, and the apprehension of the suspect.*

**Note:** While all of the above exceptions do give authority to search without a warrant none of these exceptions stand on their own as sufficient grounds for a warrantless search unless the officer can also show that obtaining a warrant under the circumstances was not practical.

### **6. ARREST WARRANTS**

When can an arrest warrant be served?

- **Felony arrest warrant** may be served anytime day or night.
- **Misdemeanor arrest warrant** may be served day or night if in a public place, but NOT between the hours of 8:00 PM and 08:00 AM at suspect's residence.

If a misdemeanor arrest warrant is authorized for night service or consent is given to enter the residence by a person of authority then you can arrest in the residence at night.

If you have PC to believe the wanted person is in the residence of another you will need a search warrant for the body of "Joe Criminal."

STEAGALD v. UNITED STATES, 451 U.S. 204 (1981) U.S. SUPREME COURT

*Pursuant to an arrest warrant for one Lyons, Drug Enforcement Administration agents entered petitioner's home to search for*

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*Lyons without first obtaining a search warrant. In the course of searching the home, the agents found cocaine and other incriminating evidence, but did not find Lyons. Petitioner was then arrested and indicted on federal drug charges. His pretrial motion to suppress all evidence uncovered during the search of his home on the ground that it was illegally obtained because the agents had failed to obtain a search warrant was denied by the District Court, and petitioner was convicted. The Court of Appeals affirmed.*

### **Held:**

*The search in question violated the Fourth Amendment where it took place in the absence of consent or exigent circumstances. Pp. 451 U. S. 211-222.*

*(a) Absent exigent circumstances or consent, a home may not be searched without a warrant. Two distinct interests were implicated by the search in this case -- Lyons' interest in being free from an unreasonable seizure and petitioner's interest in being free from an unreasonable search of his home. Because the arrest warrant for Lyons addressed only the former interest, the search of petitioner's home was no more reasonable from petitioner's perspective than it would have been if conducted in the absence of any warrant. The search therefore violated the Fourth Amendment. Pp. 451 U. S. 211-216.*

*(b)*

PAYTON v. NEW YORK – 445 U.S. 573 (1980) U.S. SUPREME COURT

*These appeals challenge the constitutionality of New York statutes authorizing police officers to enter a private residence without a warrant and with force, if necessary, to make a routine felony arrest. In each of the appeals, police officers, acting with probable cause but without warrants, had gone to the appellant's residence to arrest the appellant on a felony charge and had entered the premises without the consent of any occupant. In each case, the New York trial judge held that the warrantless entry was*

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*authorized by New York statutes and refused to suppress evidence that was seized upon the entry. Treating both cases as involving routine arrests in which there was ample time to obtain a warrant, the New York Court of Appeals, in a single opinion, ultimately affirmed the convictions of both appellants.*

**Held:** *The Fourth Amendment, made applicable to the States by the Fourteenth Amendment, prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest. Pp. 445 U. S. 583-603.*

Where can arrest warrants be served?

- In a public place
- At suspect's residence if officer believes he is home
- In the residence of a third party if the person with authority gives you consent to enter
- In the residence of a third party if you have a search warrant for "the body of" suspect
- Exigent circumstance anywhere

Although officers may forcibly enter to arrest on a misdemeanor /felony arrest warrant we must comply with the knock and announce requirement (barring exigent circumstance).

**Note:** See page 36 for knock and announce requirement for search warrant service.

\*\*Idaho officers may NOT forcibly enter the residence of a person wanted on an out-of-state felony (extraditable) arrest warrant. Officers can arrest him, but cannot force entry to do so. There are two exceptions:

- You get a fugitive to Idaho warrant
- He flees into the residence

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### **7. SEARCH WARRANTS**

Article I section 17 of The Idaho State Constitution mirrors the Fourth Amendment of the U.S. Constitution and protects citizens from unreasonable searches and seizures.

**Probable Cause definition #2** (The standard to search): *PC to issue a search warrant is determined by evaluating the totality of circumstances and making a “practical, common-sense decision whether, given all the circumstances set forth in the affidavit before {the magistrate}, including the veracity and ‘basis of knowledge’ of persons supplying hearsay information, contraband or evidence of a crime will be found in a particular place.*

The Magistrate can rely on hearsay if there is substantial basis to support it. The Magistrate can rely on an anonymous informant if the veracity (reliability and credibility) and basis of knowledge are strong.

An informant’s basis of knowledge can be self-verifying given the details provided i.e. a former EOD military man describes bomb making material in someone’s garage.

A search warrant must be applied for in the district where the property to be searched is located.

Note: State has jurisdiction on tribal land when crime occurred outside Indian Country.

A search warrant that is not signed by a judge (even accidentally) is NOT valid.

Officer must leave a copy of the search warrant and a receipt of things seized behind. An inventory must be made of property taken “in the presence” of person from whom property was taken. In his/her absence the inventory must be filled out in front of one credible witness.

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Search Warrants can only be served in the daytime unless authorized for night service on good cause.

Search warrant must be returned within 14 days of issuance. Upon return of the search warrant an affidavit listing the items seized must be included.

Once the search warrant is “issued” (signed by the judge) and literally on its way to the address, officers may make entry to secure the residence prior to its arrival.

You can prevent the suspect from entering his residence without the company/supervision of an officer while search warrant is being issued.

Search warrant may be served electronically to corporations, banks, phone companies and Internet companies.

Pending a search warrant for a vehicle you can seize it.

## **KNOCK AND ANNOUNCE**

The knock and announce requirement exists to prevent property damage and to prevent a violent confrontation with police.

\*Failure to knock and announce will result in the suppression of evidence.

Knock and Announce is implied on a consent entry.

Knock and Announce Exceptions:

- Persons inside are armed
- Evidence may be destroyed
- Suspect may escape
- Persons on premises are engaged in furtive conduct

Without these exceptions a search warrant served without a knock and announce will result in a suppression hearing.

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\*If the affiant knows the suspects are armed officers may ask for a “no-knock warrant.”

The smaller the items being searched for, the broader the scope of the search i.e. looking for photos would include a computer. In this modern world a computer is equivalent to opening a file cabinet drawer.

You cannot search persons in the residence unless they are specifically named in the warrant. Of course, if you’ve met the Terry pat down requirements you can do a search limited to weapons.

Officers can search the personal effects of overnight guests during the execution of a search warrant.

Every item seized must be supported by PC to believe the items seized are those described in the search warrant.

Plain View: Officer may seize items found outside of the scope of the search warrant if he is where the search warrant authorizes him to be and the item seized is immediately incriminating.

\*\*Remember, Plain View Doctrine does not expand the scope of your search. If you think you may need broader scope, get a second search warrant.\*\*

### **TRACKING DEVICES**

The U.S. Supreme Court on 1/23/12 unanimously restricted the police’s ability to use a GPS device to track criminal suspects without a search warrant in a first test of how privacy rights will be protected in the digital age. UNITED STATES v. JONES No. 10–1259. Argued November 8, 2011—Decided January 23, 2012

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The court rejected the government's view that long-term surveillance of a suspect by GPS tracking is no different than traditional, low-tech forms of monitoring.

### **ABANDONED PROPERTY**

There is no expectation of privacy for abandoned property. Trash placed on curb or edge of property for pick up is okay to take. Same goes for motel wastebasket after guest leaves.

*No expectation of privacy from bottle left in interview room by defendant. The DNA sample collected from the bottle is valid.*

\*If the suspect voluntarily disclaims ownership of an item i.e. a backpack, it can be searched. He voluntarily terminated his interest in property.

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